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LAW·COMMISSION  
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*Preliminary Paper 47*

FAMILY COURT  
DISPUTE RESOLUTION

*A discussion paper*

*The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.*

These should be forwarded to the Law Commission  
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# 1

## Introduction

1 **I**N JUNE 2001 the Law Commission received terms of reference from the Government to undertake a review to consider what changes, if any, are necessary and desirable in the administration, management and procedure of the Family Court in order to facilitate the early resolution of disputes. The Commission was requested to consider:<sup>1</sup>

- the part in the process played by information giving, counselling, legal advice, mediation, assessment, case management and adjudication;
- who can best fulfil each of these functions;
- how those services are provided;
- the timing of the different interventions and the means of accessing them;
- how the views and interests of children should be best represented and at what stage of the process; and
- culturally appropriate personnel and processes.

The terms of reference also required the Commission to look at resource allocation in the family jurisdiction and to consult widely.<sup>2</sup>

2 At the end of July 2001 we released a scoping paper and circulated that to indicate to groups within the community the range of our inquiry and concerns.

3 Before we look at advocating change, we consider that it is important that we understand where we have come from and how the system operates at present. It is probably only those who are of the age to be grandparents or great grandparents who can remember the days pre-1980 when it was deemed essential for lady petitioners to wear a hat and gloves to the High Court and for men and women to be subjected to the humiliation of hearing the lurid details of their spouse's adultery before they could obtain a divorce, the details of which would then be published in *Truth*. There are many other examples that could illustrate the radical changes that have taken place in family life and the legislature's response to it over the last 20–30 years. There will always be change and we shall need to respond to that change with different laws and different procedures.

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<sup>1</sup> Our terms of reference only relate to the processes for dispute resolution in the Family Court. We are not addressing any issues about the content of the law that is applied in the Family Court.

<sup>2</sup> Family Court proceedings are not open to the public. Reporting of proceedings is restricted to official law reports. Questions have been raised about the desirability of making Family Court decision-making more accessible. This issue is not addressed in this reference but is part of the Law Commission reference on the structure of the courts.

- 4 The media have given a great deal of coverage to expressions of concern about the operation of the Family Court. Many of the submissions on the Ministry of Justice Discussion Paper: *Responsibilities for Children: Especially When Parents Part*<sup>3</sup> were critical not only of the law relating to custody and access but the way in which the Family Court operates. Unpacking the reasons that give rise to these expressions of concern is more difficult. Often, discontent with the state of the substantive law spills over and affects the way that people perceive the actions of the Family Court and its staff.
- 5 Probably nowhere else in the court system does a court have to be as responsive to social change and as knowledgeable about it. That response to change inevitably causes dissonance while the system and the people who use it struggle with the impact of those changes. No court process can heal all the wounds that people in emotional strife inflict on each other. No court can address the issues of poverty and social inequity. No human system will operate 100 per cent effectively all the time.
- 6 In this paper, we would have liked to be able to give quantitative information about the Family Court process, for example, average timeframes for the disposal of different types of proceedings. The statistical information that is available, however, does not assist in making any quantitative assessment of the process. Without undertaking specific case study research we are unable to provide such an assessment.
- 7 We consider that it is still a valid exercise to report on the experience of those members of the public who use the Family Court and the experience of the professionals who work in the Family Court. They say there are changes that can be made that would improve the experience for court users.
- 8 The issues that concern us in New Zealand have also arisen in other similar jurisdictions such as Australia, the United Kingdom and California.
- 9 There is no way to test the effect of different ways of doing things before they have been tried. We could measure the present system endlessly but that would not tell us whether a change would improve it.
- 10 The only way a new approach can be assessed is to put it in place and pilot it in comparison with the current process.
- 11 In this preliminary paper we look at the context out of which this inquiry arises. We first look at sources of relevant information and point out that relatively little concrete information is available on the operation of the Family Court. In chapter 2 we describe and critique the roles of all the participants in this system, including the clients and the children who are subject to applications to the Family Court.
- 12 In chapter 3 we set out the main problems we perceive in the current system and offer some suggestions as to how those criticisms can be answered.
- 13 We must be realistic about our proposals and appreciate that resources are not unlimited.
- 14 By way of background we include chapters on the history of the Family Court, the social context in which it operates and detailed descriptions of the progress of each type of application through the Family Court. We intend these background

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<sup>3</sup> Ministry of Justice *Responsibilities for Children: Especially When Parents Part* (Wellington, 2000).



chapters as an information resource, particularly for those who are professionally involved in the work of the Family Court. Throughout this paper, we will be using a certain amount of legal terminology. We have included, at the end of the paper, a glossary explaining the terms commonly used. Unless the context indicates otherwise, where we refer to the Court, we mean the Family Court.

- 15 We are calling for submissions. Although we have articulated some of the problems and made some suggestions for change, we are open to the identification of further problems and other suggestions as to how any of these problems can be addressed. No doubt some of those submissions will be very comprehensive. However, we also invite submissions on the specific issues discussed in this paper and welcome further information or references.
  - 16 Please forward any comments or submissions to the Law Commission by 2 April 2002. Submissions can be sent by email to [com@lawcom.govt.nz](mailto:com@lawcom.govt.nz). When sending email submissions please use the words Family Court Review in the subject line.
  - 17 The Commissioner with responsibility for this project is Vivienne Ullrich QC.
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## 2

# The players in the system

## INTRODUCTION

18 **A**S A STARTING POINT we describe the way each of the players in the system interacts with the Family Court and with the other participants. We explain the role of each player, the limitations and constraints on that role, the positive contribution that a player can make to Family Court processes, and any negatives associated with that role. We need to be clear about the roles of the people currently involved before we seek to change those roles or allocate parts of those roles to new players. We include the users of the Family Court (clients and children) as well as the professionals because the way they interact with the system is crucial to its success or otherwise.

19 The questions to consider in relation to this chapter are:

- 
- Q1 Does the way the players are described accord with your experience of the Family Court?
  - Q2 Is there any further comment or criticism you would add about any of the players?
  - Q3 What should the Family Court expect from these players?
  - Q4 What should the users of the Family Court expect from these players?
- 

## CLIENTS

20 A broad section of the population has occasion to make use of the Family Court at some time during their lives.

21 For some persons that use may be brief and relatively peripheral. A person may use the Court for a counselling referral or to complete forms to obtain a dissolution of marriage. In other cases, the main “authority” contact for the family may be with the Child, Youth and Family Service, and the involvement of the Court may seem a rather irrelevant side issue. In a case where the Court is endorsing a protective intervention, such as under the Protection of Personal and Property Rights Act 1988 or the Mental Health (Compulsory Assessment and Treatment) Act 1992, the contact with the Court may be not much more than a protective formality. In other cases, involving matrimonial property for example, there will be a dispute over the interpretation of the law that has to be resolved by judicial determination.

22 Clients bring to the Family Court a range of disputes about money and property that engender strong emotional responses because they arise out of relationship

breakdowns and long-standing family grievances; for example, applications under the Matrimonial Property Act 1976, the Child Support Act 1991 or the Family Protection Act 1955. In these situations, pre-judicial intervention such as counselling and mediation may assist in resolution of the dispute because those processes are more apt to confront the emotional dimension involved. The Court is also required to incorporate an acknowledgement and understanding of the emotional component so that obstructive and manipulative behaviours can be controlled at a case management level.

- 23 The applications that commonly cause the most distress to the users of the Family Court are those involving disputes over the care of children. Children are precious to most parents and to other persons who become immediate caregivers. Disputes over children arise in some circumstances where a person, such as a grandparent, has stepped in to care for a child when it has been perceived that the parent is not capable of providing good care. That may arise through illness, substance abuse or a violent relationship. Often the dispute is between parents who have been in a relationship but who are now estranged.
- 24 For two parents to be able to resolve the issues relating to their children after separation, each must be prepared to accord the other a degree of trust and respect that each can care for the child sufficiently. Where a relationship has broken down because of a perception that the other person is untrustworthy or inadequate or violent it is not surprising that a parent feels unsure that the child will be safe and secure with that person. After an adjustment period to begin to heal the feelings of loss and rejection and anger, which often accompany a breakdown in a relationship, many parents are able to work out a parenting plan that satisfies the interests of both, while acknowledging and accommodating the interests of their children.
- 25 For other parents, such an accommodation is much more difficult. They have feelings of loss and rejection. They are angry that the other has accused them unjustly. They fear losing a meaningful relationship with their children. They fear that the other parent does not have the same standards of responsibility or practical skills in caring for the child. They have a theoretical concept of what parenthood involves and what “rights” it enshrines. They may not have high self-esteem or be able to readjust emotionally. They may seek to blame the other parent, to seek revenge, to score points, or to insist on a position consistent with their beliefs. There are situations where both parents are antagonistic to resolution, but in many cases one parent is continually confronted by the other. Where these issues arise and cannot be resolved, the Family Court can be the arena for ongoing and repeated dispute.
- 26 The standard legal process presided over by a judge, which follows the principles of natural justice and gives each party the right and opportunity to respond to each allegation before a determination can be made, is not the ideal forum for such a dispute.
- 27 There are clients who feel assisted and supported by their lawyers, who gain insights and negotiate settlements through counselling and who feel that justice has been delivered to them if they have had to leave the decision-making to the judge.
- 28 There are also a number of clients whose needs have not been met by any of the associated Family Court procedures. They feel disempowered by the Family Court process. In some cases there is disaffection with the substantive law, but in many cases it is the nature of the process that has caused disaffection. There are women

who leave their children in the custody of violent partners because they cannot summon the emotional strength to challenge their partner. There are parties of both sexes who disengage from the court process because they find it too confrontational or the legal fees too expensive. There are those who allege gender bias. Historically that was more often the complaint of women but recently the publicity has been for complaints from men. These concerns need to be addressed. Are there ways of engaging the clients in the Court process so that they feel their needs have been met?

- 29 It must be emphasised that these cases form only a small proportion of all the matters dealt with by the Family Court and a relatively small proportion of the applications filed in relation to guardianship issues. Nevertheless, these cases absorb a great deal of the resources of the Family Court and generate most of the adverse publicity about the Court.

## CHILDREN

- 30 Children are not usually parties to an application before the Family Court although they are often the subjects of Family Court proceedings. However, there are some exceptions. A child, through a guardian ad litem (adult representative), can make an application under the Family Protection Act 1955. A child can also make an application for a protection order under section 9 of the Domestic Violence Act 1995 by a representative, and once a young person is married or has attained the age of 17 years any such application must be made in his or her own right. The Court is, however, directed to take account of the interests of the children in many different types of application to the Family Court. Under the Matrimonial Property Act 1976, the Court is required to have regard to the interests of children and may make an order settling matrimonial property for the benefit of the children of the marriage. A Family Court is not to make an order dissolving a marriage unless it is satisfied that arrangements have been made for the custody, maintenance and welfare of every child of the marriage or there is a special circumstance justifying making an order dissolving a marriage.<sup>4</sup> The welfare of the child is the paramount consideration in respect of any application made under the Guardianship Act 1968.<sup>5</sup> Under the Children, Young Persons, and Their Families Act 1989, the welfare and interests of the child or young person shall be the first and paramount consideration.<sup>6</sup> The Adoption Act 1955, perhaps because of its longevity, only requires that the welfare and interests of the child will be promoted by the adoption.<sup>7</sup>
- 31 A child who is not a party to the proceeding has no status to enable his or her voice to be heard independently of those who are parties to the proceedings, unless a lawyer is appointed to represent the child. That can occur under section 30 of the Guardianship Act 1968, section 159 of the Children, Young Persons, and Their Families Act 1989; section 162 of the Family Proceedings Act 1980; section 81 of the Domestic Violence Act 1995; and section 26 of the Matrimonial Property Act 1976, but only under the Guardianship Act 1968 and the Children, Young Persons, and Their Families Act 1989 is an appointment mandatory in certain circumstances.

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<sup>4</sup> Family Proceedings Act 1980, s 45.

<sup>5</sup> Guardianship Act 1968, s 23.

<sup>6</sup> Children, Young Persons, and Their Families Act 1989, s 6.

<sup>7</sup> Adoption Act 1955, s 11.

- 32 Once counsel for the child is appointed, the child is effectively a party to the proceedings, and counsel will be present at all court hearings and will actively advocate and negotiate on behalf of the child.
- 33 However, appointment of a counsel for the child is often delayed until any dispute for which the child is the subject has been ongoing for some time and the court proceedings themselves are reasonably advanced.
- 34 Children are not regularly and normally involved in a counselling reference from the Family Court or in mediation conferences except through representation by counsel for the child.
- 35 In its submission on the review of the Guardianship Act 1968, the Office of the Commissioner for Children has raised the desirability of the involvement of a child advocate at an early stage in the dispute who will represent the child and direct the focus of the adults toward the interests of the child.
- 36 There are also those who submit that children should be parties to early counselling intervention.
- 37 The Children's Issues Centre at Otago University has carried out valuable research on children in the Family Court system in New Zealand.<sup>8</sup>
- 38 The research reminds us that thinking on the rights and autonomy of children and their place in the family has changed radically over the last 100 years. Smith et al also emphasise changes in theories concerning the development of children and the ability of children to reason and conceptualise. The researchers suggest that Vygotsky's perspectives on child development, as opposed to the approach of Piaget, indicate that:
- ... children behave more competently in situations where they are given social support and guidance and where they feel secure and comfortable with people. When support is gradually withdrawn children are able to take on more responsibility for themselves. When children are participants with more capable others, their learning is enhanced. This implies a model of learning where everyone serves as resources for each other, builds on the ideas of others and takes varying roles and responsibilities according to their understanding and expertise.<sup>9</sup>
- 39 Such an approach has implications for the way children's views are ascertained, presented and acknowledged in the Family Court process. The conclusions from the research emphasise that each child needs to be treated as an individual and that generalised statements about the abilities, capacities or emotionally healthy outcomes for children are unhelpful. A child's best interests must be assessed within the context of relationships that are significant to them.
- 40 Not unexpectedly the researchers found that:
- Contact with loving, involved, engaged parents is much more likely to have a positive effect on children than contact with disengaged indifferent or abusive parents. . . . Children value affection, emotional support, having their parent take an interest and being involved in their lives in a meaningful way.<sup>10</sup>

<sup>8</sup> A Smith, N Taylor, P Tapp *Children Whose Parents Live Apart: Family And Legal Contexts* (Children's Issues Centre, Dunedin, 2001). Piaget saw the young child as a solitary entity, with inherent learning structures, requiring modest environmental guidance. Vygotsky saw a child's development as highly influenced by its environment.

<sup>9</sup> Smith, Taylor and Tapp, above n 8.

<sup>10</sup> Smith, Taylor and Tapp, above n 8, 46.

Children are torn by ongoing conflict between their parents.

- 41 The Children's Issues Centre research produced data that showed the degree to which children were consulted about, and involved in, custody and access arrangements. It showed that only 19 per cent of the children in the study reported being consulted about their initial custody arrangement. Over one-third (37 per cent) mentioned being consulted about initial access arrangements and that increased when the children were older. Over half, at 52.3 per cent, had none or little input into access decisions. Almost 16 per cent of the children had their views prevail as the major determinant of their current access arrangement.
- 42 The researchers summarised their position as follows:
- This study has demonstrated that children are indeed competent social actors who reflect and devise their own ideas and strategies for coping with family life after their parents separate, and that their views are worth listening to. It has often been assumed that children are not competent to participate in decisions, especially when they are younger. This assumption of children's incompetence has recently been widely challenged in the literature . . . and we believe that this study adds weight to the view that even quite young children have sensible ideas to offer. In the current climate where parents' (especially fathers') rights and well-being are such a dominant part of public and professional discourse, it is timely to consider the rights of children to have their views listened to and taken into account. While "the best interests of the child" have always been a consideration in the aftermath of divorce and legal contexts these have almost always been strongly dominated by professional assumptions about what is good or bad for children. We question the assumption that children are over burdened by being consulted. Most of them want to be consulted, which we reiterate does not mean that they want to take all of the responsibility for decisions.<sup>11</sup>
- 43 This research and new thinking on children's capabilities raises a number of issues about how children are treated as subjects of, or actors in, the Family Court process. Under the present process, the views that parents have about the interests of their children are well advocated. It is not until quite late in the process, usually after counselling and after proceedings have been filed and after there has been a mediation conference, that counsel is appointed to represent the children. It is also not usually until this later stage that more objective evidence is obtained directly from a psychologist or social worker as to the interests and views of the children. Because we know that many custody and access arrangements are settled before this stage of the proceedings and the research indicates that very few children are consulted or have their views taken into account before this stage, there must be questions as to whether the best arrangements are being made for these children. From the children's point of view, it is not only the decision that is made concerning their care and living arrangements, it is also the process by which this decision is reached that can be questioned. If the children are involved in the process in an appropriate way and informed about what is happening and consulted about their views, they are much more likely to accept the decisions made and feel comfortable enough to be able to meet the challenges of the new family situation. Careful consideration needs to be given as to how Family Court processes can meet these needs.
- 44 Professor Carol Smart<sup>12</sup> suggests that in order to treat children ethically we need to be able to hear what it is they value and to be able to see how they make sense of the

<sup>11</sup> A Smith and M Gollop *What Children Think Separating Parents Should Know* (Children's Issues Centre, Dunedin, 2001) 18.

<sup>12</sup> Carol Smart, Centre for Research on Family Kinship and Childhood, the University of Leeds, UK "Changing Family Relationships" (paper presented to the New Zealand Law Conference 2001, Christchurch, New Zealand, 4–8 October 2001).

social world. This is important for any group that is less powerful, more marginalised, or somehow more disenfranchised. She says that it is not good enough for adults to speak for children or simply to suppose that they know what children think and feel by virtue of once having been a child or by virtue of being a parent.

- 45 We do have international obligations as signatories of the United Nations Convention on the Rights of the Child. Article 12 of the Convention requires member States to:

. . . assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

- 46 The Article goes on to require that the child shall be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child. These principles need to be continually reinterpreted to take account of new research on the capacities of children, and the legal response needs to be adjusted accordingly.

- 47 Although children must be treated as individuals, and generalised statements about outcomes for children may be unhelpful, when a child is being assessed within the context of significant relationships, cultural factors are important. Those cultural factors need to be conveyed to and understood by the Court. Expertise needs to be made available to the Court so that this cultural dimension is included in decision-making. There are resources available to the Court in respect of Māori children, and it is important that they are employed so that the process, as well as the outcomes, for Māori children and Māori families is appropriate. However, it can sometimes be more difficult to obtain that expertise for smaller immigrant communities.

## FAMILY COURT JUDGES

- 48 The basic function of Family Court judges is much like that of other judges: their role is to interpret and apply the law in order to help resolve people's disputes. Family Court judges, however, do differ in some ways from District Court or High Court judges. This section outlines some of the key differences.

### Family Court judges are specialists

Specialist judges are essential to a Family Court. By this we mean judges who are genuinely interested in family law as it affects every member of the family; who are temperamentally suited to the work; with, preferably, substantial practical experience in this field, and willingness to undertake continuing education by way of study or refresher courses.<sup>13</sup>

- 49 Family Court judges are appointed in accordance with section 5 of the Family Courts Act 1980.<sup>14</sup> As recommended by the Royal Commission on the Courts and as enacted in the Family Courts Act 1980, persons appointed as Family

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<sup>13</sup> *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978) para 520.

<sup>14</sup> Section 5 Appointment of Family Court Judges

(1) The Governor-General shall from time to time, by warrant under his hand, appoint sufficient Family Court Judges to exercise the jurisdiction of Family Courts.

(2) A person shall not be appointed to be a Family Court Judge unless—  
(a) He is, or is eligible to be, a District Court Judge; and



Court judges should have practised family law for several years and should possess personal qualities and characteristics that mean that they are temperamentally suited to the type of work that comes before a Family Court judge.

### **Appointment as a Family Court judge**

- 50 The Judicial Appointments Unit within the Ministry of Justice is responsible for handling the appointment process for District and Family Court judges. The Judicial Appointments Unit periodically advertises in national publications for interested persons to tender an expression of interest in appointment to the District Court. Candidates should note in their expression of interest that they would like to be considered for application to the Family Court bench. The expressions of interest are kept on file within the unit and are consulted when a vacancy arises. Once a shortlist is prepared, a selection panel, comprising the Secretary of Justice, the Chief District Court Judge and the Principal Family Court Judge, interviews the candidates and makes a recommendation to the Minister of Justice. Successful applicants will be assigned to a court and undergo an induction period organised by the Institute of Judicial Studies (IJS).

### **Judicial training**

- 51 Newly appointed District Court judges take part in a five-day judicial orientation programme, which aims to educate new judges and equip them with some of the knowledge and skills particular to the role of a judge.
- 52 In addition to this, there are a number of specific training programmes run by the IJS for judges on topics such as judgment writing, cultural education, and gender awareness, as well as annual updates on specific topics.
- 53 The IJS has helped to implement a mentoring programme for new judges. A new judge is teamed up with an experienced judge in his or her chambers. The new judge completes a self-assessment document about how he or she views the role of a judge and then meets with the mentor to discuss the completed document. The judges identify the strengths and weaknesses of the new judge and together they develop a plan for improving skills or gaps in knowledge and then put the plan into action. The IJS has developed the mentoring structure and guidelines, but the success of the mentoring scheme depends on the individuals involved. Where a new judge is sent to a sole charge court, mentoring is less available.

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(b) He is, by reason of his training, experience, and personality, a suitable person to deal with matters of family law.

- (3) If the appointee is not, at the time of his appointment, a District Court Judge, he shall be appointed to that office.
- (4) Notwithstanding his appointment as a Family Court Judge, any Family Court Judge may from time to time sit as or exercise any of the powers of a District Court Judge.
- (5) Subject to subsection (6) of this section, every Family Court Judge shall hold that office so long as he holds office as a District Court Judge.
- (6) With the prior approval of the Governor-General, any Family Court Judge may resign that office without resigning his office as a District Court Judge.



- 54 In addition to the programmes run by the IJS, there are a number of general and specialised legal conferences and training programmes that judges will attend from time to time.

### **A more inquisitorial role**

- 55 The role of a Family Court judge differs somewhat from that of a judge in the general jurisdiction of the District Court. Current family legislation contains inquisitorial aspects; the judge may receive such evidence as he or she sees fit, regardless of whether it would be otherwise admissible in a court of law.<sup>15</sup> The Family Court judge may call for reports from the Director-General of Social Welfare,<sup>16</sup> doctors, psychiatrists or psychologists<sup>17</sup> in respect of the child or person.<sup>18</sup> Additionally, the Court may call witnesses on its own behalf rather than just relying on the witnesses that the parties call.<sup>19</sup>
- 56 In this way, it might be considered that the role of the Family Court judge is more inquisitorial than the more traditional model of impartial, judicial decision-making. In particular, cases involving children lend themselves to a more active, inquiring judicial approach.<sup>20</sup>

### **Mediation conferences**

- 57 An important role that distinguishes Family Court judges from other District Court judges is the mediation function that is assigned to them by virtue of section 13 of the Family Proceedings Act 1980.
- 58 There is considerable debate about the appropriateness of judges conducting mediation conferences. The primary role of a judge is to act as an arbiter, which involves different skills from those usually associated with mediation. Parties are aware that the judge will ultimately be acting as an arbiter in their case, and they might feel under pressure to settle in accordance with a judge's suggestions in the course of mediation, thinking that if they do not, it will proceed to a hearing with another judge and a similar outcome will be imposed regardless. The imbalance of power makes it difficult to state with certainty that such mediation conferences can truly be viewed as mediation. One commentator from the United Kingdom has stated of judicial mediation:

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<sup>15</sup> Guardianship Act 1968, s 28.

<sup>16</sup> Adoption Act 1955, s 10; Children, Young Persons, and Their Families Act 1989, s 186; Guardianship Act 1968, s 29.

<sup>17</sup> Children, Young Persons, and Their Families Act 1989, ss 178–179; Guardianship Act 1968, s 29A.

<sup>18</sup> Section 21 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 confers wide powers for the Judge to call for reports in respect of patients. Section 76 of the Protection of Personal and Property Rights Act 1988 allows the Court to call for a medical, psychiatric, psychological or other report on any person in respect of whom an application is being made.

<sup>19</sup> Adoption Act 1955, s 24; Children, Young Persons, and Their Families Act 1989, s 199; Guardianship Act 1968, s 28; Mental Health (Compulsory Assessment and Treatment) Act 1992, s 23; Protection of Personal and Property Rights Act 1988, s 78.

<sup>20</sup> In a speech given at the 1991 New Zealand Family Law Conference in Auckland, His Hon Judge PF Boshier suggested that a rational process of investigation guided by a Family Court judge could be an efficient and productive means of resolving custody disputes.

[The] distinction is blurred once court personnel make direct efforts to orchestrate settlement by acting as mediators at some stage prior to judgment. Even where these efforts are self-consciously limited to facilitating communication between the parties, rather than helping to fashion the shape of the settlement, any distinction between the self-constructed, negotiated outcome and an imposed decision is problematic. The efforts which Judges Gerlis and Rose describe as they “strive to encourage settlement” are clearly the honest attempts of enthusiasts who passionately believe what they are doing is in the best interests of litigants; but they cannot in their nature provide the backdrop to uncoerced decision-making. The authority of the court, historically deployed in the delivery of “judgment” becomes linked to “settlement”, so eroding the line between negotiated outcome and imposed decision that it has hitherto been in the hands of the parties to cross.<sup>21</sup>

- 59 In some ways, the mediation offered by Family Court judges operates more as a reality check for litigants, often giving them a sense of what the outcome might be should they proceed down the litigation track. At this point, some parties settle. The mediation conference may amount to a form of settlement conference rather than a true mediation process.
- 60 There is considerable variation in the skill base of the judges who conduct mediation conferences. Some judges may have had experience as mediators prior to appointment to the bench, but generally, mediation has been a skill that judges have been expected to develop upon appointment, with the assistance of training sessions by skilled mediators.
- 61 Recently, there has been an initiative to improve judicial mediation skills. The IJS initiated a programme to train four Family Court judges in mediation skills. The training programme taught a number of models of mediation and specific mediation skills such as communication and reframing. As a result of attending the programme, the four judges have been accredited to teach mediation skills to other Family Court judges. The judges who attended the course rated it positively.
- 62 Many judges comment favourably about mediation conferences, rating their success highly and stating that they enjoy conducting mediation conferences, regarding them as one of the more pleasant aspects of their work as a judge. It is unclear, however, whether there is a correlation between judicial and client satisfaction with the outcome of mediation conferences.

### **Courtroom and case management**

- 63 Once appointed, judges are autonomous. This autonomy is designed to protect them from inappropriate pressure being brought to bear on them in an attempt to sway the course of a case. It goes without saying that judges must abide by the law as established by statute and precedent, fundamental constitutional principles, and judicial ethics. Beyond that, there is little direct “management” of judges.<sup>22</sup>
- 64 The Principal Family Court Judge is the head of the Family Court bench and will from time to time issue practice notes directing how judges and counsel should deal with procedural aspects of case management. However, barring clear

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<sup>21</sup> S Roberts “Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship” [1993] 56 MLR 452, 469–70.

<sup>22</sup> Although complaints about a judge’s conduct may be made to the Judicial Complaints Unit, which will investigate complaints.

misconduct or hopeless incompetence, the Principal Family Court Judge would be unlikely to intervene in the way in which a judge chooses to run his or her courtroom.

- 65 The Family Court judge is the ultimate decision-maker in defended Family Court cases.<sup>23</sup> The judge hears the evidence presented to the Court by the lawyers and the parties and, if necessary, seeks the assistance of reports and/or advice from specialists such as counsel for the child, psychologists, and psychiatric and medical report writers, whom the judge may direct to investigate a particular line of inquiry.
- 66 Although it is up to counsel how he or she chooses to run a case, the judge will issue directions to the parties and their lawyers during the course of proceedings and will try to keep the matter on track through to the determination of the dispute.
- 67 One judge once described the variation between Family Court judges in the following terms:
- While we all usually agree on matters of basic principle, there are some points on which we tend to think differently. Take as an example the point at which it can be said that mediation and conciliation have done all that can reasonably be expected of them; that there is a limit to the services that can properly be provided out of public money to help solve the problems of the eccentric, the unbalanced, or the plain bloody-minded; that the time has come for the referee to make the parties' decision for them. On this kind of issue, different Family Court Judges naturally have different flash-points.<sup>24</sup>
- 68 Judges are responsible for the way in which their Court runs and they play a crucial role in case management. In spite of guidelines and practice notes, there can be considerable variation in the style and practice of the judge in the courtroom. Some judges are content to take a more detached role as an impartial observer, whilst others adopt a much more hands-on style of management.
- 69 Judges have the power to control proceedings and to prevent abuse of the Court.<sup>25</sup> In spite of this, some judges are reluctant to sanction parties and counsel who misuse the Court's processes for their own, less laudable ends.
- 70 The current system does not allow for great continuity in case management. One judge may deal with a case one week, and that case, or another matter relating to the same parties, might be dealt with by another judge at another stage. There are pros and cons related to this system. Some might think that having a fresh pair of eyes working on the case lessens the chance that a judge might become biased against one or both of the parties. However, having the file relating to one family being dealt with by a number of judges can mean, especially where there are a number of applications in respect of one family, that no one person has a full perspective of what is going on in that family's life. That lack of understanding might pose the risk that a decision is made without regard to the overall context of that family's life.

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<sup>23</sup> Even where the parties reach an agreement in the course of mediation and agree to formulate a consent order, the judge retains a discretion to refuse to endorse the consent order.

<sup>24</sup> His Hon Judge BD Inglis *Practice and Procedure in the Family Court* (Legal Research Foundation Family Law Seminar, Auckland, 1984) 2.

<sup>25</sup> *McMenamin v AG* [1985] 2 NZLR 276; *Aplin v Lagan* (1993) 10 FRNZ 562.

- 71 Other jurisdictions have moved towards adopting a “one-judge–one-family” or “one-team–one-family” method of case management. With such a method of case management a family is assigned to a particular judge, or team of judges and associated Court staff. Whenever a matter involving that family arises, the assigned judge or team handles it. This ensures that the judge and Court personnel are well acquainted with the family and have a good grasp of the totality of the issues involving that family. A common concern of judges is that, with the workloads they carry, there is insufficient time for them to adequately acquaint themselves with a file before it is called up. With this system, there is less likelihood of things being missed because a judge is unfamiliar with the file.
- 72 In places where there is a one-judge–one-family approach, there will usually also be provisions that enable a judge to be removed from the case if a litigant can demonstrate that the judge is biased against them.

### *Docket trial system*

- 73 Two judges in the Auckland District Court, Judges Doogue and Boshier have recently implemented a trial project, which closely resembles the features of the one-judge–one-family model discussed above. This project, the “docket project”, involved assigning cases to a judicial team, in this case, Judges Doogue and Boshier. The Judges see this as being more efficient: it appears to have reduced multiple case management conferences and appearances, and the parties have the advantage of appearing before a judge who is well acquainted with their file.
- 74 The project also involves the judges’ trialling early intervention in the cases on their list. Early and firm judicial control is taken with the management of the proceedings, with the aim of eliminating delays and facilitating early determination of the disputes. The judges tailor a disposition track for the case according to the specific needs of the parties in each case. This approach is a key facet of what is known in some other jurisdictions as “differential case management”.
- 75 The judges who initiated the project have reported good success in terms of reducing the timeframes for the disposition of matters.<sup>26</sup> However, there is some difference of opinion as to the weight that can be attached to the initial impressions of how the system is working. The Department for Courts has presented the Principal Family Court Judge with an independent statistical report assessing the data used in the docket project. Further assessment of this project might be warranted.

### **Exercise of general jurisdiction of the District Court**

- 76 In 1978, the Royal Commission on the Courts recommended:

[W]e think it desirable that these judges should have jurisdiction to hear criminal or civil matters, as well as family court matters, in order that they might maintain adequate breadth of interest and experience. We recommend accordingly. While Family Court judges would not normally be called upon to exercise an extensive jurisdiction

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<sup>26</sup> Judge J Doogue and Judge PF Boshier “A Report to the Principal Family Court Judge: Auckland Family Court Docket Project: A Trial of Early Intervention Processes 9 October 2000–24 August 2001” (Auckland, 2001).

in these wider fields, such an arrangement would enable their services to be used with greater flexibility. Personal preference should be considered, but we suggest as a guide that approximately 20 per cent of their time (one day per week, or one week in every five) could be given to matters outside the Family Court.<sup>27</sup>

Family Court judges are appointed as District Court judges and may sit from time to time in the general jurisdiction of the District Court. The amount of work that they do in the civil and criminal jurisdictions of the District Court varies amongst judges and there is some regional variation.

- 77 The Judicial Resource Manager for the Southern region estimates that Family Court judges spend approximately 80 per cent of their time on Family Court work and the remaining 20 per cent on District Court work. In the Southern region, Family Court judges play an important role in conducting preliminary hearings in criminal cases in the District Court. If they were not available to do such work, significant stresses would be placed on the District Court bench.<sup>28</sup>
- 78 In contrast, the Judicial Resource Manager for the Waikato–Bay of Plenty region told us that only one judge in that region fills a notional 25 per cent quota of general District Court work.
- 79 In the Central region, most of the judges devote 25 per cent of their time to District Court work and 75 per cent to Family Court work, but the judge based in Napier and some judges in Wellington do 100 per cent Family Court work.

### Circuit work

The Family Division of the District Courts should be manned by judges especially appointed to it, sitting mainly in the centre of greater population but readily available to sit in court buildings or whatever suitable accommodation is available in smaller centres on a peripatetic basis.<sup>29</sup>

- 80 Family Court judges are based in city and regional centres and provide Family Court services to outlying courts on a regular basis.<sup>30</sup> The geographical scope of circuits, and how often they are serviced, varies considerably.
- 81 The Northern region coverage includes:
- Auckland – also responsible for Gisborne;
  - Auckland North Shore – also responsible for Whangarei, Kaikohe, Kaitaia and Dargaville;
  - Waitakere; and
  - Manukau – also responsible for Pukekohe and Papakura.
- 82 In the Waikato–Bay of Plenty region, judges in the main centres are responsible for a cluster or circuit. The circuits are divided as follows:

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<sup>27</sup> *Report of the Royal Commission on the Courts*, above n 13, para 524.

<sup>28</sup> Preliminary hearings often proceed to full trial, so it is preferable not to set them down for jury-warranted judges, who would then have to disqualify themselves when the case reaches trial. Using Family Court and Youth Court judges to conduct preliminary hearings frees up jury-warranted judicial resources.

<sup>29</sup> *Report of the Royal Commission on the Courts*, above n 13, para 524.

<sup>30</sup> This is often referred to as “going on circuit”.

- Hamilton cluster – responsible for Huntly, Thames, Morrinsville, Te Awamutu, and Te Kuiti;<sup>31</sup>
  - Rotorua cluster – responsible for Tokoroa<sup>32</sup> and Taupo;<sup>33</sup> and
  - Tauranga cluster – responsible for Whakatane,<sup>34</sup> Waihi<sup>35</sup> and Opotiki.<sup>36</sup>
- 83 The Central region covers the area from south of the Central Plateau, including the East Cape. There are Family Courts permanently stationed in the following centres:
- Palmerston North<sup>37</sup> – also covers Levin,<sup>38</sup> Fielding,<sup>39</sup> Taumarunui,<sup>40</sup> and Taihape;<sup>41</sup>
  - Wanganui<sup>42</sup> – also covers Marton;
  - Napier<sup>43</sup> – also covers Dannevirke,<sup>44</sup> Hastings<sup>45</sup> and Waipukurau;<sup>46</sup>
  - New Plymouth<sup>47</sup> – also covers Hawera;<sup>48</sup> and
  - Tauranga.
- 84 The Wellington region incorporates:
- Porirua;<sup>49</sup>
  - Masterton;<sup>50</sup>
  - Upper Hutt;<sup>51</sup>
  - Lower Hutt;<sup>52</sup>
  - Nelson;<sup>53</sup>

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<sup>31</sup> These courts each get one day per month of judge time for Family Court and Youth Court work.

<sup>32</sup> Tokoroa gets four-to-five days per month of judge time for Family and Youth Court work.

<sup>33</sup> Taupo gets three-to-four days per month of judge time for Family and Youth Court work.

<sup>34</sup> Whakatane gets five days per month of judge time for Family and Youth Court work.

<sup>35</sup> Waihi gets one day per month of judge time for Family and Youth Court work.

<sup>36</sup> Opotiki gets one day every six weeks of judge time for Family and Youth Court work.

<sup>37</sup> Most of the time, whenever the judge is not on circuit.

<sup>38</sup> Two days per month.

<sup>39</sup> One day per month.

<sup>40</sup> One day every second month.

<sup>41</sup> One day every second month.

<sup>42</sup> Mostly full-time, except when on circuit in Marton, and for one week every second month that the Judge will spend sitting in Palmerston North.

<sup>43</sup> Mostly full-time when not on circuit.

<sup>44</sup> One half-day every month.

<sup>45</sup> Seven-to-eight days every month.

<sup>46</sup> One half-day per month.

<sup>47</sup> Most of the time when not on circuit in Hawera.

<sup>48</sup> Two days every month.

<sup>49</sup> Two-to-three days per week Family Court Judge time.

<sup>50</sup> On average six days per month.

<sup>51</sup> Two-to-three days per week.

<sup>52</sup> Daily.

<sup>53</sup> Most of the time.

- Blenheim;<sup>54</sup> and
- Chatham Islands.<sup>55</sup>

- 85 The Southern region is divided as follows:
- Christchurch – responsible for Ashburton, Rangiora, Greymouth, Westport, and Kaikoura;
  - Dunedin – responsible for Balclutha, Alexandra and Oamaru; and
  - Invercargill – responsible for Gore and Queenstown.

### **Rostering**

- 86 The task of rostering falls upon the regional Judicial Resource Managers and is undertaken after consultation with the liaison judge for the region. Rostering is complicated, as not only must the Judicial Resource Manager look after the day-to-day requirements of their own Family Court, but they must also take into account demands that the District Court might make of Family Court judicial time and ensure that satellite courts receive adequate judicial coverage. Factors that complicate this already difficult task include:
- judges falling ill; and
  - judges taking annual leave or sabbatical, particularly when announced at short notice.
- 87 Where a region is short of judges, a judge may be called in from another region, if there is spare capacity, a situation that is becoming increasingly unlikely. Another means of dealing with a shortage of judicial personnel is to maintain a quotient of acting warranted Family Court judges (usually retired judges). At present, there are five acting warranted judges. In the past year, the Southern region alone has received the equivalent of one full-time judge in acting warranted judge relief work. It would appear that the system would suffer greatly if there were no acting warranted judges.
- 88 It seems that in some regions a common means of dealing with a shortage of Family Court judge time is to postpone or cancel fixtures and concentrate on fulfilling Family and District Court list work. Fixture time has been described as coming out of the “fat” in the system, although this seems to be somewhat of an oxymoron.

### **Interface with others in the Court process**

- 89 The judge is perhaps the most visible figure in the court: Family Court litigants appear before the judge and lawyers present their cases to the judge. Counsel for child, counsel to assist, and the specialist report writers present their findings and opinions to the judge for consideration. The judge may call any witness he or she deems necessary and may examine them. The Family Court co-ordinator will often be called into Court and so also has contact with the judge. Some Courts schedule regular meetings between the judges, registrars, Family Court co-ordinators and Court staff.

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<sup>54</sup> Four days per month.

<sup>55</sup> Perhaps once a year.



## COURT STAFF

- 90 As described in Background 1 A Brief History of the Family Court, the jurisdiction and workload of the Family Court has expanded considerably. As a result of this, the workload of the administrative staff has increased to the point where creative solutions must be explored to make the work of the Court manageable.
- 91 As part of the Modernisation Programme,<sup>56</sup> the Department for Courts is currently implementing new processes and roles in all the Family Courts. It is hoped this will improve the caseload management carried out by the staff. Significant work is currently being undertaken to determine the most appropriate staffing structure for each court cluster. Some specific roles have not yet been finalised. Work is continuing on how any new role requirement can be best integrated with other departmental initiatives to ensure that the change process is least disruptive to staff and the operation of the courts.
- 92 Currently, Court staff duties and roles vary throughout New Zealand. Some Courts have already applied aspects of the Modernisation Programme, though the majority have not. In this section, the current practices as well as the staff changes that should result from the Modernisation Programme are briefly described.
- 93 At present, registrars or deputy registrars have responsibility for case management of files. Since 1992, registrars have administered lists to monitor the progress of files through the Court and give standard directions or directions by consent. The Family Proceedings Rules 1981 provide:<sup>57</sup>
- The jurisdiction of the Court to hear any application in the course of proceedings may be exercised by the registrar, unless there is provision to the contrary in either of these Acts or these rules.<sup>58</sup>
- 94 Under the Modernisation Programme, it is proposed that case officers will take over from deputy registrars the responsibility of management of files.
- 95 The role of case officers was trialled in the Wellington Development Court.<sup>59</sup> Currently only some Courts have case officers. These staff are responsible for organising fixtures, entering in new applications, the day-to-day management of files, and running the registrar's list.
- 96 For Courts that do not yet have case officers, responsibility for managing and processing files varies. Common practice is for specific people (who range from registrars, deputy registrars and administrative support staff) to be responsible for certain applications under specific Acts.<sup>60</sup> Their performance is monitored by the Family Caseload Manager (or Family Jurisdiction Managers).

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<sup>56</sup> For detail on the Modernisation Programme, see Background 1, para 578, of this paper.

<sup>57</sup> Rule 55(2).

<sup>58</sup> See also rr 293–296 of the District Court Rules 1992 which contain provisions relating to the registrar's jurisdiction.

<sup>59</sup> For detail on the Wellington Development Court see Background 1, para 582 of this paper.

<sup>60</sup> Conclusion reached by discussion between personnel at Manukau, Palmerston North and Napier District Courts and the Law Commission.



- 97 The Family Caseload Managers generally manage the Family Courts. In the larger satellite courts, there may be a team leader who manages the Family Court. They have responsibility for high-level administration, such as ensuring that standards of practice are met, reporting to the Court Manager and co-ordinating their cluster area. A Family Caseload Manager has already been appointed for each cluster area.
- 98 The experience, training, remuneration and qualifications of Court staff are all factors that contribute to the standard of service delivery in the Family Court.

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**Q5** Do you have comments about how the Family Court staff operate and are organised in your area? (We are especially interested to hear about the practice in Court offices that are functioning well.)

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## FAMILY COURT CO-ORDINATORS

- 99 Section 8 of the Family Courts Act 1980 provides that an officer must be appointed to carry out duties as directed to facilitate the proper functioning of the Family Courts and of counselling and related services. The Family Court co-ordinators currently carry out this role.
- 100 The Family Court co-ordinators are salaried employees of the Department for Courts. Their role is to organise counselling and other specialist services for Family Court clients. Their key task is to make referrals and direct members of the public to the proper agencies. They have contact with every case involving counselling that goes through the Family Court.<sup>61</sup>
- 101 The Family Court co-ordinators have personal contact with some clients, with Court personnel, and with professionals who provide services to the Court (for example, counsel for the child and specialist report writers).
- 102 The role does vary between courts, and anecdotal evidence suggests that it is often broader than that of arranging counselling and other specialist services. It is apparent from some parents involved in custody and access disputes that the Family Court co-ordinator plays a very important role in supporting Family Court clients and moving matters along when necessary.<sup>62</sup>
- 103 There is also varied practice around the country for Family Court co-ordinators attending short causes (hearings of 15 or 30 minutes) and Chambers hearings. Where Family Court co-ordinators attend, it is considered helpful as part of a team approach.
- 104 In the Wellington region, arising from the Wellington Development Court, these officers are now called "Family Specialist Services Co-ordinators". The key responsibilities of the Family Specialist Services Co-ordinators are to:
- ♦ co-ordinate specialist service providers;
  - ♦ manage cases;
  - ♦ manage relationships;

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<sup>61</sup> Sections 9, 10 and 19 referrals under the Family Proceedings Act 1980 and Domestic Violence Act 1995 programme referrals.

<sup>62</sup> Conclusion reached in G Hall and A Lee *Family Court Custody and Access Research: Report 8: Discussion Paper* (Ministry of Justice, Wellington, 1994) 32.

- ♦ assess clients and cases;
- ♦ select appropriate actions;
- ♦ provide Family Court education;
- ♦ administer documents and files; and
- ♦ maintain knowledge capital.<sup>63</sup>

- 105 It is not yet known whether these responsibilities will become formal requirements of the role for all Family Court co-ordinators. However, there is ongoing discussion on what the role of the co-ordinator should be under the Modernisation Programme.<sup>64</sup>
- 106 The co-ordinators come from diverse backgrounds and require no specific qualifications.

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**Q6** What tasks does the Family Court co-ordinator undertake in your area?

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## LAWYERS FOR THE PARTIES

- 107 Family Court proceedings differ from other court proceedings in a number of ways that impact on the role of the lawyer.
- 108 Where a client is seeking advice in relation to dissolution of marriage, separation, spousal maintenance or paternity, guardianship, custody or access, a lawyer has a duty to ensure that the client is aware of facilities that exist for promoting reconciliation and conciliation, and the lawyer should promote reconciliation, or, if that is not possible, conciliation.<sup>65</sup> Where a client applies for a protection order without notice, the applicant's lawyer must certify that he or she has advised the applicant that every affidavit must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant. The lawyer must certify that he or she has made reasonable enquiries of the applicant to establish whether the relevant circumstances have been disclosed and to the best of the lawyer's knowledge the affidavit discloses all such circumstances.<sup>66</sup>
- 109 As most matters that come before the Family Court involve very personal issues that have a profound effect on those parts of the client's life that are most likely to impact on the client's psyche, a lawyer practising in this area needs good interpersonal skills.
- 110 As well as attending to the necessary legal work, the lawyer may need to refer the client to other services available within the community, such as income support, social workers, counsellors, budget advice and so on.
- 111 A lawyer who works in the Family Court needs to have a basic understanding of family dynamics, child development and family violence issues in much the same way a business lawyer needs to have an understanding of the business environment.

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<sup>63</sup> Responsibilities as set out in *Development Court Wellington – Key Changes* (Department for Courts, Wellington, 2000).

<sup>64</sup> For detail on the Modernisation Programme see Background 1, para 578 of this paper.

<sup>65</sup> Family Proceedings Act 1980, s 8.

<sup>66</sup> Domestic Violence Rules 1996, r 26.

- 112 While the lawyer has a duty to promote conciliation and the resolution of family disputes, the lawyer also has a duty to advise the client on the law and the client's legal entitlements, and to advocate the client's interests.
- 113 It is the duty of any lawyer to "reality test" his or her client's position against that of the other party and the likely outcome of a court-ordered resolution. The lawyer also has a duty to carry out the client's instructions.
- 114 The lawyer stands between the client and the Court and inevitably filters the Court's perception of the client. Lawyers generally draft the affidavits filed on behalf of their clients. They are expected to control the content of affidavits to the extent of keeping out irrelevancies. They present the "best face" of their client by the editing exercise they undertake to prepare concise and relevant evidence. The lawyer advises on, and influences, the strategy for pursuing the client's interests. The lawyer can speed up or slow down the Court process by the choices that are made.
- 115 The role of the lawyer and the duty to his or her client would not change radically whether the procedures of the court are so-called "adversarial" (where the parties determine the material to be brought before the court) or "inquisitorial" (where the court takes a more active role in determining the content of the material brought before it). The role of the lawyer is to put forward evidence favourable to his or her client and to challenge facts or submissions contrary to his or her client's case.
- 116 A lawyer has a duty to the court and a professional obligation not to misinform the court, not to be obstructive and to comply with the directions of the court. Within those parameters, a lawyer is doing a good job for the client who advises his or her clients correctly on the law, works out a strategy for the client, manages the case to achieve the client's best interests, and advocates successfully on behalf of the client. The lawyer assists in rectifying any power imbalance between the parties.
- 117 The lawyer for a party contacts and negotiates with the lawyers for the other parties including counsel for the child, where such counsel is appointed. The lawyer for a party gains an understanding of the view of counsel for the child, reports on that to the client and builds it into his or her strategy for that client. The stance taken by the other parties in this case, through their lawyers, should be reality tested with the client and strategies modified accordingly.
- 118 Where a client is legally aided, the lawyer may be constrained by the amount of aid available. Lawyers state that they often do work that is unpaid because of legal aid limits. Lawyers have also stated that they often pay the \$50 initial contribution from their own pockets, so that the application for aid can go through and they will be paid for the balance of their work.<sup>67</sup>
- 119 Lawyers can be adversely criticised if they delay matters when that is not in the best interest of their clients, if they give wrong legal advice, if they promote unhelpful strategies, or if they do not follow their client's instructions. There will inevitably be some clients who are not served well by their lawyers. But lawyers cannot be criticised for carrying out their essential task, that is, to advocate their client's best interests.
- 120 The system needs to take account of the essential role of the lawyer and provide counterbalances in the process to address its limitations, without denying to a

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<sup>67</sup> Law Commission *Women's Access to Legal Services: NZLC SP1* (Wellington, 1999) 134.

party the right to have his or her case put properly before the court. This can be achieved by providing opportunities for alternative dispute resolution, by proactive case management, by ensuring independent evidence is available to the Court by such means as reports from social workers and psychologists, and by giving a child independent representation by the appointment of a lawyer for the child where a matter is to go to a hearing. Lawyers are also appointed for persons who are the subject of orders made under the Protection of Personal and Property Rights Act 1988 and the Mental Health (Compulsory Assessment and Treatment) Act 1992.

- 121 Lawyers who practise in the Family Court are encouraged to join the Family Law Section of the New Zealand Law Society. Membership of the Family Law Section requires an annual fee of \$125 in addition to the membership and practising fees paid to the New Zealand Law Society by all practising lawyers.
- 122 There are currently over 730 members of the Family Law Section out of a total of 8238 lawyers in New Zealand.
- 123 The Family Law Section, in conjunction with the Continuing Legal Education programme provided by the New Zealand Law Society, runs two or three seminars each year on areas of law relevant to Family Court practice. The Family Law Section also runs a conference every three years on family law issues. The Continuing Legal Education seminars and the Family Law Section conference are normally well attended.
- 124 The Family Law Section is investigating the possibility of a voluntary specialisation scheme for lawyers practising in the Family Court. Such a scheme would not prevent other lawyers from practising in the area, but would identify those who were entitled to promote themselves as specialists in family law, with the expectation that this would ensure higher standards of practice. The entitlement to hold oneself out as a specialist family law practitioner would likely involve a requirement of a certain level of experience and practice in family law and a commitment to relevant continuing education. The Family Law Section, through the New Zealand Law Society, is currently preparing to carry out a feasibility study on such specialisation schemes.
- 125 There remain issues of access to legal advice and representation and issues relating to lawyers' costs in family law disputes, as have been previously canvassed in the respective consultation papers prepared as part of the Law Commission project on Women's Access to Justice.<sup>68</sup> Many of the issues raised in those consultation papers would apply equally to a number of men using the Family Court.
- 126 Outside of the main centres, clients do not have a great deal of choice in the lawyers available to them; and if they are seeking a lawyer with a particular cultural background or language proficiency, they will not often be available.

## FAMILY COURT COUNSELLORS

- 127 The Family Proceedings Act 1980 expanded on the conciliation processes first introduced into the Magistrates Court in 1968. Rather than promoting litigation

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<sup>68</sup> Law Commission *Women's Access to Legal Advice and Representation: A Consultation Paper*: NZLC MP9, Women's Access to Justice Series He Putanga Mō Ngā Wāhine ki te Tika (Wellington, 1997) and Law Commission *Lawyers' Costs in Family Law Disputes: A Consultation Paper*: NZLC MP10, Women's Access to Justice Series He Putanga Mō Ngā Wāhine ki te Tika (Wellington, 1997).

as the first response to marital disharmony, the Act established counselling services with the aim of supporting couples in their relationships, or enabling them to come to terms with the deterioration in their relationship and find the strength to move on. The Family Proceedings Act places the Court, counsellors and lawyers representing the parties under a duty to consider and promote the possibility of conciliation, if not reconciliation, between the parties to a marriage.<sup>69</sup>

- 128 Married and de facto couples may approach the Court and make a request for counselling. This request can be made whilst they are living together, whilst they are in the process of separating,<sup>70</sup> or after they have separated. Counselling can be requested before the parties have filed proceedings or at any stage during proceedings. Where parties apply for a custody or maintenance order, the Court may also direct that they attend counselling.<sup>71</sup>
- 129 Either party may request counselling, but it should be requested on behalf of both parties. However, where it has been proved that there has been domestic violence, within the meaning of the Domestic Violence Act 1995, the parties cannot be required to attend joint counselling.<sup>72</sup>
- 130 Relationship Services has developed a practice of offering separating couples at least one individual counselling session first. This initial meeting gives the counsellor the opportunity to gauge whether violence in the relationship is an issue and provides an opportunity for each party to tell their story. The parties can then choose whether to commence joint counselling.
- 131 There is limited scope for parties other than the couple to take part in counselling. Family members, including children, step-parents or new partners may only attend if the judge makes a direction to that effect.<sup>73</sup> Such action might be regarded as pushing the boundaries of the existing legislation, since there is clearly no provision under the existing Family Proceedings Act that would suggest that such course of action was contemplated by the legislators in 1980. However, some counsellors consider that, in the context of counselling sessions in accordance with section 10 of the Family Proceedings Act, it should be possible to involve others, particularly wider family members, in the counselling process. In the view of Relationship Services, the current legislation is too restrictive regarding who may be involved in counselling sessions.<sup>74</sup>
- 132 The counselling sessions may take place at the offices of the counsellor or at the home of one or both parties. Counsellors are reasonably flexible in scheduling appointment times and will often convene sessions in the evenings or during the weekend to suit their clients' requirements.

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<sup>69</sup> Family Proceedings Act 1980, s 19. Counsellors are similarly bound to explore the possibility of reconciliation or conciliation between the parties – Family Proceedings Act 1980, s 12.

<sup>70</sup> Where the parties have applied for a legal separation order, a referral to counselling will be made in accordance with s 10(1) of the Family Proceedings Act 1980.

<sup>71</sup> Family Proceedings Act 1980, s 10 (4).

<sup>72</sup> Family Proceedings Act 1980, s 19A.

<sup>73</sup> Section 19(1)(b) of the Family Proceedings Act 1980 is often used to justify the inclusion of children or others in the conciliation process.

<sup>74</sup> Relationship Services, meeting with the Law Commission, 24 August 2001.

- 133 Parties are offered six hours of free counselling in an attempt to achieve conciliation or reconciliation. If, at the end of the six hours of prescribed free counselling, it appears that further counselling is desirable, the counsellor can apply to the Court to extend the number of sessions available. If it becomes apparent that counselling is not helping matters or if it is clear that one or both parties cannot or absolutely will not participate in the counselling process, the counsellor can terminate the counselling referral and send the clients back to the Family Court.
- 134 All information divulged during the counselling process is confidential and must be treated as privileged.<sup>75</sup> However, where information is divulged in the course of counselling that indicates there has been possible child abuse or other risk to a child, the counsellor will address these concerns with the parties. If the counsellor remains concerned, he or she may notify the Child, Youth and Family Service in accordance with section 15 of the Children, Young Persons, and Their Families Act 1989. The counsellor will also advise the Court that such a notification has been made.
- 135 When the prescribed counselling sessions have been completed (which should ideally be within eight weeks of the initial referral),<sup>76</sup> the counsellor will prepare a report for the Court that will state that the parties have attended the requisite counselling, state whether they intend to remain in a relationship or separate, and outline any agreements that the parties may have reached during the course of counselling.<sup>77</sup> The report does not give any detail about the issues between the parties as this is privileged information. If the judge has made a referral to counselling in accordance with section 19 of the Family Proceedings Act 1980 (where proceedings under the Guardianship Act 1968 are contemplated or have commenced), the report should also cover any issues that the judge ordered should be addressed in the context of counselling.<sup>78</sup> The parties will be given a copy of the counsellor's report.

### **Selection of counsellors**

- 136 New guidelines have recently been formulated for the selection and appointment of counsellors.<sup>79</sup> A Family Court counsellor must be an accredited member of a professional organisation and must have paid the professional organisation's annual dues.
- 137 Persons who wish to provide court-affiliated counselling services must demonstrate that they have special competency in a range of matters such as:
- counselling skills;
  - human and child development and family systems theory;
  - knowledge about the dynamics of relationship break-ups and family separation;
  - understanding of grief and loss;
  - knowledge about the dynamics of family violence and the impact of it on children and adults;

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<sup>75</sup> Family Proceedings Act 1980, s 18(1) and (3).

<sup>76</sup> Practice Note – Family Court Counsellors, issued by the Principal Family Court Judge, 10 August 2001, para 7.4.

<sup>77</sup> Practice Note – Family Court Counsellors, above n 76, para 7.

<sup>78</sup> Practice Note – Family Court Counsellors, above n 76, para 7.2.

<sup>79</sup> Practice Note – Family Court Counsellors, above n 76, paras 8–9.4.



- knowledge about the dynamics of child abuse;
- awareness of gender issues;
- crisis intervention skills;
- awareness of substance misuse and/or abuse;
- awareness of the types of local community resources that are available;
- knowledge of family law and how the Family Court operates; and
- general cultural and social awareness.

- 138 The Department for Courts contracts counselling services from individuals and community agencies. The largest agency to be contracted to provide conciliation services is Relationship Services (formerly Marriage Guidance). Relationship Services provides counselling services for approximately 15 per cent of all section 9 referrals and 50 per cent of all section 10 referrals.<sup>80</sup>
- 139 Most counsellors employed by Relationship Services have a tertiary level qualification and two years professional experience prior to seeking to work in the Family Court. Relationship Services has also formed groups of Māori and Pacific Islands counsellors to provide services to members of these communities.

### Complaints

- 140 Any complaints about the conduct of a counsellor are referred to the professional body of which the counsellor is a member. Complaints can also be addressed to the Health and Disability Commissioner. If a complaint has been made to one of these bodies in respect of a counsellor, the counsellor must inform the Court Manager that a complaint has been lodged and should advise the Court Manager of the outcome of any investigation.

### Costs

- 141 Counselling costs have steadily risen over the past decade from \$3469356 in 1995/1996 to \$4645727 in 2000/2001.

### *Interface with other professionals*

- 142 The Family Court counsellor's primary relationship is with the couple who present for counselling. They also have contact with the Family Court co-ordinator who arranges the referral, and they interface with the Court when they provide a report upon the clients' completion of counselling.

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**Q7** Should clients be encouraged to make use of the conciliation services of the Family Court before they engage their own lawyer?

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<sup>80</sup> Section 9 referrals are from people seeking counselling and s 10 referrals are directed by the registrar of the court when an application for a separation order has been made.

## COUNSEL FOR THE CHILD

- 143 The Family Court is authorised to appoint counsel for the child in a variety of Court proceedings. Counsel may be appointed in respect of proceedings under the Family Proceedings Act 1980,<sup>81</sup> under the Domestic Violence Act 1995,<sup>82</sup> and under the Matrimonial Property Act 1976.<sup>83</sup> In any proceedings under the Guardianship Act 1968, the Court *may* appoint a lawyer to represent the child, but has an *obligation* to appoint a lawyer to represent the child if the proceedings appear likely to progress to a hearing. Likewise, under section 159 of the Children, Young Persons, and Their Families Act 1989, the Court must appoint a lawyer to represent the child in care and protection proceedings, and is authorised to appoint a lawyer for the child in other proceedings under the Act.
- 144 Each Family Court is required to maintain a list of counsel who are available to accept appointments from the Court as counsel for the child.
- 145 Lawyers must apply to go on the list. They are then interviewed, and their application assessed, by a panel. The Practice Note on Selection and Appointment of Counsel for the Child<sup>84</sup> states that counsel should have:
- an ability to exercise sound judgment and identify central issues;
  - a minimum of five years practice in the Family Court;
  - proven experience in running defended cases in the Family Court;
  - an understanding of and ability to relate to and listen to children of all ages;
  - good people skills and an ability to relate to and listen to adults;
  - sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
  - relevant qualifications, training and attendance at relevant courses;
  - personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
  - independence; and
  - knowledge and understanding of the Code of Practice contained in the Practice Note issued on 17 November 2000<sup>85</sup> and the *Best Practice Guidelines for Counsel for the Child* ratified by the New Zealand Law Society on 18 February 2000.<sup>86</sup>
- 146 In any one case, the Court appoints a specific counsel for the child. Counsel is given a brief that has been settled by the Court, usually in consultation with counsel for the parties. That brief sets out the work that is required from counsel for the child.
- 147 In 1997, the Principal Family Court Judge requested the Department for Courts to undertake a review of the representation of children in the Family Court.

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<sup>81</sup> Section 162.

<sup>82</sup> Section 81.

<sup>83</sup> Section 26.

<sup>84</sup> The full text of Practice Note on Selection and Appointment of Counsel for the Child is annexed as Appendix C.

<sup>85</sup> Practice Note – Counsel for Child Code of Practice dated 17 November 2000 and in force from 1 February 2001 is annexed as Appendix D.

<sup>86</sup> Best Practice Guidelines for Counsel for Child ratified by the New Zealand Law Society on 18 February 2000 are annexed as Appendix E.



The Department then commissioned a research project to gather data on current practice and the views and perceptions of practitioners.<sup>87</sup> This information formed the basis of a discussion paper developed by the Department and a set of draft principles developed by the Principal Family Court Judge, on which submissions were sought. Research on the perceptions of children and young people who had been represented by counsel was also commissioned from the Children's Issues Centre. That research *The Role of Counsel for the Child – Perspectives of Children, Young People and Their Lawyers* by Nicola Taylor, Megan Gollop, Anne Smith and Pauline Tapp, was published by the Department for Courts in April 1999. Although the findings of the research supported the claim that children in New Zealand are well represented in Family Court proceedings, the report identified areas of inconsistency, poor practice, and lack of quality assurance. Two focus committees were established to address the issues associated with the role and administration of counsel for the child. Those two focus committees reported in 1999 in three parts: "The Role of Counsel for the Child", and "The Administration of the Appointment of Counsel for the Child" and "The Representation of Children".

- 148 The Family Law Section of the New Zealand Law Society then developed the Best Practice Guidelines for the Counsel for the Child, which was ratified by the New Zealand Law Society on 18 February 2000. The Principal Family Court Judge then published two Practice Notes: "Counsel for the Child: Selection, Appointment and Other Matters" and "Counsel for Child Code of Practice". Both these Practice Notes were issued on 17 November 2000 and came into operation on 1 February 2001.
- 149 The Practice Notes and the Best Practice Guidelines give guidance to those who are appointed as counsel for children and also indicate the parameters of the role to other persons who may be interested.
- 150 The role of counsel for the child is essentially to provide legal representation for the child. As the legal representative, counsel for the child is required to ascertain the views and position of the child, to ascertain the legal entitlements of the child, to work out a strategy to promote the child's case, to negotiate on behalf of the child, to represent the child's interests in any mediation or other dispute resolution process, to gather evidence to support the child's case, and to act as advocate for the child if the matter goes to a hearing. The way in which counsel carries out these tasks must be modified having regard to the age and maturity of the child.
- 151 Counsel must always advise the Court of the child's specific wishes if they have been expressed. On the other hand, counsel are advised not to press the child to take a position as between his or her parents. Counsel also has an obligation to put before the Court all relevant evidence as to the position of a child. There is a long-standing debate as to the appropriate course for counsel where the express wishes of the child appear to be in conflict with the "best interests" of the child.
- 152 The older and more mature the child, the more appropriate it is for counsel to act on behalf of the child as if that child were an adult and therefore to represent the child's views and to challenge any evidence contrary to those views.
- 153 Where the child is younger and less mature, although the child's views must be made known, there is more justification for presenting a rounded picture of the

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<sup>87</sup> The Department for Courts and Ministry of Justice Research and Evaluation Reports are listed in the Bibliography.

child's world rather than merely pursuing the information that supports the child's view.

- 154 The Practice Note on the role of counsel for the child states that where a conflict arises between a child's wishes or views and information relevant to the best interests of the child, counsel should, where the child is sufficiently mature:
- attempt to resolve the conflict with the child;
  - discuss the issues and counsel's obligations with the child; and
  - advise the Court of counsel's position and, in the case (anticipated to be rare) where counsel is unable to resolve the conflict and as a matter of professional judgment can advocate only the child's wishes, invite the Court to appoint counsel in respect of best interests issues.

The commentary in *Trapski's Family Law*<sup>88</sup> states that the similar references in the Best Practice Guidelines lack precision and might be interpreted as an encouragement to counsel to put pressure on the child to change his or her views so that they equate with the counsel's views. The author goes on to say that maybe these uncertainties can be resolved by reference to the guiding principles set out in Part 3 of the Guidelines, which amount to a strong statement that counsel for the child's role is to act on instructions of any child able or willing to give instructions. On the other hand, Part 2 of the Guidelines emphasises that counsel are free to exercise their own professional judgment in interpreting their role, which rather weakens the previous statement. *Trapski's Family Law* states that the danger with uncertainty as to the proper role of the child's representative is that the child's views may be diluted or undermined by their legal representative.

- 155 Counsel for child is often seen by the Court as someone who stands apart from the dispute between the parents or other immediate parties involved and provides more rational and measured input into the issues to be decided. In the ideal of the adversarial system, each participant is robust enough in his or her role so that there is an equal testing of each position, and the judge is then put in the position of being well-informed enough to make a correct decision. In fact, given the emotional stake for the parties, the likely power imbalances between the parties, and the variable skills of the lawyers for the parties, it may be that unless counsel for the child can in some instances take a more objective "overview", the judge will not, in fact, be "information-equipped" to make a correct decision.
- 156 Counsel for child has sometimes been accused of bias because he or she has advocated on behalf of the child that one parent should definitely be preferred over the other. However, if the child's views and the evidential information available indicate that this is the appropriate outcome for the child, then it is the duty of counsel for the child to advocate that position and to be "biased" on behalf of his or her client.
- 157 Counsel for the child has a useful liaison role as the representative of the pivotal person in a guardianship dispute. Counsel for the child can speak directly with both parties, which counsel for each of the parties cannot do, and can therefore gain knowledge unfiltered by the lawyers for the parties. Counsel for the child can sometimes negotiate successfully with the other parties, but he or she cannot take a mediating role as he or she is representing one of the parties, namely the child.

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<sup>88</sup> *Trapski's Family Law* (looseleaf, Brookers, Wellington, Guardianship Act 1968) vol IV, GA30.11(2).

- 158 In guardianship matters where a report writer is involved, counsel for the child will usually be involved in setting the brief with the report writer and then liaising with and discussing the case with that person. Counsel for the child may also canvass proposals with the report writer.
- 159 In Child, Youth and Family Service matters, counsel for the child liaises with the social workers to get information and discuss outcomes. He or she speaks with caregivers, family members and any experts involved. He or she liaises with Child, Youth and Family Service solicitors.
- 160 Counsel for the child may discuss his or her brief with the Family Court co-ordinator. Any increase above the standard hourly rate of payment and the allocation of hours for the tasks required by the Court are negotiated with either the registrar or the Family Court co-ordinator depending on the practice in that particular Court.
- 161 If a complaint is made about a counsel for the child during the course of a case, then that complaint is referred to the presiding judge. Once the case is concluded, the Family Court no longer has jurisdiction to hear any complaints against counsel for the child, and any such complaint, if it is received by the Court, is referred to the New Zealand Law Society.
- 162 In the financial year 2000/2001, appointments of counsel for children cost \$11 044 449 including Goods and Services Tax (GST). This amount has steadily increased since the 1995/1996 year when it was \$5 710 808.
- 163 When counsel is appointed, the parties are advised that they can be made responsible for the cost of the lawyer. The Court does order recovery of some costs but no figures are available as to the amount recovered. The High Court has held that there is an unfettered discretion to determine whether or not a party should contribute to the costs of counsel for the child.<sup>89</sup>
- 164 There has been a concerted effort to manage and control the costs of counsel for the child. The Practice Note issued in 1 March 1996<sup>90</sup> set out the hourly rate to be paid (\$120–170 per hour) and required that the registrar should settle a brief with any person appointed as counsel for the child that covered the work to be done and the hourly rate. Since then, the Courts have refused to pay for work done by counsel for the child unless the time allocation has previously been approved. The practice continues under the Practice Note dated 17 November 2000, although the hourly rate now ranges between \$130–170. The standard rate is \$155 per hour and higher rates are only paid in certain circumstances.

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**Q8** What do you think should be the role of the child's representative?

**Q9** Could this task (or part of it) be undertaken by a non-lawyer?

**Q10** What skills and training are necessary for the person who presents the child's view to the parents and the Family Court?

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<sup>89</sup> *E v C* (1995) 3 NZLR 310; *B-R v B-R* (1995) 13 FRNZ 561; *Burger-Ringer v Burger-Ringer* [1995] NZFLR 895.

<sup>90</sup> Practice Note – Matters Affecting the Appointment and Payment of Counsel Appointed by the Family Court, issued by Principal Family Court Judge PD Mahony, March 1996.

**Q11** At what stage should the child's representative be appointed?

**Q12** Are there different skills for different stages of the process?

(See the discussions of children and case management in chapter 3.)

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## COUNSEL TO ASSIST THE COURT

- 165 Counsel to assist the court is an appointment by the Court and can be used in a variety of circumstances where the Court considers it needs assistance.
- 166 Jurisdiction to appoint counsel to assist the court is found in section 30 of the Guardianship Act 1968, section 162 of the Family Proceedings Act 1980, and section 160 of the Children, Young Persons, and Their Families Act 1989. The Court also has an inherent power to appoint counsel to assist the court where there is no specific statutory provision.
- 167 Counsel to assist the court is sometimes appointed to make submissions when there are novel legal issues involved and the Court requires further independent input other than that brought forward by the lawyers for the parties who are biased in their particular client's interests. For example, in *Re Adoption of C*,<sup>91</sup> the Family Court at Nelson appointed counsel to assist the court to provide submissions on the law relating to surrogacy in New Zealand and in other jurisdictions and also to make submissions on the particular case on the basis of this knowledge.
- 168 Where an application has been made without notice to the other party, the Court may sometimes appoint counsel to assist to make a brief inquiry, so that orders are not made unnecessarily, or to expedite matters in an urgent situation.
- On occasion, the Court has appointed counsel to assist the court where one party is not represented, and that lack of representation is creating a problem in disposing of the case fairly.
- 169 Where a step-parent is applying with his or her spouse to adopt a child, the Adoption Act 1955 does not require a report from a social worker, and the Court has made it a general practice to appoint counsel to assist the court to investigate the situation for the child before an adoption order is made.
- 170 Counsel to assist the court is also appointed occasionally in cases where there are best interest issues for a child that are different from, or broader than, the views of the child represented by counsel for the child.
- 171 In 2000/2001, \$503 695 including GST was expended on the appointment of counsel to assist in the Family Court. The amount has gradually increased since 1995 when the total was \$253 026.
- 172 The possibility of appointing counsel to assist provides a useful resource for the Family Court. However, in some instances where counsel to assist has been appointed to investigate a factual situation, that task may have been better performed by a social worker. The Family Court as it is presently constituted does not have ready access to social workers, therefore lawyers have been used in roles that are not necessarily related to their best expertise.

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<sup>91</sup> *Re Adoption of C* (1990) 7 FRNZ 231; *Re P* [1990] NZFLR 385.

- 173 Counsel to assist the court contracts with the Court to perform the tasks required by the Court. Counsel may suggest modifications to the task once the brief has been assessed. The hourly rate of counsel to assist and allocation of time is negotiated with the registrar or the Family Court co-ordinator. Counsel to assist the court liaises with the necessary parties and lawyers depending on the nature of the task.

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**Q13** Are there tasks now given to counsel to assist the court that could be better undertaken by a person such as a social worker?

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## SPECIALIST REPORT WRITERS

- 174 Specialist report writers come from a number of disciplines. Most commonly, they are psychologists, but psychiatrists and medical practitioners may also be required to prepare reports for the Court.
- 175 In this section we concentrate predominantly on psychologist's reports, as these form the bulk of the specialist reports commissioned by the Family Court. In the course of proceedings, a Family Court judge may direct that a psychologist's report be commissioned in accordance with section 29A of the Guardianship Act 1968 or section 178 of the Children, Young Persons, and Their Families Act 1989.
- 176 Referrals for a psychologist's report in accordance with section 29A of the Guardianship Act are usually made by a judge after the parties have participated in counselling and a mediation conference. Referrals in accordance with section 178 of the Children, Young Persons, and Their Families Act are usually made after a family group conference has been convened.<sup>92</sup> One advantage of this type of referral is that the psychologist's report may encourage some couples to make custodial arrangements without the need for further judicial intervention. A disadvantage of ordering such reports early on in the process is that, in protracted cases, by the time the case comes to trial the report needs updating, entailing additional expense.

### **Selection and appointment of specialist report writers**

- 177 A psychologist commissioned to prepare a section 29A or section 178 report must be a registered psychologist with a current practising certificate and be a current member of the New Zealand Psychological Society or the New Zealand College of Clinical Psychologists. The psychologist should have at least five years clinical experience and a minimum of three years experience in working with children and families. They should also have a good knowledge of family law, how the Court operates, and the resources that are available in the community. They should have a good knowledge of family dynamics, intra-family abuse, drug and alcohol dependency, and psychopathology. One of the criticisms of the system has been that there is no means of ensuring consistent and co-ordinated training of psychologist report writers.<sup>93</sup> With the Department for Courts guidelines on managing professional services, it is hoped that once a person has been added to the list of specialist report writers he or she should undergo further specialised training and supervision.

<sup>92</sup> Section 178 reports may be psychologist's, psychiatrist's or medical reports. See also *Managing Professional Services in the Family Court* (Department for Courts, Wellington, 2001) 4.

<sup>93</sup> Dr Llewelyn Richards-Ward, submission to Law Commission, 12 September 2001.

- 178 Psychologists who wish to receive referrals from the Family Court must submit an application to a panel for appointment as a specialist report writer.<sup>94</sup> The panel comprises:
- ♦ a Family Court judge;
  - ♦ a registrar of the Family Court;
  - ♦ a Family Court co-ordinator;
  - ♦ two experienced Family Court specialist report writers;
  - ♦ a counsel for the child; and
  - ♦ a representative of the tangata whenua.
- 179 Usually the judge will set a brief, and counsel for the child normally prepares this with co-operation from counsel for the other parties.<sup>95</sup> The registrar or Family Court co-ordinator is responsible for assigning work to those on the specialist report writer list.
- 180 Generally, the psychologist's report aims to convey the views of the child and how the needs of the child might best be met. In deciphering and advocating the best interests of the child, the report writer considers a range of factors such as:
- ♦ the background and developmental stage the child is at, the experiences of the child, their perceptions, hopes, fears and expressed wishes;
  - ♦ the relationships that the child has with parents, siblings and other family members, and how the child's family environment operates;
  - ♦ the presence of negative emotions in the family environment; and
  - ♦ each parent's personality, ability to cope with stress, resources and resourcefulness, adaptability, and awareness of, sensitivity to, and ability to meet the child's needs.<sup>96</sup>
- 181 In addition to the elements listed above, the Court might direct the report writer to look at a number of specific issues, particularly in cases where there is a suggestion that there has been physical or sexual abuse or parental alienation.
- 182 The report writer gains this information in a number of ways: by interviewing each party and the child and observing the child with each parent and with siblings. Other persons, such as teachers, team coaches, or agencies who play a significant role in the child's life, may also be interviewed. In addition to interview and observation, the report writer might also administer standard psychological tests to gauge the intellectual capacity, personality and psychological well-being of the child.
- 183 The report should summarise the results of these inquiries in such a way as to outline the child's expressed wishes and the weight that should be given to them, the needs of the child and the ways in which each parent can meet these needs, and any difficulties that the report writer discerns that could prevent the parents from meeting those needs.

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<sup>94</sup> See Practice Note – Guidelines on Specialist Reports for the Family Court issued by Principal Family Court Judge Mahony 26 June 1995.

<sup>95</sup> Practice Note – Specialist Reports, above n 94, para 2.1.

<sup>96</sup> Section 29A does not allow a report designed to assess the parents, except in so far as it relates to their ability to parent their child. If the report writer believes that a psychological or psychiatric assessment of the parents is necessary, the Court may make an order to this effect in accordance with s 178(2) of the Children, Young Persons, and Their Families Act 1989.



- 184 The section 29A report is prepared for the benefit of the Court rather than for the parties. This is to ensure that the report is objective. The judge may make a direction to the effect that counsel may allow their clients to read the report and discuss its contents, but the litigants are not to receive a copy of the report to take away with them. The expert report writer is the Court's witness, and the report prepared by the report writer will be submitted to the Court as evidence. Counsel for the parties (or the party, if the party is unrepresented) and counsel for the child may cross-examine the report writer about the contents of the report.
- 185 Many litigants feel that the section 29A report predetermines the course of proceedings, and that negative comments in a report will automatically affect the outcome of their proceedings adversely. The section 29A report is influential but does not determine the outcome of a case. Although the report writer might canvass some care options for the child and discuss the relative merits and demerits of any proposal, the judge is the person who ultimately decides what is in the best interests of the child.

### **Supplementary specialist reports**

- 186 Sometimes a report writer might be concerned that there is a danger that the contents of the report might in some way be misused by one of the parties or that disclosure might place a child at risk. In such cases, the report writer might file a supplementary report or a memorandum to the report when the report is given to the registrar and judge. The question then arises as to whether the judge can suppress the contents of this supplementary report and whether its existence must be disclosed to the parties. The concerns raised by this practice are twofold. On the one hand, releasing the report may endanger the child. On the other, however, withholding the report denies a party's expectation that the principles of natural justice will be applied. Children have a right to safety and parents have a right to hear the evidence upon which a decision will be made. Similarly, counsel need to have sufficient information to be able to represent their client effectively.
- 187 Two New Zealand cases have considered whether and how supplementary reports should be used.<sup>97</sup> In the *Brocas* decision, the report was made available to the Judge first, who decided to release it to the father after having made arrangements to ensure the safety of the children.
- 188 It seems that a good way of dealing with such cases would be for a judge initially to be provided with a supplementary report alerting the judge to any safety concerns. If necessary the judge could make interim arrangements to protect the child prior to the release of the report. The disclosures could then be included in the general report that would be released to the parties. This would ensure that the parents' right to natural justice is not impinged upon any more than is absolutely necessary. It would allow a party the chance to counter the accusations, whilst ensuring the child's safety.

### **Self-represented litigants**

- 189 Some judges might be of the view that it is inappropriate or potentially dangerous that the self-represented litigant receives a copy of the report. Section 29A(3)(a) of the Guardianship Act states that a self-represented litigant should receive a copy of the report:

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<sup>97</sup> *M v B* [1993] NZFLR 487 (CA); *Hayes v Brocas* (7 July 1997) unreported, Family Court North Shore, FP 491/94.

- (3) A copy of the report shall be given by the registrar of the Court–
    - (a) To the barrister or solicitor appearing for each party to the proceedings or, if any party is not represented by a barrister or solicitor, to that party;
- 190 In the past, some judges have attempted to avoid giving a report to a self-represented litigant by saying that section 29A must be read subject to section 23 of the Guardianship Act, which states that:
- In any proceedings where any matter relating to the custody or guardianship of or access to a child, . . . the Court shall regard the welfare of the child as the first and paramount consideration.
- 191 It is hard to see how this approach can be justified, given the explicit nature of the current legislation. The Court has moved away from such an interpretation, but it might have added significantly to a perception that the Court is hiding information from a litigant and that the system is in some way biased.

## Second opinions

- 192 Sometimes a party to the proceedings might strongly object to the contents of the report and may seek a second opinion. This does not automatically mean that a specialist opinion will be sought. The Court employs specialist report writers and the Court determines who is qualified to make such assessments. However, where it appears that it would be desirable, the Court may order a second opinion of a psychologist's report. In other cases, one of the parties may obtain a critique of the court-appointed psychologist's report. Permission has to be obtained from the Court to have the first report released for such a critique.
- 193 Most professionals agree that, where possible, the number of times that a child is interviewed should be kept to a minimum. For this reason, any report writer hired to produce a second opinion, will generally not have access to the child or parents, but will review the information and data collected by the first report writer. Upon request, the initial report writer should turn over to the second expert any primary material, such as drawings by the child, the results of psychological testing, and any video or audiotapes of the child.

## Increasing costs

- 194 Depending on the conduct in court<sup>98</sup> and financial means of the parties, they may be required to contribute towards the cost of specialist reports.<sup>99</sup> However, a sizeable proportion of the cost for specialist reports is picked up by the State. The cost of section 29A reports has increased substantially over the past five years. In the 1995/1996 financial year, the Department for Courts spent a total of \$2 089 958 on section 29A reports. By the 2000/2001 financial year, that figure had risen to \$3 574 719, an increase of \$1 026 438. However, the costs of reports obtained under section 178 of the Children, Young Persons, and Their Families Act 1989 have fluctuated dramatically. Although the costs for psychological reports

<sup>98</sup> Where a party has unnecessarily prolonged proceedings, or been unreasonable or unco-operative, the judge may order that the party contribute towards the cost of the specialist report.

<sup>99</sup> *Burger-Ringer v Burger-Ringer* [1995] NZFLR 895.



under section 178 have steadily increased, the costs of medical and psychiatric reports have fluctuated erratically.<sup>100</sup> No explanation has been given for this escalation in some and fluctuation in others of the number and cost of specialist reports.

### **Interface with other players in the Family Court system**

- 195 The specialist report writer has a number of points of contact with other players in the Family Court system. Their first point of contact may well start with a referral from a Family Court co-ordinator. The next and primary point of contact is a meeting with the child, the child's parents and significant others in the child's life.
- 196 The specialist report writer will also have significant contact with the Family Court co-ordinator and counsel for the child. Counsel for the child will usually liaise with the Family Court co-ordinator prior to a brief being assigned to a report writer. Once assigned to the report writer, the counsel for the child will explain the section 29A brief to the psychologist and advise them as to any contact with the child that might have already taken place. The counsel for the child will check with the report writer to ensure that all relevant persons have been spoken to. Where counsel for child has not yet met with the child, he or she might wish to seek the report writer's advice as to whether this would be desirable in the circumstances of the case. If the report writer requires more information about the parties or the child from the Court, he or she can seek this information through the Family Court co-ordinator.<sup>101</sup>
- 197 Once the report has been produced, counsel for child can lead the report as evidence for the court. If counsel for child objects to the report, he or she will advise the Court accordingly and will cross-examine the report writer about the report.
- 198 The report writer ultimately produces a report that will help guide the Family Court judge's decision-making.

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**Q14** At what stage of proceedings should a section 29A report be obtained?

(See chapter 3 for the usual sequence of events on Case Management.)

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<sup>100</sup> The cost of s 178 medical reports was \$1074 in 1995/1996; \$3409 in 1997/1998; \$5059 in 1999/2000 and \$181 in 2000/2001. Section 178 psychiatric reports totalled \$45 324 in 1995/1996; \$22 836 in 1996/1997; \$71 945 in 1997/1998; \$37 909 in 1998/1999; \$62 354 in 1999/2000 and \$18 901 in 2000/2001. The fluctuations may be related in part to the obtaining of psychologist's reports in care and protection cases by social workers through their Departmental budget.

<sup>101</sup> Practice Note – Specialist Reports, above n 94, para 3.5.

## PROGRAMME PROVISION

### **Programmes for respondents**

- 199 The Domestic Violence Act 1995 implemented a requirement that persons<sup>102</sup> against whom a protection order has been made must attend a stopping violence programme.<sup>103</sup> In addition, where the Court makes an order against an associated respondent, the Court may direct the associated respondent to attend a programme.
- 200 The main aim of programmes for respondents is to prevent further domestic violence. To this end, the programmes aim to increase the respondents' understanding of the context and effect of domestic violence, in particular the effect it has on victims and on children exposed to the violence, and the intergenerational effect of domestic violence. The programme also educates participants about the Domestic Violence Act and the consequences that will follow from a breach of a protection order. The course aims to encourage respondents to develop non-violent conflict resolution skills.<sup>104</sup>
- 201 The direction from the Court should specify which programme the respondent (and/or associated respondent) should attend, when the first session is, the total duration of the programme period, and the number of sessions each month the respondent should attend.<sup>105</sup>
- 202 Once a referral has been made, the registrar will notify the programme provider of the direction<sup>106</sup> and the programme provider will contact the respondent to arrange a time and place to meet initially.<sup>107</sup>
- 203 The registrar must provide certain information to the programme provider. This includes:<sup>108</sup>
- information about the violence used by the respondent and/or associated respondent;
  - when the violence first began;
  - the nature of the domestic violence that formed the basis for the protection order being granted;
  - the frequency of the domestic violence;
  - whether domestic violence was used against a child of the applicant's family, and if so, the nature of that domestic violence;
  - the length of the relationship between the parties;
  - whether the parties to the application have previously been parties under the Domestic Violence Act or the now repealed Domestic Protection Act 1982;
  - whether allegations of substance abuse have been made in the course of the proceedings;

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<sup>102</sup> The respondent and/or any associated respondent.

<sup>103</sup> Domestic Violence Act 1995, s 32.

<sup>104</sup> Domestic Violence (Programmes) Regulations 1996, reg 32.

<sup>105</sup> Domestic Violence Act 1995, s 33.

<sup>106</sup> Domestic Violence Act 1995, s 34.

<sup>107</sup> Domestic Violence Act 1995, s 35.

<sup>108</sup> Domestic Violence (Programmes) Regulations 1996, reg 11.

- whether the protection order has been served; and
- the contact details for any programme provider who may be providing a programme for any other associated respondent or protected person named in the proceedings.

- 204 Where a without-notice application has been granted and the judge has made a direction for the respondent to attend a programme, the order must be served upon the respondent and five clear days must elapse before the direction becomes confirmed. During this time, the respondent may notify the Court that he or she objects to the direction, and the Court will consider and either confirm or dismiss the objection.<sup>109</sup>
- 205 Once an order has been made directing a respondent to attend a programme, the order is taken seriously and non-compliance with the order is punishable by a term of imprisonment.
- 206 Where there is good reason, however, a judge may vary the direction.<sup>110</sup> The programme provider may excuse the respondent from attending the programme or may request that the programme be altered so as to more appropriately meet the needs of the respondent.<sup>111</sup>

### **Programmes for protected persons**

- 207 The Domestic Violence Act also envisages that programmes should be made available for adults and children who have been the victims of domestic violence.<sup>112</sup> Programmes for adult protected persons aim to empower them to deal with the effects of domestic violence by informing them, supporting them, and building their self-esteem. Programmes also aim to increase the understanding of protected persons about the nature of domestic violence and its effects, especially in the context of the intergenerational cycle of violence. The programme should help the protected person to find ways to maximise their own safety. It should inform the protected person about the types of programmes that the respondent might be directed to attend and what the goals of those programmes are.
- 208 Where an applicant, a child of the applicant's family, or another specified person, requests the registrar to authorise the provision of a programme, the registrar must arrange a referral without delay. Lawyers should instruct applicants of their right to receive the provision of such programmes.<sup>113</sup>
- 209 Programmes for children who have been subjected to, or exposed to, violence aim to help children develop their self-esteem and confidence, to help give them a realistic view about domestic violence, and to encourage them to express how they feel about the violence that they have experienced in their lives. The programme should teach the child how to keep himself or herself safe in the future and should teach the child conflict resolution and anger-anxiety management skills.

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<sup>109</sup> Domestic Violence Act 1995, s 36.

<sup>110</sup> Domestic Violence Act 1995, s 37.

<sup>111</sup> Domestic Violence Act 1995, s 41.

<sup>112</sup> Domestic Violence Act 1995, s 29.

<sup>113</sup> Domestic Violence Act 1995, s 29(6)(a)–(b).

- 210 If the applicant is not legally represented, the judge or registrar must inform the victim of the right to make a request for the provision of a programme.<sup>114</sup>
- 211 Applicants may decide some time after a protection order has been granted that they would like to attend a programme. In such cases, they should make a request within three years of the order being made. The registrar of the Court retains the discretion to allow a programme to be provided after three years have elapsed since the making of the initial protection order.<sup>115</sup>
- 212 Where the provision of a programme is made but there is no available or appropriate group programme, the registrar must authorise the provision of an individual programme for the protected person.<sup>116</sup> Where a request is made in respect of a child, the registrar may order the provision of a group or individual programme.<sup>117</sup>
- 213 The number of sessions that will be provided can vary, but the programme may not be less than nine hours in duration and should not exceed 12 hours in total.
- 214 Once the programme has been completed, or when the protected person stops attending the programme, the programme provider supplies a report to the registrar of the Court stating that the protected person has completed (or dropped out of) the programme.

### **Programme providers**

- 215 There are a number of individuals and organisations in the community who provide programmes in accordance with the Domestic Violence (Programmes) Regulations 1996. All such individuals<sup>118</sup> or organisations must apply to a panel to be approved as a programme provider in respect of a particular client base.<sup>119</sup>
- 216 Where a person seeks to be approved as an individual programme provider, they must demonstrate their knowledge and skills in a number of areas, such as:
- knowledge and understanding of the nature and effects of domestic violence and the dynamics of violent relationships;
  - knowledge of, and expertise in, working with the client group that the provider wishes to provide services to;
  - group facilitation skills if the applicant wishes to run group sessions;
  - good knowledge of tikanga Māori,<sup>120</sup> where the participants are likely to be primarily Māori; and
  - good knowledge and understanding of the values and beliefs of any particular cultural group that the programme provider wishes to provide services for.

<sup>114</sup> Domestic Violence Act 1995, s 29(4)(a).

<sup>115</sup> Domestic Violence Act 1995, s 29(4)(d).

<sup>116</sup> Domestic Violence (Programmes) Regulations 1996, reg 4.

<sup>117</sup> Domestic Violence (Programmes) Regulations 1996, reg 5.

<sup>118</sup> Domestic Violence (Programmes) Regulations 1996, regs 14–15.

<sup>119</sup> Domestic Violence (Programmes) Regulations 1996, reg 12.

<sup>120</sup> In particular, reg 27 of the Domestic Violence (Programmes) Regulations 1996 requires that the programme take into account the values and concepts of: *mana wāhine* (the prestige attached to women); *mana tāne* (the prestige attached to men); *tiaki tamariki* (the importance of safeguarding and rearing children); *whanaungatanga* (family relationships and their importance); *taha wairua* (the spiritual dimension of a healthy person); *taha hinengaro* (the psychological dimension of a healthy person); and *taha tinana* (the physical dimension of a healthy person).

- 217 If a person who is applying to be an individual programme provider has been the victim of domestic violence at any stage in the three years preceding the application, the applicant must show that he or she has dealt with the effect that the domestic violence has had on his or her life.
- 218 A person who has had a protection order made against him or her, or who has been convicted of a domestic violence offence in the three years prior to bringing the application for approval, cannot be approved as an individual programme provider. If a protection order has been made against the applicant, or if the applicant has been convicted of a domestic violence offence at any time outside of that three-year period, the applicant cannot be approved as a provider unless he or she can satisfy the approval panel that he or she has accepted full responsibility for the domestic violence.<sup>121</sup>
- 219 Applicants must also be a current member of an appropriate professional body that has a code of ethics, an effective complaints procedure, and that provides continuing education and peer supervision for its members.<sup>122</sup>
- 220 If the applicant is approved as a programme provider, he or she must have in place systems that ensure there is ongoing monitoring and evaluation of the efficacy of the programme and an established communication channel with other programme providers. He or she must also be able to ensure, in so far as it is possible, the safety of the programme participants.<sup>123</sup>

### *Problems*

- 221 Programme providers have raised a number of concerns about Domestic Violence Act programmes. The following represent some of the concerns articulated in the Department for Courts and Ministry of Justice process evaluation of the Domestic Violence Act and by persons with whom the Commission has had contact.
- 222 Although programme providers are taking non-attendance by respondents at programmes seriously and following the correct procedures by notifying the Court of this fact, some who responded to the process evaluation survey felt that there was not enough follow-through in terms of prosecuting respondents for non-attendance. The Family Court co-ordinators interviewed in almost a third of the courts surveyed stated that even if a notification is passed onto them, it seldom leads to further action being taken.<sup>124</sup>
- 223 The Department for Courts has investigated this concern. Court staff have been instructed that they have to pursue prosecution of persons who do not attend programmes and have monitored the prosecutions undertaken up to 1 September 2000. Information is now being collected on a national database about breaches of protection orders for non-attendance at programmes.<sup>125</sup>

<sup>121</sup> Domestic Violence (Programmes) Regulations 1996, reg 15(3).

<sup>122</sup> Domestic Violence (Programmes) Regulations 1996, reg 16.

<sup>123</sup> Domestic Violence (Programmes) Regulations 1996, reg 16.

<sup>124</sup> H Barwick, A Gray, and R Macky *Domestic Violence Act 1995: Process Evaluation* (Department for Courts and Ministry of Justice, Wellington, 2000) 96.

<sup>125</sup> Department for Courts *Courts Circular FAM 00/05*, 24 August 2000.

- 224 There has been poor uptake for protected persons programmes. Such programmes are particularly important, in that if a victim of domestic violence fails to deal with issues relating to the impact of violence upon his or her life (and in many cases in the lives of the children also), this can have a ongoing effect in future relationships.
- 225 A protected person may be told about the availability of the programmes when they first contact the Court for a protection order. However, when they are in a state of crisis, it may be that they cannot appreciate the value of the programme for themselves and their children. Lawyers and Family Court co-ordinators both play a role in encouraging protected persons to participate in such programmes. Where the Family Court co-ordinator takes it upon himself or herself to contact the protected person to remind them about the availability of the programme, uptake is higher.
- 226 It is vital that good initial information is provided to applicants about the availability and importance of such programmes, and that there is follow-up to ensure that protected persons are reminded and encouraged to participate in such programmes. In response to the concerns raised in the Department for Courts and Ministry of Justice review of such programmes, the Department for Courts has issued a court staff circular instructing staff to ensure that protected persons are informed and reminded of their right to participate in a protected persons programme.<sup>126</sup>
- 227 Concern has been expressed that there are insufficient programmes specifically designed for Māori<sup>127</sup> and Pacific Islands women and children.<sup>128</sup>
- 228 One programme provider for protected persons commented that a number of women who have suffered domestic violence approach her and wish to take part in the programme because they have heard from friends and family how beneficial it is. In the course of the programme they often come to decide to address the effect of domestic violence in their lives, and they approach the Family Court for a protection order. The programme provider does not get funded for rendering programme services in such cases, since the Court did not initially refer the client.

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**Q15** Should protected persons programmes be made available on request to the Family Court, without the necessity for a court order?

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## CHILD, YOUTH AND FAMILY SERVICES

- 229 There has long been a somewhat fraught relationship between the Family Court and the Department of Child, Youth and Family Services. This is due in part to the different functions and focus of each organisation and in part to the protection of boundaries for the allocation of funding.

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<sup>126</sup> Department for Courts *Courts Circular FAM 01/02*, 8 March 2001.

<sup>127</sup> John and Puti Snowden from Te Whanau o Te Maungarongo, submission to Law Commission, 28 September 2001.

<sup>128</sup> Barwick, Gray and Macky, above n 124, 102.

230 Child, Youth and Family Services is a government department with statutory functions as set out in the Children, Young Persons, and Their Families Act 1989. Section 7 sets out the duties of the Chief Executive of the Child, Youth and Family Service as ensuring that the objects of the Act are attained and that these objects are attained in a manner consistent with the principles set out in sections 5 and 6 of the Act.

231 Section 4 sets out the objects as follows:

4. The object of this Act is to promote the well being of children, young persons, and their families and family groups by —
  - (a) Establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the well-being of children, young persons, and their families and family groups and that are —
    - (i) Appropriate having regard to the needs, values and beliefs of particular cultural and ethnic groups; and
    - (ii) Accessible to and understood by children and young persons and their families and family groups; and
    - (iii) Provided by persons and organisations sensitive of the cultural perspectives and aspirations of different racial groups in the community:
  - (b) Assisting parents, families, whanau, hapu, iwi, and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, ill-treatment, abuse, neglect, or deprivation:
  - (c) Assisting children and young persons and their parents, family, whanau, hapu, iwi, and family group where the relationship between a child or young person and his or her parents, family, whanau, hapu, iwi, or family group is disrupted:
  - (d) Assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:
  - (e) Providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation:
  - (f) Ensuring that where children or young persons commit offences, —
    - (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
    - (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:
  - (g) Encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

232 Section 5 sets out the principles to be applied in exercise of the powers conferred by the Act as follows:

5. Subject to section 6 of this Act, any Court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:
  - (a) The principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:
  - (b) The principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:



- (c) The principle that consideration must always be given to how a decision affecting a child or young person will affect —
    - (i) The welfare of that child or young person; and
    - (ii) The stability of that child's or young person's family, whanau, hapu, iwi, and family group:
  - (d) The principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
  - (e) The principle that endeavours should be made to obtain the support of —
    - (i) The parents or guardians or other persons having the care of a child or young person; and
    - (ii) The child or young person himself or herself —
 to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
  - (f) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.
- 233 Section 6 provides that the welfare and interests of the child and young person shall be the first and paramount consideration having regard to the principles set out in 5 and 13 of the Act (but exempting the Youth Justice procedures contained in Part 4 of the Act).
- 234 The Department of Child, Youth and Family is charged with providing social work services for families either through its own employees or by contractual arrangements with other agencies. Emphasis is placed on the welfare of the child and the child's place in, and relationships with, his or her family.
- 235 Where social work assistance and intervention is insufficient to protect a child, then the Department is obliged to initiate Court intervention so that protection for the child can be Court ordered and enforced.
- 236 The focus of the Family Court is on dispute resolution. Generally, in respect of matters brought to the Court by the Child, Youth and Family Service, the assumption appears to be that other avenues of social work intervention have been pursued and that the Court is being resorted to for emergency protection or as a last resort intervention. The Court is concerned to complete the judicial tasks within the timeframes imposed by the statute as well as achieve a timely resolution for the best interests of the child.
- 237 The first contact between the Family Court and the Department is for urgent applications for warrants to uplift children from dangerous situations and for the making of interim orders.
- 238 Where an application is filed for a declaration that a child is in need of care and protection, the Department is the applicant and, in effect, the caregivers, parents or guardians are the respondents. It is incumbent on the Department to produce the requisite evidence. The Department employs its own solicitors to act on its behalf in relation to the applications, and part of the evidence is usually from the Departmental social workers who are the case workers in the matter.
- 239 There are often delays in the Department filing its evidence prior to the hearing. These delays appear mainly to relate to staff shortages and changes in social workers, although some delays are obviously caused by difficulties with members of the families involved.

- 240 The statute prescribes certain time limits. Under section 200, where an application is made for a declaration, the Court shall, so far as it is practicable, give priority to the proceedings in order to ensure that, unless there are special reasons why a longer period is required, the hearing of the application commences not later than 60 days after the application is filed in the Court. The 60-day time limit is often exceeded.
- 241 Once an order for a declaration has been obtained and the Court proposes to make a services order, a support order, or a custody order, the Court must be provided with a plan prepared by a social worker.
- 242 Under section 131, any adjournment for the purposes of obtaining such a plan shall not exceed 28 days unless the Court in any special case otherwise determines. That plan is required to be filed in Court at least two working days before the date set for the hearing to resume. There are often delays in preparing the plan that result in adjournments and a failure to comply with the 28-day limit.
- 243 Once a plan is finalised and approved by the Court, the matter must be reviewed every six months when the child is under seven years and annually for older children and young persons.<sup>129</sup> In accordance with the Caseflow Management Practice Note, the Court should enter the matter in a registrar's list for the review date, but often the review papers are not filed by the Department on time and the matter is called in several registrar's or judge's lists before the review can be completed.
- 244 There are areas of "competition" in relation to budget resources. For example, the Department can arrange a report by a psychologist as part of its investigation and to inform its decision about proposed disposition. Such a report is funded out of the Departmental budget. If, however, a psychologist's report is ordered by the Court under section 178 then it is paid for from the Court budget. Mediation conferences in Children, Young Persons, and Their Family matters are rarely arranged through the Court, although procedures for mediation conferences are set out in sections 170–177 of the Children, Young Persons, and Their Families Act 1989. The Court relies on the family group conference as the only means of alternative dispute resolution that is funded from departmental resources. Although, of course, a family group conference is required before an application for a declaration can proceed and its scope is much wider than the mediation process available to the Court.
- 245 On occasion, other matters that come before the Family Court through different channels (such as applications under the Guardianship Act) bring to the notice of the Family Court matters that it considers need intervention in terms of the Children, Young Persons, and Their Families Act.
- 246 There may be allegations of sexual abuse that arise out of a custody or access application. The Court may consider that the level of conflict between parents is such that emotional abuse issues are raised in respect of a child in the family. On reviewing an application under the Domestic Violence Act 1995, the Court may consider that a child is at risk of physical harm.
- 247 Section 15 of the Domestic Violence Act provides that any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected, or deprived may report the matter to a social worker or a member of the police.

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<sup>129</sup> Children, Young Persons, and Their Families Act 1989, s 134.

- 248 Section 19 of the Children, Young Persons, and Their Families Act provides that in any proceedings where the Court believes that any child or young person is in need of care or protection, the Court may refer the matter to a care and protection co-ordinator. Under section 19, any such referral must be accompanied by a statement of the reasons for believing that the child or young person is in need of care and protection. The statement must include: particulars sufficient to identify any person, body or organisation that might be contacted to substantiate that belief; a statement whether or not the referral is being made with the consent or knowledge of parents, guardians, or family members; and a recommendation as to the course of action the care and protection co-ordinator might take. The care and protection co-ordinator then exercises his or her discretion as to whether to convene a family group conference, report the matter to an enforcement agency, or take other action as is appropriate. Where the reference is from a Family Court, the care and protection co-ordinator must furnish the Court with a written report within 28 days.
- 249 The Court has experienced difficulties in getting sufficient, appropriate and timely responses from the Department to referrals from the Court under sections 15 and 19.
- 250 From time to time, the Family Court also wishes to access information about a family, held by the Department, or to employ the services of a Departmental social worker to carry out an assessment under section 29 of the Guardianship Act 1968. The Court has had difficulty in obtaining such assistance in a timely fashion. It was originally envisaged that the kind of assessment required to assist in determining the placement of a child under the Guardianship Act 1968 would often be most appropriately provided by a report from a social worker. In fact, the difficulties in obtaining reports from Child, Youth and Family Service social workers has resulted in a situation in most parts of the country where reports from social workers are rarely requested and instead the expertise of a child psychologist has been called upon under section 29A of the Guardianship Act 1968.
- 251 A joint protocol dated 1 July 2000 (reproduced as Appendix A) has been negotiated between the Department for Courts and the Department for Child, Youth and Family in an effort to overcome these problems.
- 252 This protocol sets out a process of referral, and a course of action to be followed for referrals by the Court to the Department (section 15), to the care and protection co-ordinator (section 19), and for a social worker report (section 29). It also provides a procedure for responding to requests for information. The procedure for the request and the expected time frame for a response are set out in the protocol. Where a referral is made under section 15, the Child, Youth and Family Service is required to prioritise the case as “critical to be responded to on the same day” or “low urgency within 28 days” or “no further action”. A brief written report is to be provided to the Court as soon as is practicable. Where a referral is made under section 19, the care and protection co-ordinator is to indicate the intended action to the Court within seven days and report to the Court within 28 days.
- 253 In relation to section 29 of the Guardianship Act, the protocol identifies two different types of section 29 reports. The first type of report is a limited report that merely requests information already within the knowledge of the Department. A general report under section 29 is a fuller assessment and must address any specific issues identified by the Court. A general report would be expected to take six weeks to prepare, but it is expected that a limited report would be able to be provided within a much shorter time frame. Where there is a request merely for

information under section 29, then such a specific and limited report could be provided in one working day.

- 254 This protocol has now been in force for over a year. Reports as to its efficacy vary from around New Zealand. In some areas, Courts have established more efficient lines of communication via the Family Court co-ordinator and an appropriate liaison person in the Department, and requests are processed within the time allocated. In other areas of New Zealand, the compliance with the protocol has not been so effective.
- 255 The protocol was reviewed by the two Departments after the first 12 months. Some possible improvements to the operation of the protocol have been suggested in the review report. The report's key findings are that:
- There are delays by Child, Youth and Family in allocating Court work which is impacting on the work of the Family Court.
  - The intent and operational requirements of the Protocol still need to be clarified.
  - Consultation and collaboration between the Judiciary, Courts and Child, Youth and Family from local to National Office levels needs to be encouraged.
  - The Protocol has worked best when there is meaningful liaison between local courts and local branches of Child, Youth and Family.
- 256 There are still a number of areas where the Family Court could benefit from social work assistance but which are not covered explicitly by legislation and therefore not subject to the protocol: for example, urgent assessment reports where there are without-notice applications or applications on notice with time abridged for interim orders; or applications to adopt by a step-parent. The Court uses the appointment of counsel to assist the court in these two situations. They would be better covered by a social worker. A Departmental social worker has access to a broader information base than a private social worker, which could be of great assistance in an emergency or a potentially violent situation.
- 257 In theory, and if funding were made available, the Family Court could contract with social workers in private practice to perform some of these functions. The setting up of a registration system for social workers may assist in the evolution and implementation of such a practice in the future.<sup>130</sup> The question remains as to whether or not it would be preferable for the Family Court to have access to social workers within the Department of Child, Youth and Family Services, especially having regard to the powers of Departmental social workers to obtain information under sections 59–66 of the Children, Young Persons, and Their Families Act, where the social worker believes on reasonable grounds that a child is in need of care and protection. If such use of social workers by the Family Court were to become a valuable complementary resource, there would need to be a clear protocol between the Department for Courts and the Department for Child, Youth and Family Services, and there would need to be funding specifically allocated for the purpose in the Child, Youth and Family Services budget.

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**Q16** Would it be of assistance for the Family Court to contract with social workers for services in the same way as the Court contracts with counsellors?

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<sup>130</sup> Social Workers Registration Bill 2001, no 155-1.

## LEGAL SERVICES AGENCY

- 258 Legal aid is a form of financial assistance for people who have insufficient means to pay for their own representation when becoming, or wishing to become, a party to court proceedings.
- 259 Legal aid for civil dispute matters was first introduced in New Zealand in 1969. The legal aid format changed with the Legal Services Act 1991, which created the Legal Services Board. Further changes occurred earlier in 2001 with the introduction of the Legal Services Act 2000, which disbanded the Legal Services Board and created the Legal Services Agency (the Agency).<sup>131</sup>

### New agency

- 260 The Agency, as with the earlier Board, is a Crown entity. Previously, responsibility for deciding on applications for civil and family legal aid and for payment approval for legal aid services lay with regionally based committees of lawyers (District Sub-Committees).
- 261 The new structure under the Agency brings the responsibility for this entire decision-making process for civil legal aid into the Agency. Trained staff are in place in nine offices throughout the country to manage this process. Further, for complex applications, the Agency has put in place a network of over 130 regionally based practitioners to provide advice. Sixty-eight of these practitioners can provide family law advice.

### Background

- 262 The Legal Services Act 2000 provides for a grant of legal aid to be made to an individual applicant to cover the costs of being involved in proceedings in the Family Court where the Agency assesses that:
- the applicant is financially eligible; and
  - the case has sufficient prospects of success; and
  - the applicant has reasonable grounds for being involved in the proceedings.<sup>132</sup>
- 263 Legal aid:
- is not generally available for proceedings relating to the status of a marriage or for the dissolution of a marriage;<sup>133</sup>
  - it is available for all other proceedings in the Family Court where the applicant is a New Zealand citizen or a lawful resident; and
  - it may also be available to persons, even if they are in New Zealand unlawfully or on a temporary permit, if there is no reason why the case should be heard in another country. For example, it could be available to a non-resident to apply for a domestic protection order under the Domestic Violence Act 1995.
- 264 As a condition of receipt of legal aid, the legally aided person may be required in some situations to repay to the Agency some or all of the costs of their legal aid, and they may be asked to authorise a charge against specified property to secure their contribution.

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<sup>131</sup> The Agency took over the granting of civil and family legal aid on 1 February 2001 and criminal aid grants on 1 November 2001.

<sup>132</sup> Legal Services Act 2000, ss 9(2)(a), 9(3) and 9(4)(d)(i).

<sup>133</sup> Proceedings under Part 4 of the Family Proceedings Act 1980.

- 265 Under the Legal Services Act 2000, legal aid is only available for advice and representation in respect of court proceedings. Legal aid can only be granted if proceedings have been filed or if there is a clear intention to file proceedings. This is interpreted to cover advice, mediation and negotiation of a dispute where there is a clear intention to file proceedings.

### Eligibility for Legal Aid

- 266 An applicant may currently be eligible for Legal Aid where (under the specific calculation prescribed in the Regulations):
- their disposable income is \$2000 per year or less; and
  - their disposable capital (discounting their home, furniture and tools of trade) is \$2000 or less.<sup>134</sup>
- 267 Currently, an applicant with at least one dependant is entitled to a personal allowance of \$10361, with either a further \$1872 if they have one child and a partner or \$4619 if they have one child and no partner, plus \$832 for each extra dependent child. If the applicant has a partner whose resources are included in the income and capital assessed, then a further allowance of \$4827 is allowed.<sup>135</sup> For example, a separated parent with two children and no new partner is entitled to an income of up to \$15812 before he or she is required to make a contribution to his or her legal aid costs, and an income of \$17812 before he or she will have no eligibility at all, that is:

personal allowance	\$10361
first child (no partner)	4619
second child	832
	<u>\$15812</u>

- 268 If there are special circumstances, legal aid can still be granted to a person who has an income above the eligibility criteria, for example, they have high medical costs, all their income is from a benefit, or they have a high level of debt.
- 269 All applicants, unless there are extraordinary circumstances, are required to pay a \$50 initial contribution. However, there is an exemption in respect of applications under the Domestic Violence Act 1995, unless such an application is made in conjunction with an application under other legislation.
- 270 Anecdotal evidence suggests that there are many people, not eligible for legal aid, who struggle to find the legal costs of carrying a matter through the Family Court. It has to be acknowledged, however, that the New Zealand legal aid system is more generous than that in many comparable jurisdictions, such as Australia.

### Administration

- 271 Aid is granted in “steps” that are designed to match the progress of a standard case from the initial taking of instructions to a final resolution. Many of those steps allocate a standard number of hours for the work involved, but if a greater amount of time is requested the application will be referred to a specialist advisor. The lawyer must come back to the Agency between each step to describe the progress (to justify their invoice) and to provide an estimate of work to be completed in the next step.

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<sup>134</sup> Legal Services Regulations 2000, reg 4.

<sup>135</sup> Legal Services Regulations 2000, reg 5.

### **Rates for payment**

- 272 Lawyers providing legal aid advice and representation related to Family Court matters are paid:
- \$110 per hour if they have up to four years' litigation experience;
  - \$125 per hour if they have at least four and up to nine years' litigation experience; and
  - \$140 per hour if they have at least nine years' litigation experience.
- 273 The Agency began a project in August 2001 to look at legal aid criteria for family lawyers to ensure a certain standard in their performance and experience. This project is expected to be completed by May 2002.
- 274 It has been alleged by some that the availability of legal aid is a factor in prolonging litigation and encouraging repeat applications. The availability and amount of legal aid is limited and restricted for each individual applicant. The system operates effectively as a loan, and where an applicant has assets such as a home, the legal aid grant is repayable. Therefore, it is only in those cases where an applicant has no assets at all, that legal aid may provide any incentive to litigate.
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### 3

## Problems and suggestions

### INTRODUCTION

- 275 **W**E HAVE DISCUSSED in the previous chapter the role of various participants in the Family Court process. We provide further background information about the Family Court in Backgrounds 1, 2 and 3. These chapters cover the history of the Family Court, the social context in which it operates and a detailed description of how each type of application is progressed through the Family Court.
- 276 In this chapter we identify some problems and offer some suggestions as to how those problems can be addressed. There may be further problems that we have not highlighted. We would be interested in hearing about any we have missed. In addition, we want to signal we are open to alternatives to the suggestions offered here to address these problems, and we welcome other suggestions and refinements to our proposals.

### LACK OF INFORMATION

- 277 Throughout the preparation for this paper, we have encountered problems in relation to accessing information about how the Family Court system is operating. Set out below is the background to the collection of Family Court information and recent developments in information collection. We then list some examples of the type of information that one might need in order to make an assessment of how the system is currently operating and where the pressure points are.
- 278 Between 1981 and 1990, statistics were collected on applications and orders made in the Family Court.<sup>136</sup> These statistics showed a range of detail, from type of application and order, age of parties by type of order, and number of children by type of order, to counselling and the means by which the orders were finally resolved. It was the only source of statistics of this type. This data collection was discontinued after 1990.
- 279 Between 1991 and 1995, Family Court statistics were not collected at a national level. This makes it difficult to track trends since the inception of the Family Court.
- 280 After the Department for Courts came into existence in 1995, a number of interim systems were developed to address some of the information gaps in the various court registries. The domestic violence database and the Family Court database were two of the interim systems set up in the Family Court for the collection and

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<sup>136</sup> The statistics were derived by the then Department of Statistics from returns supplied by the Family Courts. The results were published in *Justice Statistics* which until 1990 was an annual publication of the Department of Statistics.

collation of data. The primary functions of the Family Court database were to provide workload indicators and financial information for the courts.

- 281 With the domestic violence database, domestic violence statistics have been collected since the commencement of the Domestic Violence Act 1995.

### **Improved collection and collation of data**

- 282 Since 1998, the Department for Courts, using the Family Court database, has collected statistics on the number and types of applications. The Department for Courts has provided all statistics in this paper relating to Family Court applications between the 1998/1999 and the 2000/2001 financial years. However, the information is only from the 21 courts that have been using the Family Court database and represents 80 per cent of the New Zealand Family Court's workload. Therefore, we can only guess what the other 20 per cent of the Court's workload is. Further, the statistics collected from the applications can be deceptive as some applications may be cross-applications.
- 283 The Family Court database was not designed to capture trends, demographic information or orders. However, it is acknowledged that this system was only interim until the introduction of a new computer system.
- 284 As part of the Modernisation Programme, the Department for Courts plans to implement a new case management computer system (CMS) from July 2002 for the family and civil jurisdictions. This system will enable the collection of data, such as detail about the users of the Family Court, what applications and orders are being made, and the length of time between an application being filed and an order made.
- 285 It is expected that the CMS will address some of the information concerns highlighted in this paper. However, such information can only be recorded if it is made available by the applicant.
- 286 Aside from domestic violence orders, the Department for Courts is currently unable to provide any information about the number of orders made. This prevents us from tracking a particular form of action through from the interim orders stage to the final order. Therefore, if we want to find out how many orders lapse between the interim and final stage, because an application for a final order is not brought, we are unable to do so. Under the present system, short of conducting a manual file review, this information cannot be obtained.
- 287 We were unable to obtain information about how often fixtures are delayed or cancelled, a factor relevant to the efficiency of the Court system.
- 288 We were unable to obtain such information as the gender, age and other characteristics of Family Court applicants. Although the information sheets filed with each application contain information relating to the sex and ethnic origin of the applicants, this information is not collated in any useful way.
- 289 Further, the information sheets are only required for applications under the Family Proceedings Act 1980 and the Guardianship Act 1968. So, technically, information sheets do not need to be filled in for other applications. Even where information sheets are filled in, they may not be adequately completed.
- 290 Because we cannot say with certainty who is using the Family Court, it makes it difficult to suggest how to alter it in such a way as to be responsive to community needs.

- 291 The Domestic Violence Act 1995 was heralded with fanfare. Since its introduction there have been a series of evaluations of its implementation and impact.<sup>137</sup> However, comprehensive data on the number of orders made and the number of access orders involving domestic violence has not been captured. The Department for Courts, using the domestic violence database, is able to access ethnicity data on domestic violence applications, and the CMS system should be able to provide accurate data on the number of protection orders granted.
- 292 The current data give an indicative number of the total number of applications under the Guardianship Act 1968. Such data, as are collected in relation to custody and access applications, are unreliable. It is anticipated that the CMS system will be able to provide more accurate data.
- 293 It would be desirable to obtain statistics to establish:
- the total number of orders filed in a given period, and whether such orders are interim or final;
  - the subject nature of such orders;
  - which applications proceed to defended hearings;
  - the repeat nature of such applications;
  - the cost of disposition, particularly relating to the provision of legal aid;
  - the amount of time spent by judges on defended hearings;
  - the sex and ethnicity of Court users; and
  - the stage of family dispute resolution proceedings at which parties reach settlement.
- 294 We found it impossible to pursue this approach. Statistical information is either simply not available, unreliable or not collected consistently. As noted in the 1993 Boshier Report, there is an alarming paucity of information.<sup>138</sup> An in-depth empirical research project would be needed to gather such information.
- 295 The Caseload Management Practice Note<sup>139</sup> sets out a number of timeframes within which applications have to be processed. However, we could not find out how long such applications actually take compared with the guidelines contained in the Practice Note.
- 296 The Family Court database is able to measure some disposal standards, however, it is anticipated that the new CMS system will be able to comprehensively monitor the time frames outlined in the Caseload Management Practice Note. The Courts Management team monitors courts' workload and workflow matters on a monthly basis. The Department for Courts is also represented on management committees of the High Court and District Court judiciary set up to identify workload pressures

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<sup>137</sup> Ministry of Justice *Domestic Violence and Child Access* (Wellington, 1999); Barwick, Gray and Macky, above n 124; *Respondent Programmes* (Department of Corrections, Wellington, 2000); "Adult Protected Persons" (Department for Courts, March 2001), and two evaluations near completion "Māori Adult Protected Persons" and "Children's Programmes".

<sup>138</sup> Judge P Boshier "A Review of the Family Court: A Report for the Principal Family Court Judge" (Auckland, 1993, mimeographed) 29.

<sup>139</sup> Issued by Judge PD Mahony, Principal Family Court Judge, 1 November 1998.

on the High Court and District Court judiciary and to identify workload pressures in the courts and determine strategies for managing these.

- 297 We do not know how many self-represented litigants are appearing before the Court. Judges and Court staff suggest that the number has increased, but the numbers are not available. The adequacy of representation is an important issue. Can we assume safely that the majority of parents are legally represented? If this is the case, based on current trends, is this likely to be the case in five or ten years time? We do not know the answers to these questions and it is impossible to make a reasonable projection, in the absence of any clear data.

### *Legal aid*

- 298 The Legal Services Agency was unable to provide data for the amount of legal aid that has been granted for mediation. Nor is there a record of the success rate of mediation in diverting cases from adjudication, as such information is not disaggregated from more general “disbursements” in their system.
- 299 Aside from data collected from some civil legal aid files from 1994 and 1995<sup>140</sup> and an analysis of types of civil legal aid proceedings carried out in 1997,<sup>141</sup> we do not know who is more often granted legal aid for family proceedings, for example, men or women, custodial parents or non-custodial parents.
- 300 The Legal Services Agency has recently begun to capture data on the gender and ethnicity of legal aid applicants, but this information is not yet available. This information will also show what proceedings the applications relate to. Such information will be invaluable for research purposes.
- 301 There are also no figures available on the number of successive legal aid applications from the same person. Anecdotal evidence suggests it may be high, but without knowing the extent of successive applications, it is difficult to address any potential problem.
- 302 Some significant research has already been conducted into the Family Court. Some findings and recommendations contain valuable information that can be used when considering where the pressure points are, and what changes might need to be made.<sup>142</sup> We list in Appendix A some of the research conducted in the family law area.

### **General information**

- 303 To summarise, currently, such information as is available from the various departments involved is insufficient to support a significant analysis of how the Family Court is functioning. As one submitter to the Commission commented:

The Family Court is lacking in relevant and clinically applicable research that would assist in the operation of its social function.<sup>143</sup>

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<sup>140</sup> Collected by AC Nielsen-MRL for the Legal Services Board.

<sup>141</sup> Prepared by CM Research for the Legal Services Board.

<sup>142</sup> The Department for Courts and Ministry of Justice Research and Evaluation Reports are listed in the Bibliography.

<sup>143</sup> Dr Llewelyn Richards-Ward, above n 93.

The lack of data was commented upon in a 1984 study of the Family Court which identified a number of issues that required further research<sup>144</sup> and which prompted the comprehensive Department of Justice research programme outlined above.<sup>145</sup>

- 304 In the absence of data, we are reliant on people's perceptions of how the system is running, but such perceptions are inherently subjective.
- 305 Further data would be able to be gleaned if a file review of randomly selected files from a number of registries around the country were conducted. Although this type of research has its constraints, it might shed some light on what is happening within our Family Court system and could help lend some objectivity to the self-reported accounts offered by those currently engaged in the Family Court system. Unfortunately, the time constraints for this project did not allow sufficient time for the Law Commission to arrange for such research to be conducted.

### **Fostering a culture of data collection, interpretation and application**

- 306 It is disconcerting that, in spite of previous calls<sup>146</sup> for more information to be collected regularly and systematically, little has been done.<sup>147</sup> One might be led to conclude that throughout the 1990s there has been an attitude within the public service that data collection, extrapolation and interpretation is not a priority. It is unclear how government departments can run effectively when they cannot say who uses their services, how people use their services, how frequently and to what effect. We express reservations about this lack of basic information.
- 307 The Commission suggests that a performance monitoring unit be established to monitor the activities of the Family Court. This unit would have a quantitative and qualitative role.
- The unit would collect data about what is happening in the Family Court.
  - The unit would consult with Family Court users and stakeholders to ensure that the processes and resources of the Court best met the needs of the consumers of the system.
  - The unit could be commissioned (or could commission) research into particular areas of need.
  - The information gained from these processes could then be used to form a "feedback loop" allowing those within system to make fine adjustments to increase responsiveness and staff productivity and better serve their clients.
  - In particular, such a unit could monitor the performance of the Family Court under the Modernisation Programme to assess the effectiveness of the changes made under it.

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<sup>144</sup> J Leibrich and S Holm *The Family Court: A Discussion Paper* (Department of Justice, Wellington, 1984) 1.

<sup>145</sup> *Family Court Custody and Access Research Reports 1–8* (Department of Justice, 1985–1994), Family Court counselling research (Department of Justice 1989 and 1990 )and other research as listed in the Bibliography.

<sup>146</sup> Boshier and Doogue, above n 138, and Leibrich and Holm, above n 144.

<sup>147</sup> See paras 277–305.

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- Q17 What sort of information about the users and operation of the Family Court might usefully be collected?
- Q18 Who should be responsible for collecting such information?
- Q19 What information should be publicly available?
- Q20 Should there be an independent unit monitoring the performance of the Family Court, or should this responsibility rest with the Department for Courts?
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## DISSATISFACTION AND DISEMPOWERMENT OF FAMILY COURT USERS

### Problems

- 308 There is some dissatisfaction with the performance of the Family Court. The expression of that dissatisfaction has in part led to the Law Commission being given this project.
- 309 It is difficult to unpack all the reasons for this dissatisfaction. There is no doubt that dissatisfaction has been expressed about the procedures and processes of the Family Court. There are complaints about delays. There are complaints about the cost of lawyers to represent the matter through the system. There are complaints about the inadequacy of legal aid. There are complaints that the processes themselves can be emotionally draining and abusive. There are complaints about the skill and actions of all the professionals involved in the process including the judges, counsellors, report writers and counsel for the child. Such complaints may be that the person did not have the skills to perform the assigned task adequately. It may also be that the complainants did not consider that they had been properly heard or that their interests had not been understood or given sufficient attention. These complaints frequently give rise to an allegation of gender bias.
- 310 Some of the dissatisfaction also relates to the substantive law. The Matrimonial Property Act 1976 has recently been reviewed and many substantive changes made. The Guardianship Act 1968 is currently being reviewed with the prospect of new legislation. There was new domestic violence legislation in 1995. The changes in the substantive law will address some dissatisfaction but will no doubt raise others. That is not within the scope of this project.
- 311 Most Family Court proceedings arise out of profoundly distressing family circumstances. There will be emotional wounds from such circumstances that the Family Court will never be in a position to address.
- 312 The consequences of family breakdown may well cause family members to confront issues of social inequality and social structures, which did not create problems while the family was intact. These may be disparities in income earning capacity, education, employment opportunities, or access to childcare. They may be a consequence of social roles and expectations, such as a woman having carried out the primary parenting role during the relationship.

- 313 Professor Carol Smart<sup>148</sup> suggests that one of the factors involved in this feeling of disempowerment and dissatisfaction for men in particular, is the shift in focus away from the centrality of marriage to the centrality of parenthood. She states that the fathers' movement has arisen as a result of a perceived and real incremental loss of power in the private sphere, which was not widely felt until approximately the 1980s.
- 314 Family policy is now focussed on parenthood rather than on marriage. This is a response to the reality of de facto relationships, single parenthood, and sequential adult relationships. Part of this process is the development of the principle of the paramountcy of the welfare of the child. As adult relationships become less stable, parents place more emphasis on the parent-child relationship, which is invested with the qualities of stability and enduring and unconditional love.
- 315 And yet the social structure of families before separation or divorce tends to rely on mothers rather than on fathers carrying out parenting tasks for children. Professor Carol Smart says that parent separation:
- . . . highlights the extent to which fathers' relationships with children are mediated by mothers and dependent on mothers' facilitation. This does not mean that fathers do not love their children but it does mean that they often do not know them very well and are not sensitive to their needs, moods and tastes.
- 316 At the same time we need to respect children; their views of the situation and their needs cannot be left unattended while issues between adults are resolved.

### **Suggestions**

- 317 How do we address these issues? We need to engage in a dialogue with those who are dissatisfied. We need to know their complaints and understand their disempowerment. Then we can begin to address their issues.
- 318 If we understand the social situation and the changing arena for relationships and parenting roles, we have a better chance of orienting education programmes, counselling and mediation, in ways that will be helpful for the new family situation after separation or divorce.
- 319 Some issues that might be raised in such sessions are:
- What is each parent prepared to do to cater to the new family circumstances after divorce?
  - Are the mother and father willing to share parenting information?
  - Are the mother and father willing to acknowledge the gaps in their parenting capacities?
  - How can the children be empowered to state their needs?
  - How can parents be taught to listen to their children and take notice of and act on what they are saying?
- 320 Feelings of disempowerment and dissatisfaction by users of Family Court processes are unlikely to be resolved by Court determination after a defended hearing. The best chance of addressing these issues is to improve the conciliation interventions

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<sup>148</sup> Smart, above n 12.



such as information giving, counselling and mediation so that users of the Family Court can have their issues addressed in a more holistic way.

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- Q21** What are your dissatisfactions with the Family Court based on your experience? (Please be as specific as possible.)
- Q22** What problems have you experienced with Family Court processes?
- Q23** What changes to the process and procedures of the Family Court would address your concerns?
- Q24** Do you consider that providing education and information to Family Court users about changing social relationships in information sessions and counselling sessions would be helpful?
- Q25** Do you think training for counsellors, which encouraged them to raise the following kinds of issues, would be helpful?
- What is each parent prepared to do to cater to the new family circumstances after separation?
  - Are the mother and father willing to share parenting information?
  - Are the mother and father willing to acknowledge the gaps in their parenting capacities?
  - How can children be empowered to state their needs?
  - How can parents learn to engage with their children about their concerns in the changed family circumstances?
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## CHILDREN

### Problems

- 321 We have discussed some of the research relating to the involvement of children in the Family Court process in paragraphs 30–47 and 147–148 of this paper.
- 322 Children’s views are not always ascertained. Even where the parents or caregivers dispute custody and access, matters may be resolved without any direct input from the children.
- 323 Counsel for the child is appointed in all cases where an application for a declaration that a child is in need of care and protection is made, but often not until after a family group conference has been held. In guardianship proceedings, counsel for the child is not usually appointed until after the judge-led mediation conference.
- 324 There is no statutory requirement for children’s views to be represented at counselling or at a mediation conference if counsel for the child has not yet been appointed.
- 325 The views of children are ascertained and explored if a psychologist’s report is directed, but this does not happen in all cases, and again, occurs some time after the custody or access dispute arises and weeks after proceedings are filed.

- 326 The research indicates that children want information about what is going on. They want the opportunity to express their views. They want their views taken into account even if they do not want to control the final decision. They have valuable information and perspectives to be taken into account. How can this be achieved?
- 327 How much autonomy should parents be given? In all other areas of their parenting life parents make decisions for their children without State intervention unless the children are at risk of serious harm. Families operate their decision-making with varying degrees of democracy. Should that change when parents are separating? Does the fact of separation, and the upset to the usual modes of operation of the family, warrant intervention on behalf of the children?

### **Suggestions**

- 328 The parent education programmes we have discussed at paragraphs 403–422 of this paper would help parents focus on and consider the interests of their children.
- 329 Education programmes and materials for children would help them to come to terms with the changes in their families. It may also assist in enabling them to express their views.
- 330 Children could be included in counselling sessions with parents, but that would require a higher degree of skill and training for counsellors than is currently always the case. Any extension to the qualifications and skills of counsellors would be likely to increase costs.
- 331 If mediation were an option at an earlier stage in the Family Court process, then children could be represented at mediation in cases where the dispute involved issues around the children.
- 332 The Office of the Commissioner for Children has suggested that there should be persons appointed as child advocates, who would represent the child from an early stage in the dispute and direct the focus of the adults towards the interests of the child.
- 333 If a child advocate were appointed when the matter first came into the Family Court, that person could ascertain the child's views and assist as a go-between in counselling and mediation. That role is currently envisaged more as an advisor and reminder to the parents, but an alternative would be that the person could sit in on counselling and mediation sessions as a representative of the children.
- 334 The appointment of such an advocate raises issues about the competencies of such a person: their training, their qualifications, their skills, the extent of their role, and how they would be monitored, supervised and paid. If it were a voluntary role, there would be more complexities in monitoring and control.
- 335 Under the current system, counsel for the child is a senior lawyer with experience in the Family Court and who has had additional training. That lawyer also works alongside and liaises with court-appointed psychologists and social workers, so they do not carry out the role without additional expertise where necessary. The Commission considers that if a dispute were to go to a defended hearing, then the child should always be represented by a lawyer because the lawyer has an understanding of the court process and the requisite skills to present a case to the judge.
- 336 The relationship between the Family Court and the Child, Youth and Family Service is also of crucial importance to the welfare of the children. These issues

are discussed above in chapter 2 in relation to the Child, Youth and Family Service. The joint protocol between the Child, Youth and Family Service and the Department for Courts is a move in the right direction but that has not yet achieved a smoothly functioning relationship between the Service and the Family Courts throughout the country.

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- Q26 How can parents be encouraged to explore relevant issues with their children without involving the children in adult arguments?
  - Q27 Should children be included in counselling where the issues relate to the children?
  - Q28 Would there need to be further qualifications, training or monitoring procedures for counsellors if children were to be included in the counselling process?
  - Q29 Should children be present at mediation concerning their future arrangements?
  - Q30 How could the involvement of children in mediation be managed so that they are not burdened with adult issues?
  - Q31 If children were to be included in the mediation would such mediators need special qualifications or training?
  - Q32 Should counsel for the child be appointed at an earlier stage in the procedure rather than introducing a “new” player, that is, the child advocate?
  - Q33 Should there be a new role created of child advocate who would be appointed at an early stage when there was any dispute involving children?
  - Q34 Would such a person be an alternative to the counsel for the child or be involved only in the early stages and give way to counsel for the child if the matter were to go further down the Court track?
  - Q35 What should the role of a child advocate be?
  - Q36 What would be the training and background for a child advocate?
  - Q37 How could the work of the child advocate be monitored?
  - Q38 Would child advocates be paid?
  - Q39 Should parents or caregivers contribute to the cost of a child advocate?
  - Q40 How can the working relationship between the Family Court and the Child, Youth and Family Service be improved?
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## MĀORI ISSUES

### Problems

- 337 The terms of reference for this project relate to dispute resolution processes in the Family Court and therefore exclude comment on the provisions of the substantive law. While it is acknowledged that parts of the substantive law relating to adoption and guardianship, for example, are not compatible with Māori values, in this paper we focus on the process and procedure of the Court and the ways in which that might need to be changed and adapted, so as to incorporate Māori values and create an environment that encourages Māori participation.
- 338 While marae and iwi-based services for Māori families are to be encouraged, there are many situations in which access to an independent court is a necessary back-up. These situations include those processes of State intervention available under the Children, Young Persons, and Their Families Act 1989 when children are deemed to be at risk. It is also necessary to provide access to an independent court where one party is not willing to be subject to an alternative such as a marae-based hui. Where there has been violence or other power imbalances, the weaker party should be able to access the Court to obtain protection and for the opportunity to enforce Court-ordered arrangements. Therefore, it is essential that Māori are able to access the Family Court and that the processes of the Family Court are not alien and inappropriate for them.
- 339 The Law Commission report *Justice: The Experiences of Māori Women (Report 53)* discussed a number of systemic failures within the justice system.<sup>149</sup> The report discussed the failure to acknowledge Māori cultural values, the socio-economic disadvantages for Māori that affects their access to justice, and some problems with attitudes within the Justice sector. The values singled out as being of particular importance to Māori women included whakamā,<sup>150</sup> whanau, te reo Māori and whenua. The report describes whakamā as covering a wide range of feelings and causes. It describes feelings, from shyness to embarrassment to shame, and behaviour involving degrees of withdrawal and unresponsiveness. Māori can be whakamā when they find themselves in a situation of uncertainty and confusion, when the right course is not clear, or when they feel they ought to know what is right but do not. They are unlikely to ask for help because they felt it would be an admission that they do not know what to do.
- 340 The report describes the concept of whanaungatanga as covering all relationships formed on the basis of descent (from a common ancestor) and marriage (with spouses and in-laws). It includes relationships within whanau and between whanau:

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<sup>149</sup> New Zealand Law Commission *Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*: NZLC R53 (Wellington, 1999).

<sup>150</sup> See Dame Joan Metge's comprehensive work on whakamā *In and Out of Touch: Whakamaa in a Cross Cultural Context* (Victoria University Press, Wellington, 1986).

it means holding and preserving the practices that knit and strengthen the bonds of the family in the hapū but also includes establishing and reinforcing bonds between individuals, whanau, hapū and iwi.

- 341 It points out in relation to te reo Māori that although only approximately 25 per cent of Māori women and 24 per cent of Māori men are able to converse in Māori about everyday things, te reo Māori is still of value to Māori. Many of the Māori women spoken to in the course of the Law Commission research considered that the limited or poor use of te reo Māori was taken by many Māori women to be an indication of the level of cultural awareness of those providing legal services. Poor pronunciation of Māori names provided Māori women with further evidence that system personnel did not respect them.
- 342 The importance of whenua to Māori society was also discussed in *Report 53* and especially referred to in relation to succession policy because of its centrality to Māori cultural practices and law.
- 343 The concepts are clearly relevant to the way the Family Court is perceived by Māori and how the processes of the Family Court can become more sympathetic to Māori users.
- 344 Another theme of *Report 53* dealt with how the socio-economic position of Māori women affects the circumstances in which they can access the justice system. This related to their inability to access information and legal services due to language, the geographical distribution of services, and the costs involved in accessing those services. The cost of legal services was cited as a barrier to use. Physical distance from justice sector services was a problem, especially for women who lived in rural areas. Transport costs were often more than women could afford. Court facilities were not designed to accommodate mothers with young children who have no other adult support.
- 345 Although Māori women are even more economically disadvantaged than Māori men, Māori men suffer these same disadvantages in attempting to access the justice system and, in particular, the Family Court.
- 346 Present Family Court procedures are very much oriented to a private dispute between two adult parties. Counselling is provided for individuals or couples. The judge-led mediation conference is available only to the parties involved. The only persons present at the hearing are those immediately involved as parties unless others are called as witnesses. It is suggested that this is alien to decision-making processes within Māori society which would normally involve a much wider group. Where children are involved, it is even more important that whanau are able to express their views and be involved in the process.
- 347 The family group conference procedure under the Children, Young Persons, and Their Families Act 1989 has been held out as a process more acceptable to Māori. The emphasis in the Children, Young Persons, and Their Families Act 1989 on the wider family – whanau, hapū, and iwi is in marked contrast to earlier legislation about children such as the Adoption Act 1955 and the Guardianship Act 1968. Under section 62 of the Children, Young Persons, and Their Families Act 1989, the persons entitled to attend a family group conference include the child or young person in respect of whom the conference is held, parents, guardians or the persons having the care of the child or the young person, and members of the family, whanau or family group of the child or young person. Therefore, grandparents,

aunts and uncles, older siblings and other significant family members are commonly included in family group conferences.

- 348 While more Māori are graduating and qualifying as lawyers, there are still very few practising in the family law area, and there are insufficient Māori lawyers to cater to Māori clients. This means that many Māori are represented by non-Māori lawyers and that counsel appointed for Māori children will rarely be Māori.
- 349 Pākehā lawyers, counsellors, judges, and psychologists are often seen as being ignorant concerning tikanga Māori. Until there are more Māori professionals in the Family Court system, the Pākehā professionals who undertake this work would benefit from more education and training on Māori cultural issues.
- 350 Under the Children, Young Persons, and Their Families Act 1989, after making a declaration that a child is need of care and protection and before making orders as to disposition, the Court can call for a cultural or community report.<sup>151</sup> That report can be on the heritage and the ethnic, cultural or community ties and values of the child or young person or the child's or young person's family, whanau or family group. The report can also comment on the availability of any resources within the community that would be likely to assist the child or young person or the child's or young person's family, whanau or family group. Such cultural and community reports are not specifically provided for under the Guardianship Act 1968 or other family law legislation. The Court does, however, have the power to call additional evidence under most family legislation and has taken the opportunity to call for such cultural reports in some instances. A proper formalisation of that process would make it more widely considered and used.
- 351 There is insufficient information available to provide statistics on the number of Māori who make use of the Family Court. Anecdotally, it is said that Māori tend not to use the Family Court system in the same way as Pākehā. Māori are present in the system in relation to applications for declarations that children are in need of care and protection under the Children, Young Persons, and Their Families Act 1989 because those procedures are generally begun by the Child, Youth and Family Service. Māori do make use of the protection orders under the Domestic Violence Act 1995. The information in the Law Commission report *Justice: The Experiences of Māori Women* indicates that there are Māori women who, for a variety of cultural and economic reasons, do not access the Family Court. We would guess that this also applies to Māori men.
- 352 The Ministry of Justice and the Department for Courts is currently undertaking a research project into Māori perspectives on guardianship, custody and access. The final report was due by the end of November 2001.<sup>152</sup>
- 353 It appears that Māori are not proportionately represented in guardianship, custody and access applications or, for example, in matrimonial property applications. Neither do Māori seem to be particularly visible in respect of applications under the Protection of Personal and Property Rights Act 1988 or in family protection or testamentary promises claims. We have no information as to whether this is because they spurn this system or just feel they have no use for it. It is clear

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<sup>151</sup> Children, Young Persons, and Their Families Act 1989, s 187.

<sup>152</sup> This research project arose out of the Ministry of Justice paper *Responsibilities for Children: Especially When Parents Part*, above n 3.



that many Māori families are economically disadvantaged, and this could be, in part, the reason they are not bringing matrimonial property disputes and family protection or testamentary promises disputes to the Court.

- 354 Māori are over-represented among special patients and in mental health services generally. Over the period from 1980 to 1990, Māori were 40 per cent more likely to be re-admitted to psychiatric services than Pākehā.<sup>153</sup> This is more a social and health issue for Māori rather than an issue of access to the courts. In the case of mental illness, the Court process is imposed upon the patients. The patients do not seek to use the Family Court. This over-representation does, however, raise issues as to whether the procedures under the Mental Health (Compulsory Assessment and Treatment) Act 1992 are appropriate for Māori.
- 355 If Māori do have family law issues that they do not bring to the Family Court, how are they resolved? One possibility is that they are not resolved and that, for example, there are women who are subject to violence who feel they cannot access the Family Court and who remain in violent situations. This is not acceptable.
- 356 Another possibility is that, in some circumstances, Māori have their own dispute resolution processes for family issues. Could the Court benefit from knowledge about those processes, and could those processes be incorporated within the conciliation services available to the Family Court as appropriate referrals for Māori families?
- 357 The Law Commission needs input from Māori to define the problems for Māori in relation to the Family Court.

### Suggestions

- 358 Some of the issues that we have raised in relation to access to the Family Court for Māori cannot be addressed by changing the process available through the Family Court. They can only be addressed by government policies that deal with social disadvantage, education and social welfare services. However, specific services for Māori could be provided through the Family Court. In many areas, Māori counsellors are already available and this service needs to be expanded wherever possible.
- 359 If a new mediation process were introduced as an early intervention available through the Family Court, then it would be appropriate if Māori mediators could be employed to be available for Māori families.
- 360 The programmes provided under the Domestic Violence Act already include programmes specifically oriented towards Māori and run by Māori, both for perpetrators and victims of violence. It would appear, therefore, that there are resources of counsellors and probably mediators who can be employed to take on referrals from the Family Court.
- 361 In relation to the proposed intake procedures (see paragraphs 372–379), it may well be possible for programmes to be devised to be marae-based or provided

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<sup>153</sup> See L Dyall in “Māori” in PD Alice and SCD Collings (eds) *Mental Health in New Zealand from a Public Health Perspective* (Mental Health Group, Ministry of Health, Wellington, 1997) 83, 93.



by Māori provider groups who could provide education, counselling, or dispute resolution procedures specifically for Māori families.

- 362 More training and education programmes could be provided for lawyers, counsel for children, judges, psychologists and social workers that work in the Family Court with Māori families.
- 363 Some thought needs to be given to encouraging young Māori professionals, such as psychologists and lawyers, to consider careers assisting Māori families through the Family Court. We recognise, however, that there are high demands in all areas of life in New Zealand for Māori professionals, and it may be some time before there are enough qualified professionals to fulfil all the need across society.
- 364 The Law Commission needs input from Māori on how to improve Family Court processes so that they accord with Māori values and processes.

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**Q41** Do Māori view the Family Court as relevant to them?

**Q42** Are there ways in which the Family Court deals insensitively or inappropriately with Māori?

**Q43** Have some Family Courts provided processes incorporating Māori values that could be made more widely available? Can you tell us about them?

**Q44** Should persons other than the immediate parties be invited to a Court-referred mediation?

**Q45** Should persons other than the immediate parties be invited to a judge-led mediation conference?

**Q46** If those who are invited to mediation include a wider group, are there privacy issues or intimidation issues which are of concern?

**Q47** Should Pākehā lawyers, counsellors, judges and psychologists receive more training on Māori cultural issues?

**Q48** If so, how could that training be provided?

**Q49** Should cultural or community reports be available in cases involving Māori children?

**Q50** Should cultural or community reports be available in cases involving Māori adults?

**Q51** Are there marae- or iwi-based services for Māori families that could become referrals for the Family Court?

**Q52** Should the Family Court contract with marae or Māori provider groups to provide information, education, counselling or mediation specifically for Māori families as part of the conciliation service of the Court?

**Q53** Is the prospect of making an application to the Family Court for the appointment of welfare guardians or property managers for incapacitated relatives alien to Māori society?

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## CONCILIATION SERVICES IN THE FAMILY COURT

### Problems

- 365 As the Family Court system operates at present, there is a standard intake procedure that depends in part on the intervention point provided by legislation and in part on the Casflow Management Practice Note guidelines. A detailed description of the progress of each type of application through the Family Court is provided in Background 3.
- 366 People can enter the Family Court process by making a request for a counselling referral under section 9 of the Family Proceedings Act 1980. That request is only available for a limited range of Family Court proceedings and is the only formal step that can be taken before proceedings are issued.
- 367 Where the application is brought under the Guardianship Act 1968 the parties will normally be referred to counselling as a first step.
- 368 In other cases, the first step would generally be a registrar's list hearing to check service details and give directions concerning the filing of evidence.
- 369 Most Family Court intervention is initiated at the time an application is filed. This application sets out the terms of a claim and is served on the other party. The application is drafted to request Court intervention to resolve a dispute between the applicant and the respondent. It states the claim that the applicant has against the respondent.
- 370 There is, therefore, a relatively quick entry into a process that is adversarial. While there may be opportunities for further counselling, for negotiation, and for mediation or settlement conferences, the aim of the Court intervention is to move the parties down a path towards a hearing and to ensure that all the information or evidence that the Court will require to make a determination is available. This is likely to engender in the parties a state of mind that favours attack and defence rather than mutual movement towards resolution. It requires the parties to take positions and maintain them.
- 371 In contrast, a dispute resolution process designed to resolve issues rather than make rulings on them would encourage the expression of interests with a view to finding common ground and mutual advantage.

### Suggestions

#### *Intake procedure*

- 372 In a social work context, an intake procedure is designed to review the problem and assess the best way of dealing with it. That may involve such questions as:
- Who is affected by the problem?
  - Who would be best qualified to assist?
  - What is the best course to take?
  - When should that begin?
- 373 We suggest that a similar procedure would be of assistance in the Family Court. When a person comes to the Family Court, there could be a brief assessment interview, and the person could be directed to the most appropriate person to help. The possible options would depend on the range of referral facilities made available to the Family Court and the liaison between the Family Court and other

entities, such as the Child, Youth and Family Service, Mental Health Services, and mediation facilities. The first referral may be to an information session, to sole counselling, to couple counselling, to a family group conference or to a meeting on a marae. In cases where a child is about to be taken out of the country or there has been violence, the matter would still need immediate referral to a judge. Where the initial referral was for information or counselling, the matter may then come back for further intake assessment and the next referral may be, for example, to a judge for consent orders, to a mediation process, for a mental health assessment for one party, or to a counselling process that involved the children.

- 374 Except in those cases where emergency judicial assistance is required, all the processes should be readily accessible, as is counselling now, without the need for a lawyer. That would not prevent the parties seeking legal advice, if they chose, or being referred for legal advice, as part of the intake procedure in appropriate cases.
- 375 Such an intake procedure would allow referral to culturally appropriate interventions if they were available.
- 376 The object would be to provide case-specific and appropriate intervention at the right time, rather than a “one size fits all” approach.
- 377 If such a process was put in place, the person who carried out the intake interview would need to have appropriate skills and training.
- 378 It could possibly be an expanded role for the Family Court co-ordinator, although if that were to occur, the number of co-ordinators would need to be increased or some of their administrative tasks allocated elsewhere.
- 379 The primary skill of the person or persons performing the intake interviewer role would need to be the assessment of human behaviour. That person could have a background in either social work or clinical psychology. In addition, that person would need to have knowledge of the legal processes of the Family Court and some basic knowledge of family law principles. If the person was professionally trained as a social worker or a counsellor, additional training within the Family Court system could equip them with the necessary knowledge of the Family Court.

### *High-conflict litigants*

- 380 It is common for there to be conflict following separation when emotions are running high. However, as the family adjusts to the changes, the conflict generally lessens. Such families are generally amenable to therapeutic intervention, such as counselling and mediation.
- 381 However, there is a relatively small, but significant, number of parents whose conduct is characterised by highly conflictual behaviour. This behaviour can continue for a number of years. Such parents will often make repeated applications to the Court over relatively minor issues. Anecdotal evidence suggests that frequently these parents are self-represented, having retained and dismissed a number of lawyers.
- 382 These litigants take up an enormous amount of time and energy from judges, some of whom estimate that the 5–10 per cent of clients that they would characterise as being “high conflict” can absorb up to 90 per cent of their time.
- 383 Many of these litigants can behave quite differently outside the context of ongoing litigation and can often conduct themselves reasonably functionally with their

children, family, friends and colleagues. The more pathological elements of their personality are triggered by the relationship breakdown and can be observed in the context of their engagement with the court process.

- 384 There are a number of behavioural characteristics that characterise high-conflict parents. The presence of domestic violence in the relationship is a fairly reliable indicator, as is the presence of substance abuse.
- 385 Certain personality disorders are more likely to be present in persons engaged in high-conflict tactics.<sup>154</sup> Such personality disorders include:
- ♦ Narcissistic;<sup>155</sup>
  - ♦ Obsessive-Compulsive;<sup>156</sup>
  - ♦ Histrionic;<sup>157</sup>
  - ♦ Paranoid;<sup>158</sup> and
  - ♦ Borderline.<sup>159</sup>
- 386 There are a variety of screening tools that can be used to screen for litigants with these particular personality disorders.<sup>160</sup> They do not need to be administered by a psychologist, but a clinical psychologist must score and interpret the test results.
- 387 Litigants would have to be assessed early in the process for it to be most effective. It would not be appropriate or cost-effective for all parties coming into the Family Court system to be assessed. The assessment would need to take place once a flag was raised as to the behaviour of a party. That may arise as a result of an early referral to counselling, for example, but sometimes problems may not present themselves until later.
- 388 Once the question was raised, the party would need to be referred back to the intake interviewer for an assessment to be arranged. Once a party is identified as a high-conflict litigant, special procedures should be available as are discussed in the section on case management and parenting co-ordinators at paragraphs 459–496.

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<sup>154</sup> See JR Johnston and LE Campbell *Impasses of Divorce: The Dynamics and Resolution of Family Conflict* (The Free Press, New York, 1988).

<sup>155</sup> Within the diagnostic features ascribed by the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV TR)* (4 ed, American Psychiatric Association, Washington DC, 2000), 301.81. See also ME Ehrenberg, MA Hunter and ME Elterman “Shared Parenting Agreements After Marital Separation: The Roles of Empathy and Narcissism” 62 *Journal of Consulting and Clinical Psychology* 808.

<sup>156</sup> Within the diagnostic features ascribed by the American Psychiatric Association *DSM-IV TR*, 301.4.

<sup>157</sup> Within the diagnostic features ascribed by the American Psychiatric Association *DSM-IV TR*, 301.50.

<sup>158</sup> Within the diagnostic features ascribed by the American Psychiatric Association *DSM-IV TR*, 301.0.

<sup>159</sup> Within the diagnostic features ascribed by the American Psychiatric Association *DSM-IV TR*, 301.83.

<sup>160</sup> For example the MMPI-2 test (Minnesota Multiphasic Personality Inventory) and the MCMI-III (Millon Clinical Multiaxial Inventory III) test.

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- Q54 Do you consider that an initial intake interview that guided people to an appropriate first process would be useful?
- Q55 What are your suggestions for such an interview and referral procedure?
- Q56 What sort of person could do that job?
- Q57 What training and qualifications would such a person require?
- Q58 What would be the range of referral possibilities (for example, information, legal advice, counselling, mediation)?
- Q59 Do you consider that a procedure to identify high-conflict litigants would be helpful?
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## INFORMATION SESSIONS AND PARENTING PROGRAMMES

- 389 Most of the people who approach the Family Court will probably fall into three broad categories:
- confused and looking for some direction as to their options;
  - already decided upon a course of action, but unclear as to how they should pursue it; or
  - looking for further information on specific issues.
- 390 The needs of each category differ slightly, and so the information and services available should be designed to meet the needs of people in each category, as and when they need it.
- 391 As a general premise, the more people are educated about a system, the better equipped they are to make informed choices and wiser use of scant resources. The experience that people take away from the Family Court is largely determined by a knowledge of what options are available to them, an understanding of the processes, their ability to communicate with their partner, the influences and attitudes of others, and how costly and accessible the system is.<sup>161</sup>
- 392 This reasoning no doubt lay behind the Ministry of Justice discussion paper, *Responsibilities for Children: Especially When Parents Part*<sup>162</sup> which asked a number of questions relating to the provision of information in and about the Family Court. Such questions included:
- what should the role of the Family Court be and how should it operate;<sup>163</sup>
  - whether the Family Court should provide information sessions to potential participants, and what information should be provided;<sup>164</sup> and

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<sup>161</sup> Lord Chancellor's Department *Information Meetings and Associated Provisions within the Family Law Act 1996: Summary of the Final Evaluation Report* (Lord Chancellor's Department, London, 2001).

<sup>162</sup> Above n 3.

<sup>163</sup> Ministry of Justice, above n 3, Question 5.17.

<sup>164</sup> Ministry of Justice, above n 3, Question 5.17.

- what sort of information should be provided about custody and access, and who should provide it.<sup>165</sup>
- 393 This section of the paper will discuss the provision of information about Family Court services and processes in general, with particular emphasis on the kind of information that might be useful for couples with children who are contemplating separation.
- 394 At present, the Family Court provides some basic information about the Court and its processes. The Department for Courts has produced a series of pamphlets for those who think they might need to have recourse to the services of the Family Court. The pamphlets provide basic information about the following topics:
- Family Court information and services;
  - counselling;
  - dissolution of marriage;
  - domestic violence;
  - guardianship, custody and access;
  - matrimonial property;
  - mediation; and
  - paternity.
- 395 The pamphlets give a brief explanation of the services that the Family Court offers and describe the processes that families will encounter in the Family Court. The pamphlets emphasise that parties should make use of the counselling services available through the Family Court.
- 396 The pamphlets are available in printed form from courts, citizens advice bureaux and other community agencies, and in electronic form from the Department for Courts website.<sup>166</sup>
- 397 Other than the counselling services offered by the Court, the main sources of information for prospective Family Court users are:
- citizens advice bureaux;
  - community law centres;
  - lawyers; and
  - women's refuges.
- 398 The lack of comprehensive information about the Family Court and its processes leaves scope for interest groups to promote their own view of the way in which the Family Court operates. Such information may be less than neutral in its presentation of the role and processes of the Court and the current state of the law.
- 399 At present little information is provided by the Court about, for example, the effect on children of parental separation, particularly where there is a high level of conflict between the parents. Nor is the information provided sufficient to enable those who wish to bring proceedings without legal assistance to do so.
- 400 One Family Court co-ordinator in Napier uses the video *You're still Mum and Dad* as a basis for discussions about post-separation parenting. Anecdotal reports indicate that this video, though a little outdated, is well received by the parents.

<sup>165</sup> Ministry of Justice, above n 3, Question 5.11.

<sup>166</sup> <<http://www.courts.govt.nz>>.

## Overseas

- 401 Other jurisdictions, notably the United Kingdom, Canada and the United States, have made considerable efforts to make information available to couples contemplating Family Court proceedings.<sup>167</sup>
- 402 This section will provide a broad description of some of the services provided in other jurisdictions. We might wish to consider these services when deciding whether and how to increase the provision of information to Family Court clients.

## *United Kingdom*

- 403 The Family Law Act 1996 (UK) signified a shift in the way that the law treated separation and divorce. The object of the Act is, where possible, to support marriages and to provide services for couples and couples with children who are contemplating separation. Part II of the Children Act 1989 (UK) recommended that information sessions be provided for parents contemplating separation. Rather than implement the programme on a nationwide basis, Part II required that a controlled study of the value of such programmes be carried out in a number of centres. The results of the pilot study would determine whether Part II of the Children Act would be rolled out as a nationwide model.<sup>168</sup>
- 404 The Family Law Act 1996 (UK) specifies what information must be given in the information sessions. Broadly speaking, the topics covered at the information sessions should address:
- the importance to be attached to the welfare, wishes and feelings of the children;
  - how the parties may acquire a better understanding of the ways in which children can be helped to cope with the breakdown of a marriage;<sup>169</sup> and
  - what the parties should expect of the legal and/or court process.
- 405 Information sessions educate parents about the effect on their children of their choice to separate, and encourage parents to modify their behaviour to minimise the potentially negative impact of the separation.<sup>170</sup> The sessions benefit children by reinforcing that the parents' separation is not their fault, and it gives them an idea of what to expect throughout the court/mediation process.

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<sup>167</sup> Usually, but not exclusively, relating to separation, divorce and custody and access arrangements for children.

<sup>168</sup> One of the problems that appears to have beset the project is that there were two, potentially conflicting, goals of the information sessions. In the view of the Lord Chancellor, the primary aim should be to preserve and assist marriages. The other primary aim is to provide parents with information about the ways in which parents can assist and support their children through their separation.

<sup>169</sup> In a New Zealand review of over 200 studies of the effect of family dissolution on children by Jan Pryor and Bryan Rodgers, the authors stated that families need information about their children and the likely effects on the children of family dissolution. See J Pryor "Family dissolution: What About the Children?" (1998) 2 BFLJ 310, 312.

<sup>170</sup> Family Law Act 1996 (UK).



## DELIVERY OF INFORMATION

- 406 A question that must be considered is how information about legal processes and issues relating to family reorganisation might best be delivered. In the United Kingdom, trial information packs were provided to the parents before they attended either a one-on-one meeting or a group meeting. The information packs included material about the emotional and legal process of separation, the effect of separation on children and how to minimise the potentially negative effects, and age-appropriate materials explaining to children what separation might mean for them in practical terms.<sup>171</sup>

## GROUP MEETINGS

- 407 The pilot project trialled a variety of methods of delivering information to participants. One of the more successful forms of meeting seems to have been a group information meeting conducted by two presenters, usually a solicitor and a Family Court welfare officer.<sup>172</sup> During the course of the meeting, parents were shown a specially made video that depicted the mediation process and featured children talking about their experiences of divorce. Participants generally found the information about children's experience of separation interesting and relevant, but a number of de facto couples commented that the information about the divorce process was completely irrelevant to them. The video was rated well by participants, and the group meeting appeared to be a good method of educating people about the use of mediation to help resolve disputes.<sup>173</sup>
- 408 The general information session was followed by a session chaired by relationship counsellors and solicitors describing the separation and divorce process. Those attending the meeting are given an opportunity to ask questions. The questions most commonly asked related to mediation, children's issues and the legal process.<sup>174</sup>

## ELECTRONIC DELIVERY OF INFORMATION

- 409 In some of the trial areas in the United Kingdom, rather than attending meetings, information was delivered to clients by means of CD-ROM. Many of those who received information in this manner rated its effectiveness lower than those who attended face-to-face meetings rated their information. The problem was not that attendees were technologically illiterate, but that attendees felt that they got more

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<sup>171</sup> The children's material is written in a child-friendly manner and, depending on the age and maturity of the child, may include a workbook for the child to complete with a parent or another adult, a worksheet with puzzles, a boardgame, and a diary that includes comments from other children whose parents have divorced. Children and parents have evaluated these leaflets and the response has been largely positive. See Lord Chancellor's Department, above n 161.

<sup>172</sup> Lord Chancellor's Department Research in Progress "Information Meetings and Provisions" June 1999 <<http://www.opengov.uk/lcd/research/general/srp/srpsec3.htm>>.

<sup>173</sup> Lord Chancellor's Department, above n 172, 25. However, it did not result in an increased uptake in mediation services.

<sup>174</sup> Lord Chancellor's Department, above n 161.

out of a session where they could ask questions and get information that was personalised to their experiences.<sup>175</sup> To a certain extent, this would not appear to be such an issue in New Zealand, where all separating couples are offered counselling sessions.

- 410 However, a number of participants commented that they did like being able to start and stop the CD-ROM and absorb the information at a pace that suited them. Some commented that they thought that the information should either be available on the internet or people should be able to take the CD-ROM home, to work through in privacy and at their own pace.

#### LESSONS TO BE LEARNED FROM THE UNITED KINGDOM EXPERIENCE

- 411 Initial results from the survey of information sessions are positive.<sup>176</sup> The majority of the parents surveyed reported that, as a result of the information sessions, they felt better informed about topics relating to the children, such as how divorce affects children, and how family mediation and family counselling services operate.<sup>177</sup> A number of parents interviewed said they felt that the sessions made them more aware of the importance of dealing with the divorce responsibly and of not involving the children in the parents' dispute. Eighty per cent of parents who took part in the information meetings said that the information about how children feel about the separation was useful. In many cases, it encouraged them to alter the way they were behaving or to co-operate better for the sake of the children:

It made me realise that you have to be careful not to involve children in the blame between two parents. The information I got from the meeting was well worth listening to. It made me realise sometimes you do things and you don't even realise you're doing them.<sup>178</sup>

- 412 Ninety per cent of those who attended the meetings in the United Kingdom felt they had learned something and that the meetings had a positive effect on the way they were feeling, and also helped to change the way they looked at their situation and options. Many reported that the information sessions helped to give them the strength to move forward, with a feeling of confidence that they had made the right decision. Another positive spin-off from the information sessions was that participants reported that the sessions made them more aware of what it is that lawyers do, and so enabled them to use lawyers more prudently.<sup>179</sup>
- 413 Following the release of the final evaluation report,<sup>180</sup> the Lord Chancellor's Department announced that the Government would not proceed with implementing Part II of the Family Law Act 1996 (UK). There was a fundamental disjunction between the stated aims of the Lord Chancellor and those of the professionals

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<sup>175</sup> Lord Chancellor's Department, above n 161.

<sup>176</sup> Lord Chancellor's Department, above n 161.

<sup>177</sup> Lord Chancellor's Department, above n 161.

<sup>178</sup> Comment from the father of a child aged 16 and twins aged 19 to the Lord Chancellor's Review Team, above n 161, 49.

<sup>179</sup> Lord Chancellor's Department, above n 161, 43.

<sup>180</sup> Lord Chancellor's Department, above n 161.

involved in the trials. Rather than achieving the Lord Chancellor's aim of "saving marriages", the information sessions simply ensured that people were better prepared to go about the divorce process. The report writers suggested that the aim of information sessions and relationship counselling should be to improve relationships, regardless of whether that means the parties stay together or move apart. For the most part, the information sessions simply helped confirm for people decisions they had already made.

- 414 An important point to take from the United Kingdom experience is that providing information in paper or electronic format is not a substitute for one-on-one (or group) information meetings, but that it can provide a useful starting point. Decision-makers need to bear in mind that the 1996 International Adult Literacy Survey found that one-in-five New Zealanders have very poor literacy skills. Many Māori, Pacific Islands Peoples, and those from other ethnic minority groups, are functioning below the level of competence in literacy required to meet effectively the demands of everyday life.<sup>181</sup> For this reason, it would be unwise to focus all attention on written material.

## *United States*

### INFORMATION

- 415 A number of courts in the United States have websites with information that would be of use to persons contemplating commencing court proceedings. The New York Family Court has made special efforts to improve the dissemination of information about the court process and of general advice about the law relating to topics affecting families.

### INFORMATION SESSIONS AND PARENTING PROGRAMMES

- 416 It is impossible to state a general position for the United States. Not all States have specific Family Courts; many States deal with family matters in courts of general jurisdiction. Many States offer both court-mandated and non-mandated psycho-educational programmes aimed at educating parents about the effect of divorce. Generally speaking, the programmes are aimed at effecting theoretical and cognitive change in the parents, directing them towards conciliation rather than reliance on judicial resolution of their differences. The programmes aim to build upon the competencies of the participants as parents.<sup>182</sup> The more specific goals that the programmes aim to achieve include:
- increasing parents' knowledge of the effects of divorce on children;
  - reducing children's exposure to conflict;
  - increasing parental communication;
  - improving parenting skills;
  - facilitating children's divorce adjustment;
  - facilitating parental divorce adjustment;
  - preventing behavioural problems in children;

<sup>181</sup> See para 652 of this paper.

<sup>182</sup> G Stone, K Clark and P McKenry "Qualitative Evaluation of a Parent Education Program for Divorcing Parents" (2000) 34 J of Divorce and Remarriage 25.

- decreasing complaints to court; and
  - increasing understanding of court proceedings.<sup>183</sup>
- 417 To achieve this, the following topics are covered in the course of the parent education sessions:
- children's reactions and adjustment to divorce;
  - responding to children's reactions to divorce;
  - stages of divorce for adults;
  - co-parenting communication skills;
  - parents' reactions and adjustment to divorce;
  - co-operative and parallel parenting;
  - referrals to services and materials;
  - custody and visitation; and
  - parenting plans.<sup>184</sup>
- 418 In addition to the programmes described above, which are designed primarily to educate parties going through the divorce process, a number of courts also offer special education services for high-conflict parents, parents with substance abuse problems, step-parents, parents of youth offenders, as well as general support groups for parents. Some counties within the United States also offer education sessions for children whose parents are going through separation.
- 419 These services outlined above may be offered by the Court directly or may be provided by community-based organisations.

### **Options for New Zealand to consider**

- 420 New Zealand could make more information available about the Family Court and its processes. The revised information pamphlets supplied by the Department for Courts are a good starting point, but consideration might be given to producing more comprehensive information kits for Family Court users.
- 421 New Zealand could consider creating parenting programmes for parents going through separation. Some of the models outlined above provide examples of the type of content, format and delivery that could be used. Such programmes would not necessarily need to be delivered in a courthouse setting. The programmes could be delivered in a community setting, at times and locations suitable for families in that particular community. It is possible that locating such programmes away from a courthouse setting might engender a more conciliatory approach in some participants.
- 422 Consideration might be given to creating materials and programmes for children who often can be the innocent casualties of parental separation. Programmes and materials could be developed and used in a school setting. They could be built into the school curriculum, perhaps as part of a general life skills module, so that children whose parents are separating, and who are going through a traumatic time, do not feel singled out for particular attention.

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<sup>183</sup> MJ Geasler and KR Blaisure "1998 Nationwide Survey of Court-Connected Divorce Education Programs" (1999) 37 Family and Conciliation Courts Review 36, 51.

<sup>184</sup> Geasler and Blaisure, above n 183.

- 423 We invite comment about the provision of information and programmes to those who use the Family Court system.

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- Q60 Should there be more information about the Family Court and its processes?
- Q61 What sort of information do you think people need to know?
- Q62 Should there be self-help kits to enable people to commence proceedings?
- Q63 Should special information for children be created?
- Q64 How might such information best be delivered?
- Q65 Should there be programmes for separating parents?
- Q66 Should such programmes be voluntary or mandatory?
- Q67 Should all parents attend, or just those who are unable to agree upon custody and access matters?
- Q68 What should be the aim of such programmes?
- Q69 How should they be structured?
- Q70 Should the State fund the total cost of the programme, or should parents be required to make a contribution (possibly on the basis of their means)?
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## USE OF TECHNOLOGY TO IMPROVE ACCESS TO THE FAMILY COURT

- 424 There is a far greater use of technology in society now than 30 years ago. Access to a telephone is almost universal in New Zealand at 97 per cent overall. Internet access within the home is also relatively high, at 41 per cent, considering the relatively recent introduction of this communication technology.<sup>185</sup> Overall, families with dependent children are more likely than average to have Internet access in the home. However, one-parent families are about half as likely as two-parent families to have Internet access (25 per cent compared with 50 per cent) and considerably less likely than two-parent families to have a telephone (89 per cent compared with 98 per cent).<sup>186</sup>
- 425 The Family Court could make good use of existing technologies to extend its services to those in the community. Information could be provided on the Internet. Forms could be completed and filed electronically, rather than manually.
- 426 Although New Zealand has a relatively high rate of Internet access and usage, to ensure that all have access to such technology would require publicly accessible terminals located at libraries, citizens advice bureaux, community law centres, women's refuges, schools and local police stations.

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<sup>185</sup> *The Social Report 2001* (Ministry of Social Policy, 2001) 92.

<sup>186</sup> *The Social Report 2001*, above n 185, 93.

- 427 Webcam and other video technology could allow for greater use of videoed testimony. This could be particularly useful for ex parte domestic violence applications. At present, in cases where the applicant is in an area where there is no resident judge, an application will be faxed to a judge and the judge will have to make a decision on the basis of the papers, without having an opportunity to see or hear the applicant. Verbal and visual cues would provide the judge with a clearer basis upon which to assess the veracity of the applicant's claim.

## MEDIATION IN THE FAMILY COURT

### Problem

- 428 The only process labelled "mediation" in the current Family Court process is the mediation conference chaired by the Family Court judge in accordance with sections 13–18 of the Family Proceedings Act 1980, and the more rarely used mediation conference under the Children, Young Persons, and Their Families Act 1989 where an application for a declaration has been made that a child is in need of care and protection.<sup>187</sup>
- 429 The objectives of a mediation conference are:
- (a) to identify the matters in issue between the parties; and
  - (b) to try and obtain agreement between the parties on the resolution of those matters.<sup>188</sup>
- 430 Such a conference is only available under the Family Proceedings Act 1980 where one spouse has applied against the other for a separation order or a maintenance order or one parent has applied against the other parent for an order for custody or access. Mediation conferences are not available for other proceedings in the Family Court including those involving matrimonial property.
- 431 The only persons who can be present at a mediation conference as of right are the parties, their respective lawyers and counsel for the child if appointed. Some judges, with the permission of the parties, have permitted others to attend.
- 432 Generally, such conferences are allocated one-to-two hours of time, although longer conferences are held from time to time depending on the inclination and availability of the judge.
- 433 Judges have received mediation training but their skills are variable. In most models of mediation, the mediator is seen as a disinterested facilitator. It is, therefore, a difficult role for a judge to assume, as the parties have expectations of the judge as an ultimate decision-maker and an authority figure. The parties are likely to view comments by the judge as indicative of a judicial view of the likely determination of the dispute. Some judges and lawyers see the mediation conference as an opportunity to reality test the client's view of the case.
- 434 Some counselling providers, including Relationship Services, consider that the conciliation counselling they offer to some couples is, in fact, a form of mediation if the couple is at the stage where resolution of the issues arising out of the

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<sup>187</sup> Children, Young Persons, and Their Families Act 1989, s 170.

<sup>188</sup> Family Proceedings Act 1980, s 14, and with slightly different wording s 171 of the Children, Young Persons, and Their Families Act 1989.

relationship is a viable process. Exactly what is offered to the client will depend on the training of the counsellor and the counsellor's assessment of the best "process" for this couple. This may or may not meet the expectations of the client. If clients use the allocated "counselling time" (that is, six hours) to explore their feelings around separation, to come to terms with separation, or to explore the possibility of reconciliation, the opportunity to "mediate" their issues as part of the Family Court process will be lost until they have a mediation conference with a judge.

- 435 The theory and practice of mediation has been extensively developed since 1980. It is now a well-established academic discipline and extensive research has been carried out in Europe and North America. Mediation is taught as a subject at a number of universities in New Zealand in law faculties and in business studies departments. It is taught as part of the Diploma of Dispute Resolution at Massey University. Massey University also runs masters programmes. The Massey University courses are affiliated to the education programmes of the Arbitrators' and Mediators' Institute. There are several bodies in New Zealand offering mediation skills training including Lawyers Engaged in Alternative Dispute Resolution (LEADR). A number of statutes provide for state-funded mediation processes as a means for resolving disputes (for example, the Employment Relations Act 2000, the Environment Act 1986, and the Residential Tenancies Act 1986).
- 436 Mediation of family law matters is used in a number of jurisdictions, for example, the United Kingdom, Australia, the United States and Canada.<sup>189</sup> However, this is not without debate. There are differing views on whether mediation is an appropriate means by which to deal with custody and access disputes. We list below some of the concerns expressed about the use of mediation.
- 437 Mediation has been criticised by some feminists for reinforcing the power differentials that existed prior to the relationship breakdown, thus disadvantaging women.<sup>190</sup> The Law Commission for England and Wales warned that:

There are also dangers in relying too heavily upon conciliation or mediation instead of more traditional methods of negotiation or adjudication. These include exploitation of the weaker partner by the stronger, which requires considerable skill and professionalism for the conciliator to counteract while remaining true to the neutral role required[.]<sup>191</sup>

However, other studies discredit the claim that mediation disadvantages women.<sup>192</sup>

<sup>189</sup> For a description of selected United States and Canadian models see JH McLeod (ed) *Family Dispute Resolution: Litigation and its Alternatives* (Carswell, Toronto, 1987) 86. See also J Pryor and P Seymour "The Mediation Debate: A Contradiction in Terms?" (1998) 2 BFLJ 261.

<sup>190</sup> See the discussion of the pros and cons of mediation in A Diduck and F Kaganas *Family Law, Gender and the State* (Hart Publishing, Oxford, 1999) 354–362. See also M Fineman "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making" (1988) 101 Harvard Law Review 727–774; and T Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale Law Journal 1545–1610.

<sup>191</sup> Law Commission (England and Wales) *The Grounds for Divorce* (Report 192, HMSO, London, 1990) para 5.34.

<sup>192</sup> RE Emery *Renegotiating Family Relationships, Divorce, Child Custody and Mediation* (Guildford Press, New York, 1994) 243; J Kelly "A Decade of Divorce Mediation Research" (1996) 34 Family and Conciliation Courts Review 373; J Pearson "The Equity of Mediated Divorce Settlements" (1991) 9 Mediation Quarterly 179.



- 438 It is generally accepted that where couples are locked in an intractable dispute, or where there is a history of domestic violence between the spouses or towards the children, mediation is considered inappropriate.<sup>193</sup>
- 439 Yet another issue is whether mediation should be conducted on an “all issues” basis (for example, mediation that would cover all the family law disputes involving the family, such as relationship property, custody and access matters) or whether each issue ought to be mediated separately.
- 440 However, on a more positive note, some of the claimed benefits of mediation are that it takes less time to reach agreement than when using litigation, more comprehensive and detailed arrangements are made in respect of children, and it is less costly.<sup>194</sup> One United States study that followed up families who had been assigned randomly to mediate, rather than litigate, their family disputes found that families who had mediated were more involved in the lives of their children and had greater influence in co-parenting their children.<sup>195</sup>

### Differing types of mediation

- 441 There are many different types of mediation.<sup>196</sup> In more traditional models of mediation, the mediator is an impartial facilitator who will try to avoid influencing the outcome of the mediation process and who will accept any decision<sup>197</sup> that the parties reach by the process of mediation.
- 442 Another form of mediation, sometimes used in divorce mediation, is that of the therapeutic mediator (sometimes also referred to as a facilitative or interventionist mediator) who will take a more active role in crafting an agreement that is in accordance with principles and practices that are known to facilitate positive outcomes, in particular in relation to post-separation adjustment.

<sup>193</sup> F Kaganas and C Piper “Domestic Violence and Divorce Mediation” (1994) *Journal of Social Work and Family Law* 265; Grillo, above n 190; D Ellis and N Stuckless *Mediating and Negotiating Marital Conflicts* (Sage Publications, California, 1996); E Kruk “Promoting Co-operative Parenting After Separation: a Therapeutic/Interventionist Model of Family Mediation” (1993) 15 *Journal of Family Therapy* 235, 246.

<sup>194</sup> See J Pryor and F Seymour, above n 189, which gives a comprehensive overview of the benefits and criticisms of mediation of family disputes. See also J Kelly, above n 192; M Benjamin and H Irving “Research in Family Mediation: Review and Implications” (1995) 13 *Mediation Quarterly* 53–82; JA Walker “Family Conciliation in Great Britain: From Research to Practice to Research” in JB Kelly (ed) *Empirical Research in Divorce and Family Mediation* (Jossey-Bass, San Francisco, 1989) 29–53.

However, the Government should be cautious about assuming that such mediation services will be cheaper than judicial intervention. A number of overseas studies are cautious about the alleged benefits of mediation in relation to costs. See R Ingleby “Court Sponsored Mediation: The Case against Mandatory Participation” (1993) *MLR* 441, 442. See also the references contained in footnote 12 of page 442 of this article.

<sup>195</sup> RE Emery and others “Child Custody Mediation and Litigation: Custody, Contact and Coparenting 12 Years After Initial Dispute Resolution” (2001) 69 *Journal of Consulting and Clinical Psychology* 323.

<sup>196</sup> See K Foy “Family and Divorce Mediation: A Comparative Analysis of International Programs” (1987) 17 *Mediation Quarterly* 83.

<sup>197</sup> Provided that decision is clearly not harmful to any party.

- 443 The therapeutic mediator plays an important role in educating participants in the mediation process and helping to facilitate co-operative arrangements. The mediator might also play an ongoing role, supporting the family as they make adjustments to their new life circumstances.
- 444 This model of mediation particularly lends itself to the negotiation of parenting plans.
- 445 Another type of mediation, known as impasse-directed mediation has been designed to assist families who have reached an impasse in their ability to communicate and make appropriate post-separation arrangements.<sup>198</sup> The impasse-directed mediation is structured in three distinct phases. During the first phase, the mediator will clinically evaluate, counsel and negotiate with the parents. The second phase involves helping the parties to identify and resolve specific issues and, where possible, to develop parenting plans. In the third stage, the implementation stage, the mediator helps the parties to implement, monitor and, where necessary, modify any agreement they may have reached.

### **Suggestions**

- 446 We are attracted to the notion of expanding the Family Court conciliation services and we suggest trained mediators could provide a mediation service.
- 447 Mediation would be one of the services that the “intake officer” could direct clients to. We envisage that it would rarely be offered as the first intervention but may well be appropriate after initial information and/or counselling referrals.
- 448 Such a mediation option could be available to all persons who would otherwise have their issues decided by the Family Court if they were not resolved by mediation. This would clearly include relationship property issues, family protection claims and testamentary promises claims, as well as all guardianship issues not currently included under custody and access.
- 449 Mediation could be extended to other proceedings, such as dispensing with parental consent in adoption or the appointment of a welfare guardian under the Protection of Personal and Property Rights Act 1988.
- 450 There may be no need for a separate mediation process for applications for declarations under the Children, Young Persons, and Their Families Act 1989, because the family group conference procedure precedes the opportunity for a judge-led mediation conference.
- 451 It should be possible for persons other than just the parties to be invited to a mediation. In some situations that might involve members of the wider family. This is of particular relevance to Māori families. In other situations it might involve a professional such as a doctor or a therapist who has previously been involved with the family, provided that privilege and confidentiality issues could be resolved. In some situations it might involve step-parents or new partners.
- 452 Issues relating to the appointment, qualifications, training and monitoring of mediators would need to be addressed. There are general training and qualification education programmes for mediators currently available in New Zealand.<sup>199</sup>

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<sup>198</sup> LEG Campbell and JR Johnston “Multifamily Mediation: The Use of Groups to Resolve Child Custody Disputes” (1986–87) 14/15 Mediation Quarterly 137.

<sup>199</sup> See para 435 for further details on these programmes.

- 453 Family Court mediators would need additional specific Family Court training. They would need to have an understanding of such matters as family systems theory, child development, domestic violence and also a basic understanding of the legal framework.
- 454 We might wish to consider whether it would be desirable to accredit such suitably trained persons to provide mediation services to Family Court clients.
- 455 Providing a mediation option which is not judge-led raises an issue as to the mediation conference procedure currently provided under the Family Proceedings Act 1980. We do not consider that the conference, as currently held with judges, should be done away with, but we do consider that they may be more aptly named as “settlement conferences”. We would be concerned if providing such an alternative procedure were presumed to be a means of freeing up judicial time. We consider that the new mediation procedure proposed is an alternative and adjunct to the present counselling procedures, rather than a substitute for the judge-led conference.
- 456 There is an issue whether it would be appropriate to extend the participation in such a conference beyond the parties to the proceeding. If a mediation option has already been made available for a wider group then it may not be necessary for the judge-led settlement conference to include persons other than the parties. However, the increasing number of blended families, and the need to acknowledge different patterns of family life among Māori and other cultures suggests that if the “main players” are to be represented at the conference and make viable any solutions reached, then the range of persons able to be present should be extended.
- 457 The judge-led conferences perform a valuable function. They provide an opportunity to define and limit the issues, reality test the positions of the parties, order priorities and, in a number of cases, conclude the dispute by consent orders. Such conferences should be available for all Family Court proceedings.
- 458 If there were to be an earlier mediation process available, then we would expect that the number of judge-led conferences would be fewer, because more matters would settle at an earlier point in time.
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**Q71** Do you consider that mediation by a trained mediator (rather than a judge) should be offered as part of the conciliation services of the Family Court?

**Q72** What training and qualifications would a mediator require?

**Q73** How would mediators be selected?

**Q74** Should mediators be employed by the Family Court or contracted to undertake mediations for the Court?

**Q75** For what proceedings or applications should mediation be offered?

**Q76** When should mediation be offered?

**Q77** When should mediation not be offered?

**Q78** Should there be different forms of mediation depending on the type of case being mediated, or should one model of mediation be used in all cases?

- Q79** Should such an option be available in addition to the Family Group Conference where there is an application for a declaration under the Children, Young Persons, and Their Families Act 1989?
- Q80** Who should be invited to mediation?
- Q81** Who should decide who is to be invited to mediation?
- Q82** Should the mediation conference chaired by a Family Court judge be retained?
- Q83** Should the mediation conference chaired by a Family Court judge be retained but redefined as a settlement conference or something similar?
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## CASE MANAGEMENT IN THE FAMILY COURT

### Problems

- 459 The current Casflow Management Practice Note sets out certain expectations as to sequence and timeliness, which provides useful guidelines. A detailed description of the progress of each type of application through the Family Court is provided in Background 3.
- 460 There is, however, no effective nationwide data collection that allows a valid comparison between the reality of what does happen and the expectations contained in the guidelines.
- 461 It is clear, at least anecdotally, that the practice in the different Courts around the country varies considerably.
- 462 Apart from management committees,<sup>200</sup> there is no nationwide mechanism or administrative practice that monitors compliance with the case management practice guidelines.
- 463 Some of the practices employed in the Wellington area as part of the Development Court Project seem to assist in reinforcing the case management practice guidelines so that they are more likely to be achieved.<sup>201</sup> A report containing the results of a review of the Development Court Project concluded that the introduction of the new processes had brought about improved file management and case file preparation.<sup>202</sup>
- 464 Generally, it appears that the case management procedures are not sufficiently focussed and individualised to control delay and drift. In some cases, delay may suit both parties, and in some cases, delay can even be beneficial while emotional responses to the situation are normalised. Where there are children involved, their interests are unlikely to be served by continuing conflict and a lack of resolution.

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<sup>200</sup> Most Family Courts have a management committee, comprising Court staff, judges and lawyers, that looks to address specific issues of relevance to the individual Court. As part of this process, the guidelines set down by the Family Court Casflow Management Practice Note may be monitored.

<sup>201</sup> See “Changed practices and procedures” in Background 1 “History of the Family Court”.

<sup>202</sup> Department for Courts *Wellington Development Court: Validation Report*, (Wellington, 2000), para 14.

In other cases, one party may be obstructive and the Court may not be able to control that obstructive non-performance efficiently.

- 465 Proactive judges can be effective in directing case-specific interventions and controlling obstructive behaviour by using tightly timetabled directions and costs orders.
- 466 The way courts are presently administered and judges are rostered mitigates against effective judicial control. If interlocutory applications are dealt with by a selection of different judges, the opportunity for familiarity with the case and a “feel” for the game-playing that can go on is lost.
- 467 Judges often arrive at a court for a judge’s list day where matters are called in 15 minute time slots, and the numerous files have not been made available to the judge until shortly before the list is scheduled to begin. How can the judge have sufficient familiarity with the files in order to assess the urgency, appropriateness, alternative possibilities or obstructiveness of the positions being advanced by each counsel?
- 468 If the administration of each file through the court is handled by different staff members, who have little authority or status and insufficient training, there is no opportunity for the individual case to be managed within the administrative system.
- 469 The judge “docket” system trialled in the Auckland Court needs to be further reported on and assessed for the role it can play in effective case management.
- 470 The key concepts for promoting efficient case management in family matters include specialised Court staff, specific and/or differentiated case management, one-judge–one-family, and active monitoring.<sup>203</sup>
- 471 If these proposals were implemented, cases could be resolved more quickly with greater child and client satisfaction. Such changes are likely to consume greater resources in terms of salaries for more highly skilled staff, increased use of professional services and increased training costs.

### Suggestions

- 472 As well as the case management practice guidelines, there needs to be a monitoring procedure and an administrative and judicial process that ensures compliance with those guidelines.
- 473 A system that relies entirely on the personality and energy of the resident judge is inappropriate and insufficient. The judge holds office within the system, and while recognising that the different personalities of the judges will have an impact on the system, the system must operate appropriately and efficiently, whichever judge sits on a particular day.
- 474 This is not to say that a docket system whereby cases usually come before the same one or two judges is not desirable. However, providing for judges in satellite courts, and managing annual leave and sick leave will inevitably mean that the one-judge–one-family model will not be possible all of the time.
- 475 The Court administrative staff should also be able to provide continuity of file management.

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<sup>203</sup> See, for example, J Kuhn “Case Management of Child Welfare Matters in the Family Court” Center for Families, Children and the Courts, University of Baltimore School of Law, 2001.

- 476 A case officer system where each Court staff member manages a portfolio of files rather than the next task on the file being carried out by any member of the staff would support and assist a one-team-one-family approach. If case officers were of sufficient ability and had sufficient training, they should be able to be more proactive in managing the cases and signalling or recommending the next step in the process.
- 477 There also needs to be flexibility as to the next step in the process. Some of the issues in relation to early intervention such as counselling and mediation could be dealt with by the person who handles intakes to the conciliation service side of the Court process.
- 478 Once a matter has entered on to the track for progressing towards a hearing, there still needs to be flexibility as to the appropriate interventions along that track. In some cases, early appointment of counsel for the child, or the early obtaining of a psychological report, may progress the matter more effectively towards settlement. There also needs to be the opportunity to refer the matter again to counselling or mediation if that would be the appropriate intervention at the later time.
- 479 Where a case is identified as involving a high-conflict litigant, special consideration should be given as to how that case is managed and the progress of the matter should be tightly controlled.

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**Q84** What are the problems with present case management practices? (Please specify the part of the country you are referring to in your answer.)

**Q85** Are there particular problems relating to certain categories of applications? (See Background 3 Stages in the Court Dispute Resolution Process.)

**Q86** Does the current system provide the best intervention at the right time? (Please give specific examples.)

**Q87** How can these problems be addressed?

**Q88** Would it help if only one or two judges handled each case?

**Q89** Would the allocation of files to case officers be of assistance?

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## “SPECIAL MASTERS” OR “PARENTING CO-ORDINATORS” FOR PROBLEM CASES

- 480 Special masters, also known as parenting co-ordinators, are appropriately trained people who are appointed to manage custody cases where the litigants are having difficulty negotiating an agreement, or accepting and implementing a court-ordered outcome. The parenting co-ordinator acts as a buffer between the parents and others acting in the Court process. One parenting co-ordinator likened the role to that of a parent to the parents, who models appropriate and constructive parenting behaviour.<sup>204</sup>

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<sup>204</sup> Christine Coates, Parenting Co-ordinator Boulder, Colorado, USA, presenter “Special Masters and Parenting Coordinators: Tailoring Services for High Conflict Families” pre-conference workshop (Association of Family and Conciliation Courts Conference, Chicago, 9–12 May 2001).



- 481 Firm case management is essential in high-conflict cases where parents are unable to agree. Some of the advantages of case management have been mentioned at paragraphs 459–479 in this paper.
- 482 Resources need to be made available to manage and assist high-conflict families. A good way of doing this is to create collaborative teams to manage high-conflict families. Conflict can be managed by timely interventions, which encourage the parties to work together to achieve an outcome that works in the best interests of the child.
- 483 This section provides a simple outline of one case management/behavioural management tool that is used in some courts in the United States.

### **Santa Clara County, California – masters**

- 484 In Santa Clara County, California, a technique for managing high-conflict families has been developed. The special masters concept developed out of an informal arrangement between judges and local child custody evaluators in this county.
- 485 The role of the special master arose because some judges did not feel confident that they had sufficient expertise to make a particular evaluation and wanted to delegate the task to another professional to make a recommendation. Originally, special masters were used in property law cases and the scheme was later extended to family law matters. People so appointed were given a reference to resolve a specific issue, but the role of the special masters has since been extended to a more general authority to act.
- 486 A special master may only be appointed with the permission of both parties. The services of special masters are targeted at litigants who are disinclined to resolve their disputes in a constructive manner. It has been estimated that, as a result of the use of special masters in Santa Clara County, there has been a 30 per cent reduction in the use of judicial decision-making once a special master has been appointed.<sup>205</sup> Special masters in Santa Clara deal with child custody issues but do not deal with the parties' financial matters.
- 487 The decisions of special masters are immediately binding upon the parties. However, such decisions are limited to the day-to-day details pertaining to custody, not to changes in custody or major changes in the time sharing arrangements between the child and his or her parents.
- 488 Special masters are able to provide ongoing assessment of the parties and play an important role in case management. They manage key interventions and modifications to parenting plans. There is a need for firm management of cases where there are issues relating to parental alienation syndrome, domestic violence or substance abuse. The special master can act as a co-ordinator between a variety of service providers. The special master also acts as an advocate for the child and is appointed as a guardian ad litem (adult representative).
- 489 Special masters are often psychologists or lawyers. Key skills for special masters are an ability to mediate, and a comprehensive knowledge of family systems and theories of child development. The role is open to a variety of professions.

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<sup>205</sup> Dr Matthew Sullivan, Northern California Taskforce on the Alienated Child, presenter "Special Masters and Parenting Coordinators: Tailoring Services for High Conflict Families" pre-conference workshop (Association of Family and Conciliation Courts Conference, Chicago, 9–12 May 2001).



In Santa Clara, there is a requirement that a special master have five years post-qualification experience and specialised training in mediation and preparing sample child custody evaluations. When a new special master starts, he or she is teamed up with experienced masters in a mentoring relationship to facilitate training.

### **Colorado – parenting co-ordinator**

- 490 The parenting co-ordinator model in Colorado uses mediation-arbitration in high-conflict custody cases. This project was informally developed by a variety of professionals including lawyers, social workers and psychologists. Parents must consent to undergo mediation-arbitration. If an agreement is reached, it is documented and filed in Court and, if appropriate, confirmed by the issue of a court order.
- 491 Both presenters<sup>206</sup> at the Association of Family and Conciliation Courts (AFCC) conference commented that it is unrealistic to expect high-conflict parents to reach a point whereby they can co-parent. The more realistic option is to move them towards parallel parenting. The special masters favour creating parenting plans in such a way that there is little scope for the parties to dispute matters.

### **In what circumstances are special masters appropriate?**

- 492 In the opinion of the speakers at the AFCC conference, the following cases are amenable to intervention by special masters:
- guardianship, custody and access cases where there is little existing relationship between the parties,<sup>207</sup> but such as it is, their relationship with one another is healthy;
  - situations where a large team of professionals is involved with the family;
  - where the children have special needs and a higher level of parenting and parental co-operation is needed; and
  - where there are serious parental deficiencies (domestic violence, mental health problems, substance abuse, supervised or limited access).
- 493 The process may increase the conflict between some couples, especially where one or both have demonstrated a propensity for boundary violations, for example, threats and inappropriate communications. It is vital that those working with high-conflict parents set clear boundaries as many of these parents are either completely unaware of boundaries, or quite wilfully choose to disregard them.

### **Challenges for special masters/parenting co-ordinators**

- 494 There are tensions inherent in the role of the special master. They have to manage to negotiate the differences between the legal and psychological professions and have to balance the tension between formality and informality.
- 495 Special masters have commented that they feel that in some cases it is unrealistic to expect parents to be able to co-operate as parents and co-parent their children.

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<sup>206</sup> Sullivan, above n 205, and Coates, above n 204.

<sup>207</sup> For example, in a situation where a child is conceived as a result of a one-night stand or a brief relationship. The father of the child wishes to become involved in the life of the child and the mother does not oppose this. Such circumstances require the parties to develop a good working relationship for the benefit of the child.

In such cases, the special master will try to establish an arrangement whereby parenting plans are crafted in such a way as to leave little room for dispute.

## New Zealand

- 496 We might consider whether a role similar to that of the special master might be of use in New Zealand.

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**Q90** Should we consider implementing the role of a special master in New Zealand?

**Q91** What sort of qualifications, training and experience should be required of a special master?

**Q92** What powers, if any, should a special master have?

**Q93** Should the parties have to consent to a special master?

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## ENFORCEMENT OF ACCESS ORDERS

- 497 Some parents and judges have expressed concern that Court access orders are being breached and that the sanctions currently available are insufficient to act as a deterrent to the other parent who is obstructing access. Some are calling for more stringent penalties to be imposed upon parents who, without lawful excuse, obstruct access visits.
- 498 The Ministry of Justice is currently considering this issue in the context of its review of the Guardianship Act 1968. Any proposal to increase enforcement mechanisms will require a change to the substantive law relating to access. Proposals on these issues are not expected to be considered until early 2002. It would be premature to pre-empt any discussion as to what those proposals might contain.
- 499 However, we can offer some comments about ways in which the dispute resolution mechanisms outlined in this paper might help resolve access issues.
- 500 We have suggested that information sessions be available for parties with a family dispute. These information sessions would aim to educate parents about their responsibilities as parents, the responsibilities that they owe to their children, and the responsibilities and respect that they owe to one another as co-parents of their children. Such programmes aim to help parents see the situation from their child's perspective and to encourage respectful communication and co-operation for the benefit of the child. It can only be hoped that such programmes might effect a normative shift, encouraging better communication and co-operation, thus decreasing the likelihood that one parent will unilaterally decide to sever the contact that their child has with its other parent.
- 501 We consider that where the parties have already been through the Court's conciliation processes and an access agreement or order has been made and subsequently breached,<sup>208</sup> it is unlikely that further mediation or conciliation will help resolve the problem. In our view, a more active style of intervention is warranted.

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<sup>208</sup> Either as a result of a consent order or a court order.

- 502 The parent facilitator/special master role discussed above might also be useful in situations where a parent is being obstructive about access. The facilitator could be called upon to manage the situation and ensure that contact is re-established in an appropriate manner. Where one or both of the parents adopts a highly conflictual stance, the facilitator could act as a go-between, lessening the opportunity for parties to be in conflict where it has become apparent that one or both simply cannot act in a co-operative manner.
- 503 Tighter case management could ensure that such cases were called up quickly and put before a judge as a matter of priority. To allow cases to drift can easily set up the situation whereby the obstructive parent creates a new status quo, which a judge some time down the track might be unwilling to disturb, irrespective of the other merits of the case.
- 504 By the time that the Law Commission releases the final report on dispute resolution in the Family Court, we hope to be in a better position to comment on how the changes to the substantive law might be complemented by new dispute resolution processes.
- 505 When considering this chapter, the reader should bear in mind whether there are problems that need to be highlighted and discussed other than those we have raised, and whether there is further detail in relation to the problems that are stated that the Commission needs to address? We would also like to hear any other suggestions, additions or refinements to the suggestions we have made.
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## BACKGROUND 1

### A brief history of the Family Court

#### INTRODUCTION

- 506 **T**HE PURPOSE OF THIS CHAPTER is to provide a brief history of the Family Court in New Zealand. It sets out the changes to the jurisdiction and workload of the Family Court.<sup>209</sup> This chapter also outlines key changes to Court procedures and personnel.
- 507 The scope of the work of the Family Court in 2001 is very different from what it was 20 years ago. The work of the Family Court now touches more sectors of the population with many more opportunities for an interface between members of the public and the Family Court. Although the jurisdiction of the Family Court has broadened, the circumstances in which matters can be referred for counselling or mediation have not changed.
- 508 The question to consider in relation to this chapter is:

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**Q94** How have the changes in the substantive law and the increased jurisdiction of the Family Court affected those who use the Family Court?

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#### FAMILY LAW PROCEDURE BEFORE 1980

- 509 Prior to the establishment of the Family Court, family law issues were dealt with quite differently from today.
- 510 There was great emphasis in family law on marriage and, prior to 1969, on the legitimacy of children. The establishment of fault was important in determining eligibility for a divorce, separation decrees and orders, and spousal maintenance.
- 511 Jurisdiction in family law matters was divided between the Magistrates Court and the Supreme Court. The Magistrates Court in its domestic jurisdiction dealt with separation orders, spousal maintenance after separation, adoption, paternity orders, maintenance orders for ex-nuptial children and nuptial children after separation, and orders under the Matrimonial Property Act 1963 where the property at issue was under a certain value. The Supreme Court had exclusive jurisdiction in relation to divorce, separation decrees, maintenance after divorce for wives and

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<sup>209</sup> Throughout this chapter, statistics on Family Court matters are cited. For information on the collection of and problems with such statistics see chapter 3.

children, and matrimonial property over a certain value. The Magistrates Court and the Supreme Court both had jurisdiction to determine custody and access disputes.

- 512 The Domestic Proceedings Act 1968 had introduced conciliation as a concept into the Magistrates Court. A duty was imposed on lawyers to promote reconciliation of husbands and wives.<sup>210</sup> A party who desired reconciliation could apply to be referred to a conciliator. If a party applied for a separation order, the Court referred the case to a Court-appointed conciliator or a conciliator approved by an approved marriage guidance organisation,<sup>211</sup> although the Court had discretion not to refer. The Court could also refer parties to a conciliator where there was an application for a spousal maintenance order or a custody order.<sup>212</sup>
- 513 Before the changes in 1980, family law matters were dealt with across the two jurisdictions and the beginnings of a conciliation service was only available through the Magistrates Court.

## ESTABLISHMENT OF THE FAMILY COURT

- 514 The Family Court was established on 1 October 1981 in accordance with the Family Courts Act 1980. It was established in response to recommendations made by the 1978 Royal Commission on the Courts. The Royal Commission recommended the implementation of a Family Court system:

We believe it both urgent and essential that a forum should be established which can respond adequately to the present and future needs of the family in New Zealand society. We conceive this forum for the resolution of conflicts affecting family life, to be a "Family Court".<sup>213</sup>

- 515 The Royal Commission stated that the primary objective of the Family Court was to provide a suitable forum for the resolution of family disputes:

The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearances as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way, the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable.<sup>214</sup>

- 516 The Family Court is a division of the District Court. This reflects the Royal Commission's recommendation that the Family Court be readily accessible to all who use its services. The Royal Commission suggested that the District Court met this requirement better than the High Court as the High Court sat only in metropolitan areas and main provincial centres whereas the District Courts extended into smaller provincial towns. The Royal Commission also recommended that the Family Court should function as simply and inexpensively as possible and that the proposed District Courts met such requirements.<sup>215</sup>

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<sup>210</sup> Domestic Proceedings Act 1968, s 13.

<sup>211</sup> Domestic Proceedings Act 1968, s 14.

<sup>212</sup> Domestic Proceedings Act 1968, s 15.

<sup>213</sup> *Report of the Royal Commission on the Courts*, above n 13, 146, para 466.

<sup>214</sup> *Report of the Royal Commission on the Courts*, above n 13, 152, para 484.

<sup>215</sup> *Report of the Royal Commission on the Courts*, above n 13, 152, para 487.

- 517 The Family Court is an informal court – wigs and gowns have never been used and the surroundings are more informal than in the courts that previously dealt with family matters.

## ORIGINAL JURISDICTION

- 518 When the Family Courts Act was first introduced,<sup>216</sup> the Family Court dealt primarily with marriage dissolutions,<sup>217</sup> matrimonial property,<sup>218</sup> guardianship, custody and access,<sup>219</sup> spousal maintenance, child maintenance, paternity,<sup>220</sup> adoption,<sup>221</sup> property disputes arising out of agreements to marry,<sup>222</sup> contributions towards the cost of domestic purposes benefits for solo parents,<sup>223</sup> and applications for non-molestation orders.
- 519 At the time the Family Court was established, significant reforms to matrimonial and domestic proceedings were introduced. With the introduction of the Family Proceedings Act 1980, divorce became obtainable on the grounds of two years living apart (no fault needed). Maintenance laws were also considerably reformed, making spousal maintenance a form of transitional support. With the Social Security Amendment Act 1980, the liable parent contribution scheme enabled the State to collect child maintenance without the need for a court order when the custodian parent was in receipt of a social security benefit.
- 520 The Family Proceedings Act 1980 expanded on the conciliation processes first introduced into the Magistrates Court under the Domestic Proceedings Act 1968. Rather than promoting litigation as the first response to marital disharmony, the Family Proceedings Act established counselling services. The aim of the services was to support married couples in their relationships or enable them to come to terms with the deterioration in their relationship. The Family Proceedings Act places the Court, counsellors, and lawyers representing the parties, under a duty to consider and promote the possibility of conciliation, if not reconciliation, between the parties to a marriage.<sup>224</sup>
- 521 Originally, counselling was only available to married couples to resolve issues relating to that marriage or the maintenance or custody of a child of that marriage.

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<sup>216</sup> Section 11 of the original Family Courts Act 1980 set out specific Acts under which the Family Court was to hear and determine proceedings.

<sup>217</sup> See ss 18(6), 19, 26 and 34 of the Marriage Act 1955.

<sup>218</sup> The Matrimonial Property Act 1976 (concurrent jurisdiction with the High Court) and on death under the Matrimonial Property Act 1963.

<sup>219</sup> Guardianship Act 1968.

<sup>220</sup> The Family Proceedings Act 1980 provided for applications for all three matters.

<sup>221</sup> Adoption Act 1955.

<sup>222</sup> Domestic Actions Act 1975, s 9 (concurrent jurisdiction with the High Court).

<sup>223</sup> Sections 27I–27ZI of the Social Security Act 1964, inserted by s 7 of the Social Security Amendment Act 1980 and repealed by s 7(1) of the Social Security Amendment Act (No 5) 1993.

<sup>224</sup> Family Proceedings Act 1980, ss 8, 12 and 19.

- 522 Mediation conferences, chaired by a Family Court judge, were also introduced by the Family Proceedings Act 1980.<sup>225</sup>
- 523 Mediation conferences were available to married couples in all proceedings relating to separation orders, spousal and child maintenance orders, custody and access. They were also available to unmarried parents involved in custody and access proceedings.<sup>226</sup>
- 524 A new position was created to facilitate the functioning of the Family Courts and of counselling-related services. This position was initially called the counselling co-ordinator.
- 525 Provision was also made for the Court to direct medical, psychiatric, or psychological reports on children involved in guardianship, custody or access matters.<sup>227</sup>

## INCREASE IN JURISDICTION

### **Domestic violence**

- 526 When the Family Court was first set up, the non-molestation order was the only remedy available for domestic violence. Further, it was only available to married persons living apart or parties who were formerly married.<sup>228</sup>
- 527 The Domestic Protection Act 1982 extended domestic protection to those *within* marriages and de facto relationships and to the children in those families. It created new orders: the non-violence order, the emergency occupancy order, and the tenancy order.
- 528 The Domestic Protection Act 1982 saw a steady increase in the number of applications for non-molestation and non-violence orders. The increases were especially marked for de facto couples, the number of applications increasing over two-and-a-half times between 1984 and 1990. Accompanying the rise in the number of applications was an increase in the proportion resulting in court orders. In 1984, 30 per cent of all applications for non-violence orders resulted in court orders, this rose to 42 per cent in 1990. The comparable figures for non-molestation orders were 25 per cent growing to 34 per cent respectively.<sup>229</sup>
- 529 In marked contrast to the rise in non-violence and non-molestation orders, the number of occupancy orders remained fairly stable between 1984 and 1990. Over

<sup>225</sup> Family Proceedings Act 1980, s 13.

<sup>226</sup> See s 13(b) of the Family Proceedings Act 1980, which does not provide that a parent must be a married parent.

<sup>227</sup> Section 29A of the Guardianship Act 1968 introduced by s 17 of the Guardianship Amendment Act 1980.

<sup>228</sup> Family Proceedings Act 1980, s 176. The non-molestation order was originally provided under s 23 of the Domestic Proceedings Act 1968. This Act was repealed by the Family Proceedings Act 1980 and s 176 of that Act replaced s 23. The non-molestation order was a combination of civil injunction and criminal sanction. It was a remedy to deal with domestic violence, molestation, and harassment.

<sup>229</sup> *Justice Statistics 1990* (Department of Statistics, Wellington, 1990) 176. These statistics do not distinguish between interim and final orders.



that period, the number of orders issued to married parties declined by 19 per cent, counteracting the increase in orders to de facto parties.<sup>230</sup>

- 530 The 1982 Act was used extensively but came to be seen as too restrictive for the needs of modern society. It did not give protection to people in a domestic relationship other than those who were or had been in a heterosexual partnership.
- 531 The Domestic Violence Act 1995 repealed the Domestic Protection Act 1982 and established a new regime for dealing with domestic violence.<sup>231</sup> The 1995 Act widened the ambit of relationships that came within the Act's protective powers. A "domestic relationship" was broadened to include a person sharing a household, such as a flatmate, or a person with whom someone has a close personal relationship.<sup>232</sup>
- 532 The Act created a definition of "violence" which specifically included "psychological abuse".
- 533 The Act also created the protection order which replaced the former non-violence and non-molestation orders. It also made counselling generally mandatory for abusers.
- 534 Under the Domestic Protection Act 1982, applicants could only receive a final order by attending a hearing. Under the Domestic Violence Act, the applicant can get a final order by default either on expiry of the three month temporary order or by order of the Court after the hearing. This means the responsibility lies with the respondents to object to orders made against them.<sup>233</sup>
- 535 With the wider range of people who could apply for orders and the simplified processes for applicants, a huge increase in the number of domestic violence cases under the Domestic Violence Act was expected. Anecdotal evidence strongly suggests the introduction of the Act did create a large increase in the Court's workload. However, between 1991 and 1995 no consistent statistics for domestic violence applications were collected on a nationwide basis from which comparisons can be made to confirm this.
- 536 We do know that in 1990 there were a total of 7208 applications for non-violence, non-molestation and occupancy orders,<sup>234</sup> whereas the number of applications under the Domestic Violence Act in 1996/1997 was 7777. Applications decreased in 1999/2000 to 5927, which is below the 1990 figure. The reason for this decrease is not known.<sup>235</sup>
- 537 An analysis of applicants and respondents under the Domestic Violence Act from July 1996 to June 2000 shows that a significant number are Māori (22.3 per cent

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<sup>230</sup> *Justice Statistics 1990*, above n 229, 176.

<sup>231</sup> Domestic Violence Act 1995, s 129A.

<sup>232</sup> Domestic Violence Act 1995, s 4.

<sup>233</sup> Domestic Violence Act 1995, s 76.

<sup>234</sup> *Justice Statistics 1990*, above n 229, 178, table 8.1.

<sup>235</sup> Further, at least 8.7 per cent of the applications since the commencement of the Act have involved non-family relationships, a class previously not provided for. This would suggest more applications under the Domestic Violence Act 1995 than the Domestic Proceedings Act 1982.

Up to and including 1990, Justice statistics were presented for the calendar year. The year range for the Domestic Violence Act 1995 is July to June.

and 23 per cent respectively) and that respondents have been overwhelmingly male (89 per cent).<sup>236</sup>

- 538 In contrast to applications under the Domestic Protection Act, where the majority of applicants were married, de facto applicants under the Domestic Violence Act 1995 outnumbered married applicants.<sup>237</sup>

### **Protection of personal and property rights**

- 539 With the introduction of the Protection of Personal Rights and Property Act 1988, the Family Court was given jurisdiction over:
- property management for those unable to run their own affairs; and
  - decisions about personal care and welfare for certain adults.<sup>238</sup>
- 540 Previously, other courts had dealt with the administration of a person's property,<sup>239</sup> but the provision of guardianship for adults was a concept new to New Zealand.

### **Children, young persons and their families**

- 541 Child protection matters, such as abuse and neglect were previously dealt with in the Children and Young Persons Court. This meant that there could be parallel proceedings concerning the same family in both the Family Court and the Children and Young Persons Court.
- 542 With the passage of the Children, Young Persons, and Their Families Act 1989, child protection moved to the Family Court.<sup>240</sup> This added substantially to the Court's workload. For instance, 4976 applications were lodged with the Family Court in 1998/1999, rising to 7025 applications in 2000/2001.

### **International child abduction**

- 543 In 1991, the Family Court gained jurisdiction for applications relating to the international abduction of children under the Hague Convention.<sup>241</sup> In the past three years, applications have doubled from 41 applications in 1998/1999 to 81 applications in 2000/2001.

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<sup>236</sup> It is important to note that the ethnicity statistics quoted only include those applications where the ethnicity details are known (ethnicity of approximately 16 per cent of both applicants and respondents is unknown).

<sup>237</sup> Between 1984 and 1990, 56.2 per cent of the applicants under the Domestic Protection Act were married and 43.8 per cent were in a de facto relationship (*Justice Statistics 1990*, 178). Between July 1996 and June 2000, 33 per cent of the applicants under the Domestic Violence Act were married and 47.2 per cent were in a de facto relationship.

<sup>238</sup> The Act does not apply to those who are physically disabled, unless their disability is coupled with some other lack of capacity that affects their mental and communication faculties.

<sup>239</sup> See Part VII of the Mental Health Act 1969 (Magistrates Court then District Court) and the Aged and Infirm Persons Protection Act 1912 (Supreme Court).

<sup>240</sup> The Children, Young Persons, and Their Families Act also created a separate Youth Court to cover youth justice issues.

<sup>241</sup> Guardianship Amendment Act 1991.

## **Mental health (compulsory assessment and treatment)**

- 544 The Mental Health (Compulsory Assessment and Treatment) Act 1992 provides that applications for compulsory mental health treatment are to be heard and determined wherever practical by a Family Court judge.<sup>242</sup> This was a new task for Family Court judges. Previously, two Justices of the Peace could impose compulsory treatment. Statistics are not available prior to 1998, but since that time applications have risen dramatically: 2277 applications in 1998/1999, 3271 applications in 1999/2000 (43.7 per cent increase), and 3931 applications in 2000/2001 (20.2 per cent increase).

## **Wardship of the court**

- 545 Wardship of the court is where a child is placed under the guardianship of the court rather than its parents. This guardianship can be for a specific purpose (such as to prevent publication of a book which might damage a child's interests or to override a parent's refusal to consent to medical treatment for the child) or it can be a continuing status to safeguard the ongoing interests of the child (such as where the parents are highly conflicted). From July 1991, the Family Court could place a child under the guardianship of the court, but only in matters relating to custody and access.<sup>243</sup> Since June 1998, the Family Court has had concurrent wardship jurisdiction with the High Court on all matters.<sup>244</sup>

## **Family protection**

- 546 Since July 1992, the Family Court has had concurrent jurisdiction with the High Court to hear cases under the Family Protection Act 1955 (where family members seek increased entitlement under a will) and the Law Reform (Testamentary Promises) Act 1949.<sup>245</sup> However, where proceedings have already been commenced in the High Court, the jurisdiction of the Family Court is ousted.<sup>246</sup>

## **Child access and domestic violence – section 16B**

- 547 In 1995, the Domestic Violence Act of that year and an amendment to the Guardianship Act 1968 changed the approach taken by the Family Court in relation to children involved in domestic violence cases.
- 548 The amendment to the Guardianship Act, made by section 16B, provided that where there has been sexual or physical violence in a relationship, the perpetrator is not to have custody or unsupervised access unless the Court is satisfied that the child is safe in that person's care.<sup>247</sup>

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<sup>242</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 17.

<sup>243</sup> Guardianship Amendment (No 2) Act 1991.

<sup>244</sup> Section 10(A) of the Guardianship Act 1968 as inserted by s 3 of the Guardianship Amendment Act 1998.

<sup>245</sup> See s 3 of the Family Protection Amendment Act 1991, the Law Reform (Testamentary Promises) Act 1949, the Guardianship Amendment Act (No 2) 1991, and the Family Courts Amendment Act 1991.

<sup>246</sup> Family Protection Act 1955, s 3A(2).

<sup>247</sup> An important element of those reforms is that violence towards a spouse or partner in the sight or hearing of a child falls within the definition of "domestic violence" and can be grounds for the making of a protection order for that child.

- 549 The Domestic Violence Act 1995 provides that, when there is a protection order in place, the respondent may not contact any child of the applicant's family, unless contact is permitted under any order or agreement.<sup>248</sup>
- 550 An extensive research study carried out by the Ministry of Justice assessed the implementation and impact of these new provisions on a selected group, particularly in relation to the arrangements made for access to children.<sup>249</sup>
- 551 Key informants<sup>250</sup> in the Justice study believed that, although cases relating to custody and access in the Family Court have always been potentially lengthy and complex, the 1995 legislation had compounded this problem. They believed that more access cases were coming to the Family Court and cases were lengthier and more complicated because of the assessment of risk that section 16B requires.<sup>251</sup>
- 552 The Justice study also suggests that, following the new legislation, requests for reports from counsel for the child and psychologists became more common but could delay decisions. Parents who were interviewed in the Justice study expressed frustration and concern at long delays to the point that some parents made informal arrangements and others abandoned any application for access. An increase in legal costs accompanied this increase in complexity.<sup>252</sup>

### Custody and access

- 553 Custody and access issues are dealt with under the Guardianship Act 1968. The Family Court has had sole jurisdiction under this Act since 1980 except in specified exceptional cases.<sup>253</sup>
- 554 The single largest number of applications to the Family Court for each year from 1980 to 1990 (excluding marriage dissolutions) was for custody orders. From 1983 to 1990 the number of applications filed by married parties declined by 16 per cent (from 3346 to 2823), while the number filed by non-married parties increased by over 86 per cent (from 1411 to 2626). In 1990, 5449 applications for custody orders were filed with the Family Court – almost half (48 per cent) by non-married parties.<sup>254</sup>
- 555 Many custody applications result from custody disputes but at least some are filed when custody is not really disputed.<sup>255</sup> For example, some parents who have day-to-day care of children may decide to apply for an order to formalise the situation and gain the security of a custody order.

<sup>248</sup> Domestic Violence Act 1995, s 16.

<sup>249</sup> A Chetwin and others *The Domestic Violence Legislation and Child Access in New Zealand* (Ministry of Justice, Wellington, 1999). For methodology and sample profile see pages 5–12.

<sup>250</sup> Family Court judges, Family Court co-ordinators, providers of supervised access, counsel for the child, counsel for the parties, Children, Youth and Family Service, Māori and Pacific Islands Peoples family violence services, programme providers – Chetwin and others, above n 249, 6.

<sup>251</sup> Chetwin and others, above n 249, 86.

<sup>252</sup> Chetwin and others, above n 249, 86.

<sup>253</sup> Section 4 of the Guardianship Act 1968 sets out the jurisdiction of courts and the exceptions and limitations to the Family Court's jurisdiction under the Guardianship Act.

<sup>254</sup> *Justice Statistics 1990*, above n 229, 175.

<sup>255</sup> G Hall and A Lee, above n 62, 16.

- 556 Among married couples, the proportion of custody orders granted to the mother fell as the 1980s progressed.<sup>256</sup> Whereas for non-married parties during the same period, the proportion of custody orders granted to the mother increased.<sup>257</sup>
- 557 Access orders grew in number during the second half of the 1980s, climbing from 729 in 1984 to 1276 in 1990 – an increase of 75 per cent. The rise in the number of orders was attributed to a sharp increase in orders to non-married parties from 23 in 1994 to 665 in 1990. In marked contrast, orders to married parties declined by 13 per cent over this period from 706 in 1984 to 611 in 1990.<sup>258</sup>
- 558 There is a belief that only a small percentage of custody and access disputes reach a fully defended hearing. Recent statistics are not available to confirm this. Statistics collected in 1990 show that about three-quarters of final orders made to married parents in 1990 were finally agreed upon by the parents – that is, there was no formal hearing resulting in a judicial decision. Only about 6 per cent were the result of fully defended hearings. The rest were cases where the non-custodial parent did not appear at the hearing to dispute custody (some of these may have been paternity cases). Nearly 90 per cent of access orders to married parties were finally agreed on by the parents, and about 5 per cent were settled by a fully defended hearing.<sup>259</sup>
- 559 Statistics collected between 1998/1999 and 2000/2001 by the Department for Courts indicate that applications under the Guardianship Act 1968, (which would be largely custody and access applications) increased from 16 442 in 1998/1999 to 18 892 in 2000/2001.

### **Relationship property**

- 560 The High Court and the Family Court have concurrent jurisdiction to hear cases involving matrimonial property.<sup>260</sup> In reality, such proceedings are now rarely commenced in the High Court.
- 561 The Property (Relationships) Act 1976 comes into force on 1 February 2002. That Act includes some new discretionary provisions for determining division of property and extends the jurisdiction of the Family Court to cover the property of de facto couples, including same-sex couples. The Family Court will have exclusive original jurisdiction for such matters.
- 562 With approximately 250 000 New Zealanders currently living in de facto relationships, including same-sex couples, there is expected to be a significant increase in the volume and complexity of relationship property proceedings. The Department for Courts has estimated that additional funding of \$749 000 will be needed in 2001/2002 and \$1 428 000 in 2002/2003 to deal with the increase in volume and complexity of the caseload.<sup>261</sup>

<sup>256</sup> *Justice Statistics 1990*, above n 229, 175. From 87 per cent in 1980 to 74 per cent in 1990.

<sup>257</sup> *Justice Statistics 1990*, above n 229. From 56 per cent in 1980 to 72 per cent in 1990.

<sup>258</sup> *Justice Statistics 1990*, above n 229, 175 and table 8.1.

<sup>259</sup> G Hall and A Lee, above n 62, 18.

<sup>260</sup> Matrimonial Property Act 1976, s 22.

<sup>261</sup> Department for Courts and 2001/02 Estimates Vote Courts, Report of the Law and Order Committee, 7. The figure being made up of costs for additional judges, increased departmental expenses and judicially ordered costs. Of the estimated funding of \$749 000, the Department for Courts received funding of \$306 000 in the 2001/2002 year. The drawdown of funding for the

- 563 It is predicted that, initially, the Property (Relationships) Act 1976 cases will consume substantial Court time until relevant legal precedents are developed.<sup>262</sup>

## DECREASE IN WORKLOAD

### **Paternity**

- 564 The Family Court has always had the power to make paternity orders.<sup>263</sup> Initially, a defended hearing was required to establish paternity. With the advent of DNA evidence of paternity, this is no longer necessary, therefore, these cases consume far less of the Court's time.

### **Child maintenance**

- 565 Prior to 1991, child maintenance had been awarded on an individual basis after a Family Court hearing.<sup>264</sup> Maintenance agreements could be registered with the Court and enforced as if they were a court order. With the introduction of the Child Support Act 1991, this disappeared in favour of payments calculated by the Child Support Agency of the Department of Inland Revenue. The Agency calculates the amount of child support a liable person has to pay according to a formula set in the Act. The Family Court role is reduced to a limited range of appeals and applications for departure orders.<sup>265</sup> Therefore, the number of child support matters before the Family Court has reduced dramatically. Figures prior to 1998 are limited,<sup>266</sup> but from that time there has been a reduction in the number of matters before the Family Court under the Child Support Act 1991. In 1998/1999 there were 414 applications lodged with the Family Court, by 2000/2001 this had almost halved to 258 applications.

### **Separation and divorce**

- 566 In 1980, divorce became obtainable on the single ground of two years living apart, no fault required by either party. This resulted in an initial increase in the number of marriage dissolutions. Marriage dissolutions were the single largest number of applications in the Family Court between 1981 and 1983.<sup>267</sup> In 1983, the number

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judges' salaries is dependent on the timing of the amendment to the number of judges under the District Courts Act 1947.

<sup>262</sup> Professor Mark Henaghan, University of Otago (comment made at the New Zealand Family Law Conference, Christchurch, 5 October 2001).

<sup>263</sup> Family Proceedings Act 1980.

<sup>264</sup> Contained in a now repealed version of s 101 of the Family Proceedings Act.

<sup>265</sup> Specifically, the jurisdiction of the Family Court regarding child maintenance is now confined to the following sections of the Child Support Act 1991: declarations in respect of step-parents: s 99; appeals from decisions of the Commissioner of Inland Revenue in respect of objections under Part VI of the Act: ss 100–103; applications for departure orders (from the set formula provided by the Agency): ss 104–107; applications for provision of child support in form of lump sum: ss 108–111; the discharge, suspension, revival, and variation of orders: s 112; and applications to set aside voluntary agreements: s 113.

<sup>266</sup> We do know that in 1990, 660 orders were made for child maintenance (*Justice Statistics 1990*, above n 229), therefore the number of applications between 1991 and 1998 is likely to have been substantially higher.

<sup>267</sup> *Justice Statistics 1990*, above n 229, 175.



of marriage dissolution orders fell back and subsequently declined until a slight rise in 1990.<sup>268</sup> When the new law came into effect in 1980, a short hearing in front of a judge was still required. In 1990, a dissolution order became available without the need for a hearing before a judge. The number of dissolution orders has remained relatively steady since 1990.

- 567 The 1980s also saw the decline of Family Court separation orders as applicants no longer saw a need for such orders.<sup>269</sup>

### **Spousal maintenance**

- 568 Prior to the introduction of the Family Proceedings Act 1980, spousal maintenance was dealt with under the Matrimonial Proceedings Act 1963. The introduction of the Domestic Purposes Benefit in 1973 saw a decrease in applications for spousal maintenance. There was a small rise in such applications after the Family Proceedings Act 1980, and then a decrease as the decade progressed.<sup>270</sup> During the 1990s, spousal maintenance applications in the Family Court virtually disappeared.<sup>271</sup>
- 569 After 1 February 2002, the Family Proceedings Amendment Act 2001 will expand the circumstances in which a Court may grant an order when determining an application for spousal maintenance. The Act will also allow for an application for maintenance by an ex de facto partner.<sup>272</sup> Therefore, a resurgence in spousal maintenance applications has been predicted. However, applications for spousal maintenance will still only be worth pursuing where the respondent spouse is relatively wealthy.

## **CHANGED PRACTICE AND PROCEDURES**

### **Caseflow management**

- 570 Across all the courts, including the Family Court, there has been a growing awareness of the desirability of caseflow management. Caseflow management has been defined as the co-ordination of court processes and resources to move cases efficiently from filing to disposition.<sup>273</sup>
- 571 There has been a constant and conscious effort to make procedures in the Family Court more efficient and cost-effective, both for the Court and for the client. Particular emphasis has been put on preventing unnecessary delay.
- 572 Formal caseflow management was first introduced in the Family Court in 1992. This led to the establishment of case management principles and guidelines.

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<sup>268</sup> *Justice Statistics 1990*, above n 229, 165. From 12 395, marriage dissolutions in 1982 dropped to 9750 in 1983 and to a further 8555 in 1989, then rose to 9036 in 1990.

<sup>269</sup> *Justice Statistics 1990*, above n 229, table 8.1 shows 582 orders in 1994 dropping to 154 in 1990.

<sup>270</sup> A Court of Appeal decision in 1983 confirmed the limitations on spousal maintenance and the restricted approach to “inability to meet reasonable needs”: *Slater v Slater* [1983] NZLR 166.

<sup>271</sup> In 1998/1999 year there were 20 s 67 applications, this increased to 27 in 1999/2000 and 48 in 2000/2001.

<sup>272</sup> Family Proceedings Act 1980, s 65(5), as amended.

<sup>273</sup> Maureen Solomon, *Achieving Caseflow Excellence Workshop: Principles and Practice for Effective Criminal Caseflow Management* (Department of Justice, Wellington, 1995).



The current more comprehensive “Family Court Caseflow Management Practice Note” came into force on 1 November 1998. This Practice Note sets out the case management principles and guidelines for the various applications that are filed in the Family Court.

- 573 The registrar’s list was first introduced in the Family Court in 1992.<sup>274</sup> A matter is placed in a registrar’s list in order to monitor progress by checking whether applications have been served, whether Court directions have been complied with, and to make standard directions. There is a saving in both judge and counsel time, as these matters were previously dealt with by a judge in Court with counsel appearing.<sup>275</sup> Counsel are not required to appear but can send requests and brief submissions by facsimile. Counsel are requested to consult with each other and file consent directions wherever possible.

### **Greater use of technology**

- 574 In 1980 we did not have word processors, facsimiles, cellphones, email, telephone conferencing or video conferencing.
- 575 These technological changes have created the possibility for easy and effective communication from a distance. Urgent applications can be sent to a central point to be actioned by a duty judge. Counsel can attend short hearings by telephone conference on such matters as directions. Evidence can be taken reasonably effectively at a distance by video conferencing. Warrants can be sent for action around the country instantly. Documents can be filed electronically and forms can be downloaded from the Internet. All these developments are now being used, although some areas of the country are using them with greater effect than others.
- 576 There is an increased expectation that responses can be actioned quickly.
- 577 Although in its infancy, some judges make use of video links for hearings.<sup>276</sup> This has the potential to save considerable time and expense.

### **Modernisation programme**

- 578 In 1996, the Department for Courts completed its first Strategic Plan, which set out the strategic direction of the Department for 1996–2000. The Strategic Plan outlined the Department’s intention to modernise the courts system in New Zealand. This process was named “The Modernisation Programme”.
- 579 The Modernisation Programme includes:
- completion of development and implementation of replacement information technology;
  - implementation of new processes and roles, including utilisation of caseflow management methods and new technology;
  - monitoring of the benefits of The Modernisation Programme projects; and
  - implementation of legislative changes affecting the operation of the courts.

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<sup>274</sup> The registrar’s list was initially only in three Courts as part of a pilot scheme led by the Carruthers Committee in 1992.

<sup>275</sup> Family Court Caseflow Management Practice Note, above n 139.

<sup>276</sup> For instance, Judge Doogue, an Auckland Family Court judge, has trialled videoconferencing for Mental Health hearings in North Shore Hospital. She advocates for such a facility within the Court precincts, suggesting that considerable time and cost savings would be made.

- 580 The planned completion date for The Modernisation Programme is March 2003. It aims to improve access to justice through the introduction of case management processes, which will facilitate more active management of cases by each court.
- 581 As part of The Modernisation Programme, the Department for Courts plans to implement a new case management computer system (CMS) from July 2002 for the family and civil jurisdictions. This system will enable the collection of information such as detail about the users of the Family Court, what applications and orders are being made, and the length of time between an application being filed and an order being made.<sup>277</sup>

### **Wellington Development Court**

- 582 When the Department for Courts undertook the programme of change outlined above, it developed a new “Operational Model” of how courts will operate in the future. In December 1999, the Operational Model was trialled in two courts (to the extent possible without the new computer system): the Wellington District Court and the Christchurch High Court. These were called the Development Courts. Their performance was monitored between December 1999 and May 2000.
- 583 The primary function of the Development Courts was to trial the effectiveness of the Operational Model and to provide a vehicle for organisational learning on how these changes could be implemented in all courts.
- 584 A review of these Courts concluded that in the civil and family jurisdictions of the Wellington Development Court, staff were able to absorb the change in roles and improve performance in each of the areas measured. Further, the introduction of the new processes brought about improved file management and case file preparation. The judiciary indicated an increased level of satisfaction with these aspects of the Development Court.<sup>278</sup>
- 585 Some of the improvements in terms of roles and processes learnt from the Wellington Development Court have already been rolled out to the Wellington regional courts.<sup>279</sup>

### **Joint protocol between Child, Youth and Family Services and the Family Court**

- 586 A joint protocol dated 1 July 2000 has been negotiated between the Department for Courts and the Department for Child, Youth and Family Services. It was made in an effort to overcome the difficulties experienced by the Court in generating a sufficient and timely response from the Service to referrals from the Court and in obtaining certain information and social worker reports under section 29 of the Guardianship Act. This protocol has been in force for over a year and is ongoing.<sup>280</sup>

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<sup>277</sup> See chapter 3, para 284 for further detail on CMS.

<sup>278</sup> *Wellington Development Court: Validation Report*, above n 202.

<sup>279</sup> A review of the Development Court has been carried out and a report produced for the senior Executive team of the Department and the Change Board.

<sup>280</sup> For detail on the Family Court Protocol see chapter 2, paras 251–257 of this paper.

## OTHER CHANGES

### Consolidated proceedings

- 587 Prior to 1999, there were conflicting Family Court decisions concerning the power of a Family Court judge to sit as a District Court judge and hear District Court proceedings consolidated with proceedings in the Family Court (such as constructive trust proceedings and matrimonial property proceedings). This was clarified in 1999 when the High Court held that the Family Court does have jurisdiction to exercise contemporaneously the jurisdiction conferred on the Family Court and the civil jurisdiction of the District Court.<sup>281</sup> A consequence of this is that more proceedings can be heard in the Family Court rather than consolidated in the High Court or separated between the Family Court and the District Court.

### Professional services ordered by the Family Court

- 588 Professional services ordered by the Family Court include specialist report writers, Family Court counsellors, and counsel for child. Costs for such services have increased dramatically between 1995/1996 and 2000/2001. The total cost of professional services increased from \$15 019 316 in 1995/1996 to \$27 206 322 in 2000/2001.<sup>282</sup>
- 589 We do not know why there has been such an increase and there is insufficient information to make any conclusions. Some of the increase may be attributable to the changes brought about by the Domestic Violence Act 1995. However, it is clear that the costs are increasing, and increasing significantly, and have the potential to increase further. For instance, with the implementation of the Property (Relationships) Act on 1 February 2002, it is estimated that for 2001/2002 there will be a \$45 000 increase in such professional services.<sup>283</sup>

### Counselling

- 590 The way Family Court counselling is set up has changed dramatically since the Court's inception.
- 591 Originally, the only approved organisation for providing counselling was the National Marriage Guidance Council. The growth in the number of counselling referrals (that is, 4000 in 1982 to 12 000 in 1988) has resulted in an expansion in the number of counsellors. The Department for Courts now contracts counselling

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<sup>281</sup> *Singh v Kaur* (1999) 18 FRNZ 578; [2000] NZFLR 145.

<sup>282</sup> All amounts provided include GST.

For legal counsel, costs have risen from \$9 039 673 in 1995/1996 to \$18 196 411 in 2000/2001. This includes counsel for child, counsel to assist the court, Hague Convention costs, Personal Property Protection Rights costs, appointment of counsel for the child/young person by the court in care and protection cases, counsel to assist the court in care and protection cases.

For specialists reports under s 29A of the Guardianship Act 1968 and s 178 of the Children, Young Persons, and Their Families Act 1989, the cost was \$2 510 332 in 1995/1996 growing to \$4 364 184 in 2000/2001.

For s 9 and s 10 counselling, the cost increase has not been so dramatic with the cost being \$3 469 359 in 1995/1996 and \$4 645 727 in 2000/2001.

<sup>283</sup> Department for Courts, above n 261, 3.

services from many individuals and community agencies. Relationship Services continues to be the largest agency to be contracted to provide conciliation services.

- 592 Initially counsellors volunteered their time. Counsellors are now paid.
- 593 Under the original section 9 of the Family Proceedings Act 1980, counselling was only available to married couples. Now it is available to couples in any relationship. There continues to be limited scope for parties other than the couple to take part in counselling. Family members including children, step-parents or new partners may only attend if the judge makes a direction to that effect.<sup>284</sup>
- 594 A joint working party was established in 1999 to develop the requirements for the appointment of Family Court counsellors.<sup>285</sup> For the first time, a practice note (which took effect from 1 September 2001) set out the requirements and recommended procedures for the appointment of individual counsellors to the Family Court list.

### **Administration cost**

- 595 The cost of salaries and wages, administration and rent for Family Courts in the last two years is \$7 520 691 and \$11 659 923 respectively, a cost increase of 64.5 per cent.<sup>286</sup>

### **Family Court co-ordinator**

- 596 Originally named counselling supervisors, then counselling co-ordinators, these officers of the Court were originally involved in education projects and some counselling as well as co-ordinating and making referrals to counselling and report writers. However, as the volume of work increased (particularly with the Domestic Violence Act), their counselling and education role decreased. The role is now focussed on administration. Their key task now is to make referrals and to co-ordinate and direct members of the public to the proper agencies.<sup>287</sup>
- 597 The number of co-ordinators has increased over time. Initially there were only eight co-ordinators, growing to 22 in 19 courts by 1984. Now there are 28 co-ordinators in 25 of the Family Courts.<sup>288</sup>

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<sup>284</sup> Section 19(1)(b) of the Family Proceedings Act 1980 is often used to justify the inclusion of children or others in the conciliation process.

<sup>285</sup> The Principal Family Court Judge and the Department for Courts established the joint working party with representatives from the Department, the New Zealand Association of Counsellors, and the Aoteroa New Zealand Association of Social Workers.

<sup>286</sup> For the years to 30 June 2000 and 30 June 2001. Information provided by Department for Courts to the Law Commission on request. These figures include all expenditure relating to Family Output Class 4.4 per Purchase Agreement. This includes all Department for Courts staff that are involved in Family Court work (includes National Office and courts who have coded staff time as part of the administration responsibility centres).

<sup>287</sup> For detail on the role of Court co-ordinators see chapter 2 paras 99–106 of this paper.

<sup>288</sup> J Leibrich and S Holm *The Family Court: A Discussion Paper* (Department of Justice, Wellington, 1984), 22.

## Judiciary

- 598 When Family Courts first opened in 1981, there were 22 judges appointed with Family Court warrants. In 1984, this had only grown to 24 in 60 Family Courts.<sup>289</sup> There are now 36 District Court judges and 5 acting judges<sup>290</sup> who have a warrant to sit in the Family Court.

## CONCLUSION

- 599 This chapter has described the history of the Family Court and, in general terms, changes to its jurisdiction and processes.
- 600 In summary, the key changes in jurisdiction since the Court's inception are that the Family Court now has, in addition to its original jurisdiction over divorce, maintenance, custody and access, matrimonial property and adoption, a raft of new jurisdiction including child abuse and neglect, testamentary promises, family protection, mental health, de facto relationship property, protection of personal property, and domestic violence.
- 601 Although the available statistics do not provide a complete picture,<sup>291</sup> by looking at the increase in number of applications to the Family Court, it is clear that, despite some areas of reduction in jurisdiction, the overall workload of the Court has increased greatly since its inception.<sup>292</sup> Further, anecdotal evidence suggests cases in the Family Court are longer and more complex than previously.
- 602 As can be seen with the Property (Relationships) Act 1976, the Family Court's jurisdiction continues to grow. Future extensions of jurisdiction are likely.<sup>293</sup>
- 603 The increasing breadth of work coming into the Family Court has increased the overall work load, putting strains on its efficiency and resources. This has been recognised and there has been a conscious effort to review and improve its practices.

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<sup>289</sup> *The Family Court: A Discussion Paper*, above n 288, 22.

<sup>290</sup> See chapter 2 para 87.

<sup>291</sup> For criticism of lack of data see chapter 3.

<sup>292</sup> Although we do not know the number of applications lodged in the Family Court between the beginning of 1991 and June 1998, in 1988 there were 15 000 applications in the Family Court, and approximately 24 500 in 1990 (*Justice Statistics 1990*, above n 229). Further, between July 1998 and June 2001 applications increased from 56 537 to 62 647. This is a 14.9 per cent increase in the number of applications over a three year period (Family Court Database, Department for Courts).

<sup>293</sup> M McDowell and D Webb *The New Zealand Legal System: Structures, Processes and Legal Theory* (2 ed, Butterworths, Wellington, 1998) 256, para 6.46.

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## BACKGROUND 2

### The social context: a statistical overview

#### INTRODUCTION

604 **S**INCE THE FAMILY COURT'S inception in 1980, New Zealand has undergone dramatic social and economic restructuring. There have been major changes in the economy, the labour market, the population, income support programmes and in family composition. Our nation is more socially and culturally diverse than 20 years ago.

605 The question to consider in relation to this chapter is:

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**Q95** How has social and economic change affected family members and how has that impacted on the work of the Family Court?

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606 Some key social and economic changes to New Zealand society are reviewed in an attempt to answer questions such as:

- How has the structure and composition of New Zealand households changed since 1980?
- What are the trends that have shaped family relationships since 1980?
- How many children make up our population compared with 1980? What is the ethnicity and age of these children? What is the economic status of these children?
- How has legal aid changed since 1980?

607 We hope that in answering these questions, an understanding may be gained as to why the workload and complexity of cases in the Family Court has increased. The social trends also indicate issues that will be confronted by the Family Court in the near future.

#### POPULATION OVERVIEW

608 The size and composition of the New Zealand population has changed since the Family Court was established. At the 1981 Census, the population was just over 3 million living in 1 million households.<sup>294</sup> Twenty years later New Zealand has 850 000 more people in 250 000 more households. The proportion of elderly in the

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<sup>294</sup> Department of Statistics *New Zealand Census of Population and Dwellings 1981 vol 10 Households and Families* (Wellington, 1984) table 1.

population increased during that time and the population's ethnic composition also changed.<sup>295</sup>

### **Family relationships and households**

- 609 The New Zealand family is changing: family sizes are smaller and childbearing is being deferred; marriage is being delayed and is frequently preceded by a de facto relationship; separation and divorce have increased; and the population is ageing. Increasingly people are living alone or as a couple without dependants. One parent, especially among Māori, is more often rearing children. The extended family is an important feature for Māori and peoples of the Pacific Islands. Family structures are more complex and uncertain than 30 years ago. Today, people live complex lives with changes in family formation, rather than in static traditional or nuclear families.

#### *Household composition*

- 610 Between 1981 and 1991 there was a reduction in the average number of adults and children per household. The average household size reduced from 3.0 to 2.7 persons per household. Since 1991, household size has changed little.<sup>296</sup>
- 611 During the 1990s "One family only" households remained predominant; however, the share of households in this category fell slightly towards the end of the decade.<sup>297</sup> The largest change between 1991 and 1996 can be seen in households with two or more families (with or without other people). In 1991 there were 19 818 such households, and in 1996 this had risen to 32 193 households, an increase of 62.4 per cent.<sup>298</sup> The provisional count for households with two or more families for the 2001 Census is 67 068.
- 612 Significantly, Pacific Islands Peoples and Māori are more likely than others to live in extended family households. For example, in 1996 one in five Māori (19 per cent) lived in extended family households.

#### *Two-parent households*

- 613 Most children live in two-parent households but the percentage of households of this type has been declining.

#### *Blended families*

- 614 An increasing number of families are made up of parents who have separated and gone into another relationship taking their children with them, and in many cases, gaining stepchildren in the process. Such family formations are complex and may have different needs from nuclear families.

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<sup>295</sup> Statistics New Zealand *Hot Off the Press – 2001 Census of Population and Dwellings – Provisional Results* (2001) <<http://www.stats.govt.nz>>.

<sup>296</sup> M Mowbray *Distributions and Disparity: New Zealand Household Incomes* (Ministry of Social Policy, Wellington, 2001) 16.

<sup>297</sup> "One family only" households fell from 65.9 per cent in 1991 to 63.0 per cent in 1996 – Statistics New Zealand *New Zealand Official Yearbook* 2000, 115.

<sup>298</sup> *New Zealand Official Yearbook* 2000, above n 297, 115.



### *One-parent households*

- 615 The number of one-parent families has grown rapidly over recent years. In 1996, 189 900 children were living in one-parent families. This is an increase of 57 per cent since 1986.
- 616 The large increase in one-parent families is some cause for concern as children reared in one-parent families have been found to have higher levels of exposure to social and economic disadvantage, family dysfunction, stress, and impaired or compromised parenting. However, these factors are often present prior to parental separation rather than being a consequence of separation.<sup>299</sup>
- 617 Māori children and to a lesser extent Pacific Islands children are more likely than children from other ethnic groups to live with only one parent. From 1981 to 1991, the proportion of Māori children living in one-parent families doubled from 19 per cent to 41 per cent. In 1996, the figure was still around 41 per cent. This compares with 29 per cent of Pacific Islands children, 17 per cent of European children, and 12 per cent of Asian children.<sup>300</sup>
- 618 This has important implications for the welfare of Māori children, given that sole parents tend to be disadvantaged in terms of employment, income, education and housing when compared with partnered parents.
- 619 Despite the increase in the number of children entering one-parent families at birth, parental separation is still the major route into sole parenthood. There is no accurate measure of the extent to which couples with dependent children separate. Divorce rates are a poor indicator because they exclude cohabiting couples and those who separate informally. In addition, more than half of divorcing couples have no children under 18. There is some evidence of the relative size of this group from benefit statistics: sole mothers who were previously living with a spouse or partner made up 66 per cent of all sole mothers on the domestic purposes benefit at the end of June 1998.<sup>301</sup>

### **Household income**

- 620 Poverty can exacerbate problems, social or family disadvantage, and create stresses on family relationships. Looking at household income and workforce statistics is a useful indicator of families' economic circumstances.
- 621 There has been a considerable increase in couples with both partners working, many on a full-time basis, alongside a rise in families in which neither party is working. The single breadwinner family has declined from more than one-third to one-quarter of families in the period between 1986 and 1996.<sup>302</sup> In 1996, 23 per cent of all children did not have a parent in paid work.<sup>303</sup>

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<sup>299</sup> See DM Fergusson "The Christchurch Health and Development Study: An Overview and Some Key Findings" (1988) 10 *Social Policy Journal of New Zealand* 158, 171. Collectively, the findings suggest that single parenthood, in the absence of social or family disadvantage, is not a factor that makes a major contribution to childhood risk.

<sup>300</sup> *Social Environment Scan* (Department of Social Welfare, Information and Analysis Group, Wellington, June 1999) 44.

<sup>301</sup> *Social Environment Scan*, above n 300, 50.

<sup>302</sup> *New Zealand Official Yearbook* 2000, above n 297, 314.

<sup>303</sup> *Statistics New Zealand Key Statistics* (Wellington, June 1996) 8.

- 622 Income inequality has increased overall. Between 1982 and 1998, the gap between high- and low-income households widened by 17 per cent.<sup>304</sup> This suggests an increasing divergence between those who can command the available jobs and others who are marginalised and excluded. New Zealand's average household income has dropped by nearly 10 per cent since 1982.

### *Changes in real disposable income for households with children*

- 623 Households with dependent children have lower equivalent incomes, on average, than those without children. Although households with two parents and children had a mean disposable income in 1998 that was between 10 per cent and 15 per cent higher in real terms than in 1982,<sup>305</sup> the income gap between two-parent households and other parent households has widened.<sup>306</sup> Households comprising three or more adults with children had mean disposable incomes in 1998 that were, on average, still 8 per cent below their 1982 levels.<sup>307</sup>
- 624 Over the last decade, the most striking trend in the living standards of households with children is that for one-parent households. Such households' real disposable income declined steadily between 1989 and 1992 and has remained at a relatively low level of around \$19 000 per annum.<sup>308</sup>
- 625 A number of factors could account for the decline in the income of one-parent households after 1989. Firstly, in 1989 the benefit rate for sole parents with one child was increased by less than the rise in price inflation. Secondly, there was a decline in the employment rates of sole parents between 1986 and 1991, and domestic purposes benefit numbers increased by over 55 per cent over that period. Thirdly, the real value of family assistance declined over the late 1980s and early 1990s. Family support was not increased between 1986 and 1993.<sup>309</sup>

### *Changing characteristics of low-income households*

- 626 Over the decade to 1996, there was a change in the composition of households that fall into the bottom fifth of income distribution (the lowest household income quintile group). In the late 1980s, superannuitant households made up nearly half of all households in the lowest income quintile group. In the early 1990s, other types of households began to replace them. One-parent households rose from 10 to 22 per cent of the lowest quintile group between 1990 and 1992.<sup>310</sup>
- 627 Over the same period, households with dependent children rose from 38 to 56 per cent of households in the lowest quintile group; by 1994 they had increased further to 61 per cent. In the following two years, households with children declined as a proportion of households in the lowest income quintile, but their representation remained relatively high (48 per cent in 1996 compared with 38 per cent in 1990). Moreover, children remained over-represented in the lowest income quintile as

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<sup>304</sup> *Distributions and Disparity*, above n 296, 53.

<sup>305</sup> *Distributions and Disparity*, above n 296, 53.

<sup>306</sup> *Distributions and Disparity*, above n 296, 17.

<sup>307</sup> *Distributions and Disparity*, above n 296, 53.

<sup>308</sup> *Social Environment Scan*, above n 300, 17.

<sup>309</sup> *Social Environment Scan*, above n 300, 17.

<sup>310</sup> *Social Environment Scan*, above n 300, 20.

only 40 per cent of households contained children in 1996. Thirty-three per cent of the child population lived in the lowest income quintile of households in the mid-1990s. While this proportion had dropped back to the level of the late-1980s by 1998 (24 per cent), the overall pattern remained unchanged.

- 628 One-parent households remained substantially over-represented in the lowest income quintile group. In the year to March 1996, one-parent households made up 7 per cent of all households in this group.<sup>311</sup>

### *Ethnic disparities in household income*

- 629 Ethnic disparities in the household income distribution increased in the early 1990s. In 1994, Māori representation in the bottom income group had almost trebled to 24 per cent compared with 9 per cent in 1988. Pacific Islands Peoples representation in the bottom income group for the same period had doubled from 4 per cent to 8 per cent. In the following two years, Māori and Pacific Islands representation in the lowest income group fell, but was still higher than their representation among all households.<sup>312</sup>

### *Workforce status*

- 630 Unemployment climbed rapidly and peaked at 11.1 per cent of the labour force in 1992 before declining in the mid-1990s to around 6 per cent. Following another lower peak of 7.6 per cent in 1998 unemployment is again declining to the level of the mid-1990s.<sup>313</sup>
- 631 Unemployment varies widely by ethnic group. In June 1998, unemployment rates were 5.5 per cent for European/Pākehā, 17.8 per cent for Māori, 15.8 per cent for Pacific Islands Peoples and 15.6 per cent for other ethnic groups. In part, these differences are linked to regional and local variations in employment and the concentration of the Māori and Pacific Islands populations in areas with high unemployment. They are also associated with differences in qualification levels between ethnic groups and the relative youthfulness of the Māori and Pacific Islands populations.<sup>314</sup>
- 632 The unemployment rate for Māori increased from 14 592 (14 per cent of the adult Māori population) in 1981 to 37 050 (24 per cent) in 1991 and 37 302 in 1996.<sup>315</sup>
- 633 In 1994, the Prime Ministerial Task Force on Employment identified that the stress and disruptiveness of even a short period of unemployment can cause immense strain on family relationships that can often result in break-up.<sup>316</sup>

<sup>311</sup> *Social Environment Scan*, above n 300, 20.

<sup>312</sup> *Social Environment Scan*, above n 300, 21.

<sup>313</sup> *New Zealand Official Yearbook 2000*, above n 297, 313.

<sup>314</sup> *Social Environment Scan*, above n 300, 28.

<sup>315</sup> Department of Statistics *New Zealand Census of Population and Dwellings 1981 vol 8A Maori Population and Dwellings* (Wellington, 1982) 67, table 14.

Department of Statistics *New Zealand Census of Population and Dwellings 1991: Maori Population and Dwellings* (Wellington, 1992) 25, table 11.

Statistics New Zealand *1996 New Zealand Census of Population and Dwellings: Maori* (Wellington, 1997) 110, table 33.

<sup>316</sup> Prime Ministerial Task Force on Employment *Employment: The Issues* (Wellington, 1994).

- 634 Given that Māori have been disproportionately affected by unemployment, it follows there will be disproportionate stress placed on families in this group.

### **Decreasing marriage rate and increasing rate of cohabitation**

- 635 Since de facto relationship status was first included in the 1981 Census, the rate of marriage has continued to decline and the number of people living in de facto relationships has increased.<sup>317</sup> Along with the decline in marriage, anecdotal evidence suggests a higher rate of marital separation.<sup>318</sup>
- 636 Approximately 250 000 New Zealanders, including same-sex couples, now live in a de facto relationship. At the 1996 Census, 236 394 people were living in de facto relationships, an increase of 46.1 per cent since 1991, and an increase of over 100 per cent since the 1981 Census.<sup>319</sup>
- 637 De facto unions are more common than marriage among young New Zealanders. Among women aged 20 to 24 years, 62 per cent of those who were in partnerships at the 1996 Census were in a de facto union. For men, the corresponding figure was 73 per cent.<sup>320</sup> The proportion of children from two-parent families whose parents are de facto couples increased from 9 to 14 per cent between 1991 and 1996. De facto couples tend to be younger than married couples and have younger children.<sup>321</sup>
- 638 Cohabitation is associated with higher levels of relationship breakdown than legal marriage,<sup>322</sup> and the increase is likely to have influenced the growth of sole parenthood over time. Furthermore, as cohabiting couples with children tend to have, on average, a more disadvantaged socio-economic profile than their married counterparts,<sup>323</sup> they may be more likely to be economically disadvantaged when their relationships breakdown.

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<sup>317</sup> The marriage rate dropped from 23 485 marriages in 1988 to 20 135 marriages in 1998. *New Zealand Official Yearbook 2000*, above n 297, 121.

<sup>318</sup> Note that in Background 1, para 566, of this paper marriage dissolutions and separations have not increased; we do not know how many couples have separated without court orders and/or formal agreement.

<sup>319</sup> Department of Statistics *New Zealand Census of Population and Dwellings 1981 vol 2 Ages, Marital Status and Fertility* (Wellington, 1982) 123, table 15. There were 87 960 people living in a de facto relationship at the time of the 1981 Census.

Department of Statistics *New Zealand Census of Population and Dwellings 1991: National Summary* (Wellington, 1992) 32, table 18. There were 161 853 people living in a de facto relationship at the time of the 1991 Census.

Statistics New Zealand *1996 New Zealand Census of Population and Dwellings: National Summary* (Wellington, 1997) 52, table 11.

<sup>320</sup> 1996 Census, above n 319, 52, table 11.

<sup>321</sup> Statistics New Zealand *1996 New Zealand Census of Populations and Dwellings: Families and Households* (Wellington, 1998) 17.

<sup>322</sup> Suggested by results in the *Christchurch Child Health and Development Study* (Fergusson and others, Christchurch Child Development Study, Christchurch, 1990). However, no national statistics are available to confirm this, as couples can now separate with no formal legal agreement and termination of de facto unions is statistically unrecorded. Therefore, there is no accurate measure of the extent to which couples, married or unmarried, with dependent children separate.

<sup>323</sup> *Social Environment Scan*, above n 300, 62, citing Statistics New Zealand *Families and Households New Zealand Now* series (Wellington, 1994).

- 639 Professor Carol Smart, an academic expert on family relationships, suggests there has been a shift in emphasis away from marriage and legally defined adult relationships towards family policy and law that is much more focussed on parenthood. Further, that individuals are less interested in the status (that is, being married) than the quality of their relationships. This has meant that relationships become less stable. Her suggestions are consistent with the dramatic shift from marriage to de facto relationships and with the increasing number of sole parent households.<sup>324</sup>

## Children

- 640 The status of children continues to change.<sup>325</sup> New Zealand society and legislation now places a greater emphasis on children's rights than 30 years ago. Recent New Zealand legislation concerning families (such as the Children, Young Persons, and Their Families Act 1989) incorporates concepts of children's rights and recognises diverse family forms. In 1993, New Zealand signed up to the United Nations Convention on the rights of the Child (UNCROC). This set out agreed rights, protections, entitlements and freedoms for children. Children are increasingly being treated as citizens in their own right.
- 641 Children now make up 22.9 per cent of all New Zealanders compared with 23.1 per cent in 1991 and 24.5 per cent in 1981.<sup>326</sup> The increase in the number of children living in the lowest income quintile contrasts with the decrease in the child population in New Zealand.
- 642 Changing parental work patterns are transforming family life. Growing numbers of young children are being raised by working parents whose earnings are inadequate to lift their families out of poverty, whose work entails long and non-standard hours, and whose economic needs require an early return to work after the birth of the baby. The consequences for young children of the changing context of parental employment is likely to affect the parenting that those children receive and the quality of the caregiving they experience when they are not with their parents.<sup>327</sup>

## Fertility patterns

- 643 New Zealanders are having children later in life. The mothers of children born in the 1990s are older, on average, than those born two or three decades ago. The average age of New Zealand women giving birth is now 29.4 years, compared with 25.4 years in 1975.

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<sup>324</sup> Smart, above n 12.

<sup>325</sup> Unless otherwise specified, references in this chapter to children are children under 15 years of age.

<sup>326</sup> Department of Statistics *New Zealand Census of Population and Dwellings 1981* vol 2 *Ages, Marital Status and Fertility* (Wellington, 1982) 8, table 1.

Statistics New Zealand *1996 New Zealand Census of Population and Dwellings: National Summary* (Wellington, 1997) 22, table 2.

<sup>327</sup> Committee on Integrating the Science of Early Childhood Development, National Research Council and Institute of Medicine *From Neurons to Neighbourhood: The Science of Early Childhood Development* (National Academy Press, Washington DC, 2000) 9.

644 In the late 1980s, teenage fertility rates increased slightly to reach 35 per 1000 in 1990. However, this rise was not sustained. There was a slight increase between 1994 and 1995, but the rate has since stabilised at a level slightly higher than it was in 1986.<sup>328</sup>

645 Māori women tend to commence childbearing at an earlier age than non-Māori (in their mid teens and early twenties).<sup>329</sup>

### Men

646 In general, fathers are more involved in raising their children than they were 30 years ago.

647 As in the 1980s, today's legislation requires fathers to maintain their obligations to their children regardless of the level of commitment they feel. However, there has been a recent rise in protestations from men's groups, particularly in relation to financial matters consequent on family breakdown, and more recently in relation to involvement in the care of their children after relationships break down.

648 It has been said that the fathers' movement has arisen as a result of a perceived (and real) incremental loss of power in the private sphere that was not widely felt until approximately the 1980s.<sup>330</sup>

### Women

649 Average incomes for households in which all the adults were women were consistently lower than the average incomes of households in which all the adults were men, and lower than households with mixed adult gender, regardless of whether there were children or dependent young people in the household. This gap widened during the 1990s.<sup>331</sup> Households in which all the adults are female are more likely to contain children.<sup>332</sup>

650 In 1988, female sole-parents had a mean income of 87 per cent of the male sole-parents' mean income, but the gap widened to a female-to-male income ratio of 57 per cent in 1993 which rose slightly to 62 per cent by 1998.<sup>333</sup>

651 Changing attitudes and social pressures have led women to participate increasingly in the workforce. Despite women's increasing role in the labour market, they are usually still the primary caregivers and more likely to work part-time than men.

### Literacy

652 The 1996 International Adult Literacy Survey said one-in-five New Zealanders have very poor literacy skills.<sup>334</sup> The majority of Māori, Pacific Islands Peoples

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<sup>328</sup> *The Social Report 2001*, above n 185, 24.

<sup>329</sup> Statistics New Zealand 1996 *New Zealand Census of Population and Dwellings: Māori* (Wellington, 1997) 17.

<sup>330</sup> Smart, above n 12.

<sup>331</sup> *Distributions and Disparity*, above n 296, 9.

<sup>332</sup> *Distributions and Disparity*, above n 296, 28.

<sup>333</sup> *Distributions and Disparity*, above n 296, 28.

<sup>334</sup> The methodology used to assess skill and level is explained in *The Adult Literacy Strategy 2001* (Ministry of Education, Wellington, 2001) 22.



and those from other ethnic minority groups are functioning below the level of competence in literacy required to meet the demands of everyday life effectively.

## **Ethnicity**

- 653 New Zealand is more ethnically diverse than 30 years ago and population projections predict an even greater growth of ethnic diversity as this century progresses.<sup>335</sup>
- 654 The dominant European-only group declined from 82 per cent to 75 per cent between 1986 and 1996. In the 1996 Census, 15 per cent of the population identified with the Māori ethnic group compared with 12.5 in the 1981 Census,<sup>336</sup> 6 per cent with Pacific Islands ethnic groups, and 5 per cent belonged to Asian ethnic groups. Ethnic diversity is greatest among young New Zealanders. In 1996, 24 per cent of children under 15 were identified as Māori, 10 per cent Pacific Islands and 6 per cent Asian. The ethnic diversity of the population will continue to grow because of the younger age structures and faster growth of the non-European ethnic groups.<sup>337</sup>

## **Māori**

- 655 The Māori population is markedly younger than the national population, with greater proportions of children and young dependants. In 1996, children under 15 made up 37 per cent of the Māori population,<sup>338</sup> compared with 23 per cent of the total population.
- 656 Since the 1940s, the Māori population has been growing at a faster pace than the non-Māori population. In 1981, there were approximately 385 224 who identified themselves as Māori, this increased to 524 031 in 1996, an increase of 22 per cent.<sup>339</sup> The Māori population continues to grow and is projected to reach one million by the middle of this century (over 20 per cent of the total population).<sup>340</sup>
- 657 Throughout the 1980s, and up to 1998, households with adult Māori members tended to have below-average incomes. Such households tended to suffer a particularly large fall in income through the late 1980s to a low point for incomes between 1992 and 1994 and to become increasingly over-represented at the bottom of the income distribution at that time. The position of these households has improved again through to 1998, with a return to income levels nearing those of the late 1980s.

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<sup>335</sup> *New Zealand Official Yearbook 2000*, above n 297.

<sup>336</sup> This figure includes those who identify with other ethnic groups as well as Māori.

<sup>337</sup> *Social Environment Scan*, above n 300, 5.

<sup>338</sup> Statistics New Zealand 1996 *New Zealand Census of Population and Dwellings: Māori* (Wellington, 1997) 25, table 4.

<sup>339</sup> Statistics New Zealand 1996 *New Zealand Census of Population and Dwellings: Māori* (Wellington, 1997) 21, table 1.

<sup>340</sup> Statistics New Zealand *Hot Off the Press – Maori Population Projections* <<http://www.stats.govt.nz>>.



## English-language ability

- 658 At the 1996 Census, 63 681 people over four years of age specified that they did not speak English.<sup>341</sup> This figure includes those who cannot speak at all as well as those who can speak a language other than English. With New Zealand's increasing ethnic diversity, the number of people who are not fluent in English is likely to grow.

## Changes in the age structure of the population

- 659 Like many other developed countries, New Zealand's population continues to age. This is attributed to declining birth rates and improvements in life expectancy in recent years.
- 660 The child population is ageing as the relatively large number of children born in the late 1980s and early 1990s move out of middle childhood. Children under 15 years are a declining proportion of the population, having fallen from 30 per cent to 23 per cent over the past 20 years.<sup>342</sup> As at 31 March 1991, the estimated population under 15 years was 801 550. As at 31 March 2001, the provisional estimate for the same group was 873 180.<sup>343</sup>
- 661 Growth in the prime working ages of 25–54 is also slowing.
- 662 The age distribution of the main ethnic groups in New Zealand varies widely with Māori and Pacific Islands ethnic groups having much younger populations than those whose ethnic group is Māori only. Over half of all Māori and Pacific Islands Peoples are aged less than 25 years, compared with a third of solely European New Zealanders.<sup>344</sup>

## Disability

- 663 One in five New Zealanders has some form of disability (namely, a long-term limitation in activity resulting from a medical condition or health problem) with the numbers of those under 20 with a disability reducing from 1 153 233 (37 per cent of the total population) in 1981 to 1 095 057 (30 per cent) in 1996, while those aged over 60 with a disability increased from 436 140 (14 per cent) to 557 900 (15 per cent).<sup>345</sup>
- 664 There are variations in the incidence of disabilities among ethnic groups. Māori have higher rates of psychiatric or psychological disability compared with Pākehā, while Pākehā have the highest rates of disability overall.<sup>346</sup>
- 665 Income levels for people with disabilities are lower than for those without disabilities. Income levels also vary with disability type. Those with intellectual and psychiatric disabilities have lower levels of income than do those with sensory disabilities.<sup>347</sup>

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<sup>341</sup> Statistics New Zealand *1996 New Zealand Census of Population and Dwellings: National Summary*, (Wellington, 1997) 50.

<sup>342</sup> *Social Environment Scan*, above n 300, 7.

<sup>343</sup> Statistics New Zealand *National Population Estimates: March 2001 Quarter* (Wellington, 2001).

<sup>344</sup> *Social Environment Scan*, above n 300, 10.

<sup>345</sup> Statistics New Zealand *The 1996 Household Disability Survey* (Wellington, 1996).

<sup>346</sup> *The 1996 Household Disability Survey*, above n 345.

<sup>347</sup> *The 1996 Household Disability Survey*, above n 345.

## LEGAL AID<sup>348</sup>

- 666 With the growing disparity of incomes, the drop in average household income, and the greater number of one-parent families in the lowest quintile income group, an increased demand on legal aid could be expected. However, this does not appear to be the case.
- 667 In the past few years, the total number of legal aid grants made each year in Family Court matters has steadily decreased from 24 646 in 1998/1999, 22 053 in 1999/2000 to 19 977 in 2000/2001.<sup>349</sup>
- 668 Legal aid expenditure on Family Court matters has also decreased in the past few years: in 1998/1999 expenditure was \$39 612 000; in 1999/2000, it was \$34 855 000; and in 2000/2001, \$33 655 000.
- 669 Up until 1998/1999 there was a steady increase in both legal aid grants and legal aid expenditure for Family Court matters.
- 670 Under the original regime, many grants for legal aid were open-ended. Over the past 20 years, there have been changes in the administration of legal aid, and stricter controls and restrictions have been imposed on legal aid applicants and their lawyers. This may explain why there has been a slight but steady decrease in the past three years in the numbers of applications and the cost of legal aid granted.
- 671 A substantial proportion of both applications and grants for legal aid in the Family Court are for custody and access. In the last three years, custody and access applications and grants have counted for at least 47 per cent of the total number of applications and grants in the Family Court. As with the overall number of applications and grants in the Family Court, the number of applications and grants for custody and access matters has also decreased in the last three years.<sup>350</sup>
- 672 However, expenditure for custody and access cases has risen steadily in the past three years, from \$16 474 489 in 1998/1999 to \$21 416 495 in 2000/2001. Therefore, although the number of legally aided custody and access cases has declined, the average legal aid cost of each custody and access case has increased.
- 673 Another area where there has been a steady decrease in legal aid applications and grants is in domestic violence matters.<sup>351</sup> The cost of such grants has also decreased.
- 674 The average cost of legal aid for a Family Court matter does vary between regions: however, in the past three years the average cost is approximately \$1500–1700. This is substantially less than the cost of the average civil (non-family) matter of \$2786.<sup>352</sup>

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<sup>348</sup> For detail on the current requirements for Legal Aid see chapter 2, para 266 of this paper.

<sup>349</sup> Legal Services Agency, figures sent by email to the Law Commission, 20 September 2001.

<sup>350</sup> In 1998/1999 there were 11 941 applications and 11 546 grants, and in 1999/2000 there were 10 333 applications and 10 944 grants, and in 2000/2001 there were 10 411 applications and 9834 grants.

<sup>351</sup> 6240 applications and 6048 grants in 1998/1999, 5036 and 4892 grants in 1999/2000, and 4797 applications and 4555 grants in 2000/2001.

<sup>352</sup> Legal Services Board *Report of the Legal Services Board for the Year Ended 30 June 2000* (Wellington, 2000) 44.

- 675 With the introduction of the Property (Relationships) Act 1976, it is possible that the cost of legal aid in the Family Court will rise significantly, especially in the initial years as legal precedents come to be set. The Executive Director of the Legal Services Board in 2000 estimated an initial rise of between \$3–5 million.<sup>353</sup>

## CONCLUSION

- 676 There are a number of implications for the Family Court arising out of the changing social context.
- 677 As more people separate, re-partner and live as blended families, the opportunities for disputes increase, as does the complexity of those disputes.
- 678 Much of the business of the Family Court is concerned with children (custody, access, and care and protection). As around 25 per cent of children live in the lowest income quintile of households, a large number of children who come to the notice of the Family Court are likely to come from low-income households. Poverty not only tends to exacerbate problems in families, it also reduces options for change and moving on. Cases in the Family Court system can be predicted to become more prolonged and difficult to resolve.
- 679 The increase in the Māori population will result in a greater demand for counsellors, mediators and report writers who have an understanding of tikanga Māori. As the Māori population is younger, there will be a cohort of younger Māori adults moving into the stage of having relationship break-ups and children. This is likely to result in a greater percentage of the Māori population being involved with the Family Court than is indicated by the number of Māori as a percentage of the total population.
- 680 The number of children living in poverty, the drop in average household incomes, and the declining income for one-parent households, indicate there may be greater pressure on legal aid and fewer opportunities for the Court to pass on the cost of report writers and counsel for child to parents.
- 681 The increasing gap between high- and low-income households has created clear distinctions in the socio-economic status of families living in different areas. The catchment areas for different Courts, especially in large urban centres, are likely to create different types of caseloads. Courts in different areas may need staff with particular skills that reflect the needs of the local population.
- 682 The increasing ethnic diversity of immigrant populations will mean a demand for interpreters and referral services that have an understanding of, and an ability to work with, people from other cultures.
- 683 The statistics indicating poor literacy skills for one-fifth of the population have implications for the way information on the Family Court or on parenting plans and such like is made available.

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<sup>353</sup> Legal Services Board, above n 352, 33.

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## BACKGROUND 3

### Stages in the court dispute resolution process

#### INTRODUCTION

- 684 **T**HE FAMILY COURT has a very broad jurisdiction covering exclusively statutory law. The original idea for the Family Court envisaged a conciliation service that would provide a preliminary opportunity for resolution of a dispute before it entered the court system proper. At the same time as the establishment of the Family Court, new legislation in relation to divorce was also introduced. All matters coming to the Family Court under the Family Proceedings Act 1980 and the Guardianship Act 1968 were to be governed by the procedures set out in the Family Proceedings Act and the Family Proceedings Rules. These provided for counselling and the judge-led mediation conference.
- 685 Since its inception, the jurisdiction of the Family Court has been considerably broadened, but the availability of conciliation procedures, counselling and judge-led mediation has not. Therefore, couples can request counselling, or couples or parents can be referred to counselling, only if they are making applications under the Family Proceedings Act or the Guardianship Act. Likewise, mediation conferences are only available for parties who have filed applications for guardianship, custody, access, or separation and maintenance.
- 686 As separation and maintenance orders are now rarely applied for, the judge-led mediation conference is effectively only available in relation to issues arising under the Guardianship Act. This belies the intent of the Family Court as a court that emphasises “pre-litigation” attempts at resolution of the dispute. Those conciliation procedures, which provide the *raison d’être* of the Family Court, are not in fact available in respect of applications under most of the statutes now within its jurisdiction.
- 687 As the jurisdiction of the Family Court is restricted to statute law, some of the procedures to be followed by the Court are set in the statutes themselves (for example, the Mental Health (Compulsory Assessment and Treatment) Act 1992). A number of the statutes also have their own rules, for example, the Adoption Act 1955, the Domestic Violence Act 1995, and the Matrimonial Property Act 1976. The procedures under the Family Proceedings Act and the Guardianship Act are governed by the Family Proceedings Rules. In any case, where the specific rules do not specify procedures, then the District Court Rules prevail.
- 688 The Family Court has also devised a Caseflow Management Practice Note that sets the sequence of events that should be followed once an application is filed, and that sets guideline time periods in which the various stages of the case should be completed.

- 689 The procedures to be followed for each type of proceeding according to the relevant statutes, rules and the Caseflow Management Practice Note are summarised in the following sections. These summaries are intended as a reference point for our discussion of problems, and suggestions to address these problems, set out in chapter 3. They show the limited circumstances for which counselling and mediation conferences are available. They indicate when interventions such as the authorisation of specialist reports or the appointment of counsel for the child are likely to occur in the process. They highlight the points in the process when matters can be delayed.
- 690 Some questions to consider in relation to this chapter are:

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- Q96** Is the process that you have experienced (as a party, as a lawyer, as a Family Court co-ordinator etc) described correctly?
- Q97** Do you have any other comments or criticisms to make on these processes?
- Q98** Are there particular stages within the system at which delays occur?
- Q99** Are there interventions and referrals, other than those described, which would be useful?
- Q100** Is the timing of the interventions offered appropriate?
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## APPLICATIONS FOR GUARDIANSHIP, CUSTODY AND ACCESS UNDER THE GUARDIANSHIP ACT 1968

- 691 Most applications under the Guardianship Act 1968 relate to custody and access issues. A smaller number of such applications relate specifically to guardianship issues such as disputes about where a child will attend school. All these disputes most often arise on or after the separation of parents of a child. Many of these applications are filed as custody applications and may involve a cross-application by each parent, but are essentially about how much time the child is to spend in the care of each parent. Sometimes the applicant will be a grandparent or other person where a parent is thought to be unsuitable or is unavailable to care for a child. In some instances, there is no dispute that the child should live for the majority of time with one parent, but there are issues around the proportion of time and the mechanics of how the other parent can spend time with the child. These applications are often filed as applications for the definition of access.
- 692 In many separations there will be a default arrangement initially brought about by either one parent leaving the family home and the children or by one parent leaving the home with the children. There may or may not be some arrangement for the non-resident parent to have time with the children. There may be negotiations between the parties about the arrangements for the children, and it may be some time before an application is filed in the Court.
- 693 Where a separation is precipitated by an application under the Domestic Violence Act 1995, the applicant for a protection order may also apply for an interim custody order. That situation is likely to set up complications for the other parent,

as once protection orders are made the onus is on the other parent to prove that the child will not be at risk in their care.<sup>354</sup> In this situation, the domestic violence issues may need to be determined before custody issues can be progressed.

- 694 In other cases, specific issues between the parents about custody and access will not arise until one parent re-partners or wishes to move away from the area where the family has previously resided.
- 695 Where an issue needs to be addressed urgently, proceedings can be initiated by a without-notice application or on notice with an application to abridge time for service. In such cases, the Family Court will usually be able to respond with a fast-track procedure which will get the matter before a judge in a time frame of less than a month, depending on the circumstances. Courts around the country have evolved different procedures for dealing with urgent applications and applications for interim orders. In some cases, the Court is willing to deal with such matters on the basis of affidavit evidence and submissions from counsel without cross-examination of the deponents. By that process, interim arrangements can be put in place within a relatively short time frame, and the dispute returned to the normal track to proceed to final resolution.
- 696 The Caseflow Management Practice Note sets out the sequence and time frames for a standard application for custody.
- 697 When the application is filed, it must be accompanied by a brief affidavit setting out the proposals for the care of the children. It is intended that this affidavit should merely set out a proposal for a new family situation rather than contain a great deal of background information. Most parties will then be referred for counselling. A counselling referral will be bypassed only if there is evidence that counselling has been undertaken recently in relation to the current issues or when the application is being treated as requiring urgent intervention by a judge.
- 698 Usually a direction for counselling is given, and there will also be a direction that the papers are to be served on the other party. When the matter is referred to counselling, the application is allocated a return date in the registrar's list 10 weeks away.
- 699 That 10-week time frame is set to allow service and to allow the time for the six sessions of counselling which are normally available.
- 700 If there has been agreement within that time, the matter can be referred to a judge for consent orders.
- 701 If there has not been an agreement as to a complete resolution of the matter, then there are a number of options for future action. The Caseflow Management Practice Note states that after consultation with the parties and their lawyers and the Family Court co-ordinator, the matter could be referred for further counselling, a mediation conference, a judicial issues conference, or to a judge for formal proof if no defence is filed. The case will also usually be categorised at this stage as standard or complex for management purposes.

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<sup>354</sup> Guardianship Act 1968, s 16B.

- 702 However, the expectation is that after counselling the next step in the process will be a mediation conference that should be available within six weeks. It would normally require a lawyer for one of the parties to advocate a different intervention at this point if a mediation conference were not to be set down.
- 703 If a mediation conference is directed, timetabling directions are usually left until after that conference has been held.
- 704 Standard directions for timetabling may be given at this stage, which will require the applicant to file affidavits within 21 days and the respondent to reply 21 days thereafter, with the applicant being given a right of reply within a further 14 days (a total time frame of eight weeks).
- 705 Where a case is identified as complex, a judicial issues conference is to be convened at the earliest opportunity. This will be required only if more complex directions are needed as to the evidence that should be available.
- 706 A report from a social worker or a psychologist will normally not be directed until the end of a mediation conference, and often after counsel for the child has been appointed.
- 707 Usually, counsel for the child will not be appointed until after the mediation conference, and that counsel may be directed to investigate whether a psychologist's report should be recommended.
- 708 Where a psychologist's report is directed, that should be available within eight weeks of the request. Usually, once the report becomes available, there needs to be an opportunity for negotiation, with the assistance of counsel for the child, with a view to reaching agreement.
- 709 Where agreement is not possible and issues remain that require determination there will need to be agreement or a judicial conference to determine a timetable for final evidence to be filed.
- 710 Only when all evidence is filed can the matter be put in a ready list for a hearing. There is no specific time frame given in the Caseflow Management Practice Note for the time that may elapse between certifying the matter ready for a hearing and a hearing date being obtained. Time lapses will vary according to the backlog in the particular court and the number of days required for the hearing of a case. It is usually more difficult to find the time to hear cases that are estimated to take more than two days.
- 711 The only indication given in the Caseflow Management Practice Note is that standard cases should be concluded within 33 weeks from the filing of the application and complex cases should be concluded within 52 weeks from the filing of the application.
- 712 Where a judge reserves his or her decision, there may be delays of several weeks before the decision is made available, even though the courts do try to give priority to matters involving children.
- 713 There are numerous ways in which the timelines in the Caseflow Management Practice Note are not met. Some of these relate to the ability of the Court to schedule the time that is required at the specific stage reached. For example, there can be delays in obtaining mediation conference times or time in a judge's list for



a judicial conference. There can be long delays between certifying a matter ready for hearing and obtaining a hearing time.

- 714 If a specialist report is ordered, there can be delays of longer than eight weeks while looking for a report writer who can complete the report within that time frame.
- 715 A lot of time is lost by what can only be described as “drift”, where there is not strong and enforced case management.
- 716 There may be delays while people are invited to counselling or convenient appointment times are arranged.
- 717 Delays of a few days in the appointment of counsel for child, in the appointment of a report writer, in the obtaining of briefs for report writers as directed by the Court, and in circulating counselling reports, can add up to some weeks of time in the overall process.
- 718 Delays in complying with timetabling directions for filing evidence can also cause problems. A delay of only one or two days in filing the applicant’s evidence is compounded as the respondent files evidence at a later date, and any evidence in reply is similarly delayed.
- 719 By following a standard caseflow management track, opportunities for a more focussed strategy for the particular case may be lost.
- 720 If the delays are not related to capacities within the Court system, then lawyers for the parties can sometimes push their clients’ matters through the system, but lawyers have their own priorities relating to the demands of their practices, and sometimes, the interests of their specific clients, so that they cannot be relied upon to manage caseflows. If counsel for the child has already been appointed, that person can sometimes help to manage the case and progress it towards an earlier hearing.

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**Q101** In chapter 3 we make the following suggestions for improving this process:

- an initial interview with intending applicants and an appropriate referral to follow;
- information sessions for intending applicants;
- views of children ascertained early and discussed with parents;
- availability of mediation with an experienced mediator (not a judge);
- more focussed and individualised case management; and
- special masters for on-going difficulties.

Which suggestions in chapter 3, if any, would improve the process for custody and access cases?

**Q102** What advantage would these improvements have, if any, in comparison with the present process?

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## DOMESTIC VIOLENCE ACT APPLICATIONS

- 721 Proceedings under the Domestic Violence Act 1995 may be simple, moderately complex or complex.

### **Simple or straightforward without-notice applications**

- 722 A large number of proceedings will be without-notice applications for protection orders by one party in a relationship against the other, where there has been recent domestic violence (often involving police call-outs) and the parties are separating. However, the Act also covers people with a wide range of family and relationship connections as well as people who are simply living together, for example, as flatmates. In these straightforward proceedings, an application without notice for a protection order is filed and placed before a Family Court judge to be dealt with on the papers. There is provision for applications to be referred to the duty judge by fax or email, providing original documents are then forwarded to the Court in which the applications are filed.
- 723 If a protection order is made without notice, part of the order will include a direction for the respondent to attend a non-violence programme, unless there is “good reason” for not making such a direction. The Family Court co-ordinator determines programme details. Copies of the orders are sent to the police, so that the police can advise the registrar whether the police wish to serve a temporary protection order.
- 724 Orders can be served by:
- private service, on request by the applicant or applicant’s solicitor;
  - the Court bailiff; and
  - the police, if directed by a judge or if the police indicate that they are to serve the documents.
- 725 If the respondent takes no steps following service, the temporary protection order becomes final by operation of law three months after the date on which it was made.
- 726 A respondent who objects to the making of a final protection order must file a notice of intention to appear before the Court before the temporary protection order becomes final. There is a statutory requirement for a hearing to be held no later than 42 days after the receipt of the notice of intention to appear, unless there are special circumstances.<sup>355</sup>
- 727 Within five days after service, a respondent may object to a direction to attend a non-violence programme. The hearing of an objection to attend a non-violence programme must be assigned to occur no later than 42 days after the receipt of the notice of objection, unless there are special circumstances. Where a respondent fails to attend a non-violence programme, the respondent may be called before the Court for the Court to consider whether the programme should be confirmed, varied or discharged.
- 728 In practice, once a notice of intention to appear is filed, a pre-trial conference will normally be held for timetabling directions.
- 729 With these straightforward applications, delays commonly occur as follows:
- Service. Service by the police is often the most time-consuming method, and the police do not appear to have any consistent internal protocols for dealing

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<sup>355</sup> Domestic Violence Act 1995, s 76(3).

with service of protection orders. If the police indicate that they wish to serve, this usually happens promptly. If a judge directs service by the police, it is common for service to take weeks, rather than days. Service by bailiffs is usually prompt, although complicated by the fact that, because the parties are separating, one or both parties may have several changes of address in the week following the issuing of proceedings.

- Allocation of pre-trial conference dates. Domestic violence pre-trial conferences appear to wait their turn with other matters.
- Allocation of hearing dates. Compliance with the 42-day rule is not always met. Hearings can be delayed because there is a breach of timetabling directions by the parties, a lack of consistent case management, or Court hearing time is simply not available. In some cases, it suits the parties to delay a hearing so that they can reconsider their options during a “cooling down” period. In other cases, the delay in hearing times puts applicants at additional risk and is frustrating for respondents who wish to test the evidence against them.
- Issuing of final orders. Although this is supposedly automatic, in practice solicitors or parties sometimes have to chase the Court for orders to be made. It can take several weeks for orders to be sealed and issued. Some Courts do not appear to have proper monitoring systems for the issuing of final protection orders.

### **“Without-notice” applications put “on notice”**

- 730 An application made without notice may be put on notice by a judge with or without an abridgement of time for filing a defence. The Caseflow Management Practice Note then requires a registrar’s list date to be allocated within 14 days. If the application has been served before the registrar’s list date, and no defence is filed, a judge will deal with the application immediately after the registrar’s list, and a final protection order will usually be made at this point.
- 731 If the application has not been served by the registrar’s list date, it will be adjourned at intervals of 14 days for service to be effected.
- 732 If the application is defended, the Practice Note requires the registrar to make standard directions and set the matter down for hearing. In practice, it is usual for there to be a pre-trial conference with a judge before a fixture date is set.
- 733 If, following a hearing, a judge decides that a final protection order is to be made, the police will be notified, service of the order will be arranged, and a programme direction will be made in the usual way.

### **Applications commenced on notice**

- 734 Applicants may also apply on notice, with or without an abridgement of time, for protection and property orders. “On-notice” applications would commonly be made where the parties are still living together and there is ongoing domestic violence, but without an immediate risk of physical harm. These on-notice applications follow the same caseflow management procedures as applications that are made without notice but are put on notice by a judge.
- 735 Delays with on-notice applications can occur with:
- service;
  - the allocation of a pre-trial conference; and
  - the allocation of a hearing date.

- 736 The Caseload Management Practice Note advises that the Court expects that on-notice applications will be disposed of within 13 weeks from filing. This time frame has been criticised as being too long, given the object of the Domestic Violence Act 1995. The 14-day period, for allocation of the registrar's list date either initially or if no proof of service is available, has also been criticised as being too long.

### **More complex proceedings**

- 737 Applications under the Domestic Violence Act 1995 can become moderately complex or complex in a number of ways. Some of these are covered below.
- 738 There may be multiple parties to the proceedings: more than one applicant; more than one respondent; an applicant who applies for a direction that a protection order also apply for the benefit of another person; representative actions taken on behalf of children, persons lacking capacity, and persons who are unable to make an application personally by reason of physical incapacity; and fear of harm or other sufficient cause.
- 739 Applications may be made under the Domestic Violence Act for property orders. These are occupation orders (for the applicant to occupy a specified dwelling, usually the family home), tenancy orders (vesting the tenancy of any dwelling in one of the parties), and orders relating to the furniture, household appliances and household effects in a dwelling in which the parties have been living.
- 740 Property orders can be made without notice, but the grounds are more stringent than for without-notice protection orders. In order to get a without-notice property order, there must have been physical or sexual abuse of the applicant or a child of the applicant's family, and there must be a risk of further physical or sexual abuse of the applicant or child.
- 741 There is a lower threshold for applications without notice for protection orders, which can be made without notice where there is a risk of harm or undue hardship to the applicant or a child. This does not necessarily have to involve physical or sexual abuse. Because of the different thresholds, sometimes protection orders filed at the same time are made without notice, but applications for property orders are placed on notice.
- 742 Applications under the Domestic Violence Act 1995 are often accompanied by applications under the Guardianship Act 1968.
- 743 Sometimes they are also accompanied by applications under the Matrimonial Property Act 1976 (or Matrimonial Property Act applications are filed within a few weeks after the Domestic Violence Act applications).

### **Domestic Violence Act and interim custody and custody proceedings**

- 744 The most common application to be filed with a Domestic Violence Act application is a without-notice application for an interim custody order under the Guardianship Act 1968. Some Courts require applicants to also file applications for final custody orders either at the time of the domestic violence application or immediately afterwards. Without-notice applications for interim custody orders can be placed on notice, with or without an abridgement of time for filing a defence. Sometimes other applications under the Guardianship Act (for example,

under section 13 applications for relocation of children) are also filed at this point or shortly after.

- 745 Applications and interim orders under the Guardianship Act are commonly followed by applications by the respondent for access and/or cross-applications for interim custody, custody and other orders.
- 746 Some Courts automatically place the proceedings in a judge's list 14 days after the making of a without-notice interim custody order. Other Courts appear not to require this nor necessarily to require the filing of an application for substantive custody (as opposed to interim custody) by the applicant.
- 747 Section 16B of the Guardianship Act provides that the Family Court cannot give a violent party custody of, or unsupervised access to, a child, unless the Court is satisfied that the child will be safe in the care of the violent party. Because of this requirement, proceedings involving defended applications for protection and/or property orders, custody orders, access orders, and/or other guardianship issues (such as relocation) will usually be dealt with in the following order:
- hearing of the Domestic Violence Act applications for the Court to make findings on the allegations of violence;
  - progressing Guardianship Act applications. If arrangements for supervised or unsupervised access cannot be resolved by consent, the process for determining these types of applications may include the appointment of counsel for the children; counsel to assist the court; a section 29A (Guardianship Act 1968) psychologist's report (with or without a specific risk assessment for the respondent), or a referral to the Child, Youth and Family Service for a report or investigation.
- 748 Matrimonial Property Act proceedings may run in parallel with Domestic Violence Act, and Guardianship Act proceedings; although, in practice, matrimonial property issues are often delayed until the determination of domestic violence and custody and/or access issues.
- 749 The Court sometimes appoints a "managing judge" to oversee complex proceedings. Where there is no managing judge, complex proceedings may get "bogged down" or confused. For example, matters may be placed unnecessarily in either a judge's list or a registrar's list. One aspect of the proceedings may be set down for review in a judge's list, but the judge may deal with all issues. If part of the proceedings has already been allocated a registrar's list date, that registrar's list date does not automatically get cancelled, which is confusing for parties and wastes the time of lawyers.

### **Counselling and mediation in Domestic Violence Act proceedings**

- 750 Joint counselling and mediation are not available to resolve Domestic Violence Act 1995 proceedings. Joint counselling on guardianship issues or under the Family Proceedings Act 1980 cannot be required where one party has used violence against the other or against a child. Similarly, under section 31 of the Domestic Violence Act, a protected person and a respondent or associated respondent cannot be required to attend programme sessions at which the other person is also present.
- 751 In practice, the Family Court will not require applicants to attend mediation conferences where either a temporary or permanent protection order is in force. A

protected person may consent to attend a mediation conference, but would not be required to do so.

- 752 The Court may authorise co-counselling for the parties on custody, access and guardianship issues. Co-counselling involves each party seeing a separate counsellor, usually with specific skills in both violence and children's issues, and with issues being progressed through the counsellors exchanging information and reporting back to the parties. Co-counselling is organised by the Family Court co-ordinator and may not be available in all areas.
- 753 Co-counselling is a useful way for parties to resolve access issues in cases where the respondent has used violence against the other party, but not against the children, and where the protected person acknowledges that there are no direct safety issues for the children.

### **Multiple proceedings**

- 754 The Casflow Management Practice Note does not deal with multiple proceedings relating to the one family. Where there are multiple proceedings, it is not possible for a standard casflow management timeline to apply. The different combinations of types of applications and circumstances of the parties are too variable for this.
- 755 Where there are issues under section 16B of the Guardianship Act 1968, proceedings can be extended for many months. There may be delays while a respondent is completing a non-violence programme, while social worker or psychologist's reports and risk assessments are being obtained; while a specified period of supervised access comes to an end; while review periods (of interim care arrangements) are set and monitored in a judge's list; and while hearing dates are allocated, especially for hearings that are expected to last longer than one day. Availability of report writers, especially psychologists, is usually a problem.
- 756 Once a hearing is held, a reserved decision may take several weeks to be prepared and made available.
- 757 Multiple proceedings can nevertheless be progressed efficiently, where the Court processes are sound overall and the registrar and all lawyers work together to progress the proceedings.
- 758 In some cases, flexibility in casflow management has advantages for the parties in Domestic Violence Act proceedings. For example, parties who are not able to consider counselling (joint counselling or co-counselling) or mediation at an early stage of the proceedings, to resolve their differences, may be more willing to consider counselling and mediation after a period of reflection and after the parties have attended non-violence or support programmes available under the Act.
- 759 In other cases, delays compound the conflict and can place the protected person and protected children at greater risk, allowing a respondent to continue to harass and abuse the applicant through the Court process. A respondent may also feel unfairly treated if not given an early opportunity to refute the allegations of violence which have led to a temporary protection order being made. Delays can also lead to the parties' positions over Guardianship Act issues becoming more entrenched and difficult.
- 760 The factors that influence the timely disposition of Domestic Violence Act proceedings are similar to those in other proceedings. They are:



- the overall quality of caseload management;
- the ability and training of Court staff, including institutional knowledge;
- the availability of judges and hearing time;
- a consistent approach by judges to case management, including dealing with any failure to comply with timetabling directions;
- the quality of liaison between the counselling co-ordinator and the Family Court registrar and/or deputy registrar; and
- the efficiency of lawyers.

761 Proceedings involving litigants who are not represented by lawyers often take longer to resolve and require additional Court time.

762 However, there is often more at stake in Domestic Violence Act proceedings than in other proceedings. While many proceedings in the Family Court are emotionally charged and difficult, there is a particular need for proceedings under or related to the Domestic Violence Act to be dealt with in a way that minimises risks to the applicant and children of the applicant's family and maximises the fairness of the proceedings for the respondent.

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**Q103** Are there problems with the enforcement of the 42-day rule? What is your experience?

**Q104** Should there be a special procedure where the respondent to a protection order has children, so that arrangements for children are put in place quickly?

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## CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989

763 There is a statutory requirement that all hearings on an application for a declaration that a child is in need of care and protection shall commence within 60 days of the filing of the application, unless there are special reasons for a longer delay.<sup>356</sup>

764 Applications usually come before the Court in one of two ways. Where a family has come to the notice of the Child, Youth and Family Service, and there has been social worker intervention, but the issues arising have not been resolved, a family group conference will normally have been held. It is only when no resolution is reached by that process that the matter is referred to the Family Court for an application for a declaration, with a view to orders being made by the Court.

765 In other cases, an emergency situation will arise and it is necessary for the Child, Youth and Family Service to apply without notice for interim custody orders or for a warrant. An application for a declaration will also be made.

766 In urgent cases, the file will be placed immediately before a judge, and consideration given to the appropriate orders to be made on the applications, the appointment of counsel for child, orders as to service, and a direction that a family group conference be held. An application for declaration cannot proceed until a family group conference has been held.

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<sup>356</sup> Children, Young Persons, and Their Families Act 1989, s 200.



- 767 In the non-emergency case where a family group conference has already been held, then the application for declaration will proceed on a regular track.
- 768 Once service has been completed and a family group conference held, the matter will be referred to a judge's list.
- 769 The Caseflow Management Practice Note indicates that when the matter is placed before a judge, the judge can make appropriate orders or give directions concerning counselling, a mediation conference, interim custody, restraining and all support orders. Orders for counselling and mediation conferences are made rarely. It is assumed that the processes of Departmental intervention will have explored the possibilities for settlement without Court intervention. It would be more usual for the case to be progressed towards a hearing by timetabling orders for defences and affidavits.
- 770 At this stage, it may be productive to allow time for negotiation to take place, as, in some cases, the dispute is not so much about whether the child is in need of care and protection but what the terms of the future plan for the child are and how that protection can be achieved. Consequently, a number of applications for declaration by the parents and/or guardians are admitted and orders are made with the consent of both parties.
- 771 If a declaration is still disputed, then the matter will be set down for a hearing once all the affidavits have been filed.
- 772 Once a declaration is made, whether by consent or after a hearing, the matter is adjourned for not more than 28 days to a judge's list for the filing of plans and reports. If the plan is to be defended, directions are to be given in the judge's list for a defended hearing and the matter set down for a further fixture. If not defended, then a judge makes final orders.
- 773 When final orders have been made, the registrar allocates a date for a review (no later than six months from that time when the child is aged seven years or under, and no later than 12 months from that time when the child is seven years or over, or as directed by the Court). Such a review is called in the registrar's list in the first instance, to ensure compliance.
- 774 There are a number of difficulties that arise which mean that on many occasions the hearings of such applications are not commenced within the statutory 60 days:
- If parents are defending applications themselves, they may have difficulty obtaining legal aid and complying with directions as to the filing of affidavits.
  - There are often problems with Departmental social workers being unable to comply with timetabling directions as to the filing of affidavits.
  - There are days lost by drift, waiting for judge's list time, deferring matters through registrar's lists where timetables are not complied with and, in some instances, waiting for Court hearing time.
  - There are regular delays waiting for social workers to prepare plans, especially if specialists' reports are required, and plans may not be filed within the 28 days required.
  - When matters come back into the registrar's list for review after the usual six months or twelve months, frequently the social worker's reports and plans are not available, and matters can be adjourned from two weeks to three months before plans are completed for the review. In some Courts, reviews are not being timetabled to registrar's lists as an automatic administrative response,

which means that the review may not be followed up in the expected time frame.

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**Q105** Are there ways in which the Family Court can take a more active part in achieving the earlier disposal of applications for declarations that a child is in need of care and protection?

**Q106** Would a settlement conference chaired by a judge and attended by the social workers and the parents assist with early resolution?

**Q107** How would the child's views be represented at such a conference?

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## MATRIMONIAL AND RELATIONSHIP PROPERTY

- 775 For married people whose assets comprise an interest in a house, furniture, a car and some savings, the Matrimonial Property Act 1976 has stated the law very clearly. In most situations where only these assets need to be divided, settlement will be achieved by agreement. Court intervention is more likely to be required where there is an interest in a business or farm, property transferred to trusts during the marriage, or property from separate sources such as that owned by the parties before they married.
- 776 The changes brought about by the Property (Relationships) Act 1976, which comes into force on 1 February 2002, are likely to give rise to a greater volume of litigation until relevant precedents are developed by the Courts.
- 777 Most matrimonial property applications will only be filed in the Court after parties have been in negotiation for some time concerning matrimonial property issues. Proceedings will generally be filed in circumstances where the applicant does not consider that a sufficient or appropriate response is being made by the other party. That party will either not negotiate, has unreasonable expectations, or will not provide the information needed for a settlement to be concluded. There may also be issues of law or fact that need resolution by a judge. Therefore, the motivation in filing a matrimonial property application may be to put an issue before the Court, but often it is to speed up the process and/or to obtain information.
- 778 Occasionally, an urgent application will be made for a restraining order to prevent one party from disposing of matrimonial property to the disadvantage of the other. Such applications may be made without notice or on notice with an abridgement of time for filing a defence, and the Court will normally be able to make a determination on the application for a restraining order within a short time frame.
- 779 The Caseflow Management Practice Note requires the registrar to allocate time in the registrar's list within 10 weeks of the filing of an application. Normally, an application will be filed with the applicant's MP1<sup>357</sup> affidavit form and a narrative affidavit, although the Practice Note allows the applicant a further 20 working days (four weeks) to file those affidavits after the application is filed.

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<sup>357</sup> Form MP1 is an affidavit of assets and liabilities.

- 780 The respondent is given a further 20 working days after service to file his or her MP1 and narrative affidavits.
- 781 At the first registrar's list hearing, counsel are required to help the registrar identify whether the case is standard or complex, and counsel should file a memorandum of issues, detailing the property, what is in dispute, and the directions sought.
- 782 Where the parties agree that a standard track is appropriate, then the standard pre-trial directions are given by the registrar. The standard pre-trial directions prescribe time frames for the applicant and respondent to file further affidavits. If specialist evidence such as that of an accountant or a valuer is required, the standard track time frames of three weeks may need to be extended.
- 783 In such a standard case, the application is adjourned to a second registrar's list to check compliance with the directions and, once the directions have been complied with, the registrar is to allocate a settlement conference within six weeks.
- 784 Where standard directions are not deemed to be appropriate or cannot be agreed upon, a judicial conference is allocated within four weeks under rule 11 of the Matrimonial Property Rules. Further directions can be given at that judicial conference regarding the filing of evidence, disclosure, inspection, the possibility of a section 38 enquiry and so on. A conference may be adjourned to another registrar's list to check compliance or be adjourned to another judicial conference to progress the matter.
- 785 When all the evidence has been filed and the matter can be certified as ready for hearing, a settlement conference will be allocated unless a judge directs otherwise.
- 786 The counsel must file a memorandum of issues at least seven days prior to a hearing.
- 787 Where cases are being monitored in the registrar's list pending settlement, they will be moved into the judge's list if the registrar considers that delay warrants judicial intervention or at the request of counsel for the parties. Ordinarily the registrar will move a case into the judge's list after three adjournments in the registrar's list.
- 788 The Court expects that the standard track cases will be concluded within six months of filing, and complex cases within nine months of filing.

### **Factors causing delay**

- 789 Parties can sometimes be obstructive about providing information required by the Court.
- 790 Obtaining reports from professional valuers to be used in evidence can often take some time and cause delays. In other cases, information has to be assembled and made available before professional valuers such as accountants can be instructed to prepare a valuation.
- 791 Once the information has been provided and valuations are available, the parties will often want time in order to see if a negotiated settlement is possible.
- 792 The initial adjournment to a registrar's list is appropriate, but subsequent adjournments to registrar's lists for monitoring and before matters can be entered in judges' lists can cause considerable delay. In some centres, an adjournment to a registrar's list will mean an eight week adjournment during which time it is

possible for no progress to be made. If the matter then has to await a judge's list hearing time, the delay will be compounded.

- 793 Unless there are exceptional circumstances (such as time limitations on filing), there seems no reason why an applicant should be able to delay for 20 working days after filing an application to file his or her initial affidavits.
- 794 There may be delays in obtaining judicial conference time, and repeated conferences can be necessary if one party is not providing necessary information.
- 795 Matrimonial property cases can involve complex issues of law relating to separate property, trust property, and the intermingling of separate and matrimonial property. Sometimes a preliminary hearing may need to be held in order to determine a legal issue (for example, whether certain property is owned by a trust).
- 796 It would assist if there were more opportunities for preliminary hearing times of half a day to three-quarters of a day, so that such matters could be progressed more quickly.
- 797 There is a provision in the matrimonial property rules for parties to be penalised if they do not comply with directions. A more strict enforcement of directions and the imposition of penalties on filing late evidence or the awarding of costs in favour of the other party may well assist in shortening time frames for matrimonial property proceedings.

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**Q108** Should the Family Court impose sanctions such as costs penalties or bans on filing late evidence where parties do not comply with directions?

**Q109** How could the procedure be streamlined so that one matter does not require repeated calls in the registrar's list or short cause time?

**Q110** Should there be more emphasis on conciliation, such as mediation, when an application is first filed or as a prerequisite for filing?

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## ADOPTION ACT 1955

- 798 There are far fewer applications to adopt than there were 30 years ago.<sup>358</sup> Few applications to adopt are applications by non-relatives to adopt babies. A number of adoption applications are by step-parents, but they are decreasing as it becomes more common for step-parents to apply for guardianship orders rather than adoption orders if any particular legal status is considered necessary.

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<sup>358</sup> 1968 was the peak year for adoptions when non-relatives adopted 2617 children. The number has dropped steadily since then. From July 1998 to June 1999, a total of 431 adoptions were made in the Family Court. Of the 423 adoptions reported on by the Child, Youth and Family Service in 1998/1999 only 137 were by non-relatives plus 53 inter-country adoptions.

- 799 For an application to adopt, an applicant must file an affidavit setting out his or her circumstances and the consents to the adoption from the natural parent or parents.<sup>359</sup>
- 800 The Court then requests a report on the application from a social worker, in accordance with section 10 of the Adoption Act 1955 and the Caseflow Management Practice Note.
- 801 Where the application to adopt is by the natural parent and his or her spouse, there is no requirement in the Adoption Act for a social worker's report to be obtained. However, the Caseflow Management Practice Note has established a practice of appointing counsel to assist the Court to investigate the situation and comment on whether adoption is the appropriate option.
- 802 Where the father of a child is not a guardian, or has not been named on the birth certificate or established by Court order, there is no requirement under the Act for him to be consulted about a proposed adoption. This has resulted in situations where fathers who wish to be involved have not been notified and then later attempted to challenge the adoption.
- 803 Once the report is received it is referred to a judge, and if the matter is in order, the judge will advise the registrar to set the matter down for a hearing.
- 804 Unless the Court directs otherwise, the applicants and the child proposed to be adopted shall attend the Court hearing.
- 805 Most cases are straightforward and require little Court time.
- 806 Cases become more complex if there is an application to dispense with the consent of a parent or guardian under section 8 of the Adoption Act. Such an application must accompany the application for adoption, together with an affidavit in support, and an application for directions as to service if required. An application to dispense with consent may be made six months prior to the adoption application itself, and in such a case, the Court or the registrar will give appropriate directions. Such an application is placed in a registrar's list at the end of four weeks, and if no defence is filed, then the application is set down for a short hearing, for the judge to receive the evidence. If a defence is filed, then the application is set down for a pre-trial conference before a judge within three weeks.
- 807 There may be directions for the filing of further evidence at this stage, and when the matter is ready for hearing, the file will be referred to a judge for approval as to setting down. There are no timeframes in the Caseflow Management Practice Note to cover these situations. They arise relatively rarely and would have to be fitted into the normal Court timetabling for a hearing time.
- 808 In some instances after the interim order has been made, there is an application, usually by a natural parent, for revocation of the interim order, on the basis of lack of consent or that the adoption order will not promote the welfare of the child.<sup>360</sup>
- 809 Where such an application is made, the case will usually be referred to a judge for directions as to the timetabling and filing of evidence and, if necessary, for any expert reports or social worker's reports.

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<sup>359</sup> In accordance with reg 8 of the Adoption Regulations.

<sup>360</sup> Adoption Act 1955, s 11.

- 810 The Court will make every effort to have such matters determined as quickly as possible as it will be necessary to reach an early determination in the best interests of the child.

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**Q111** Does the Family Court need to have a procedure to enquire about the father of the child who is not registered on the birth certificate?

**Q112** Are applications to dispense with consent dealt with quickly enough?

**Q113** Are applications to revoke interim orders dealt with quickly enough?

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## CHILD SUPPORT ACT 1991

- 811 The Child Support Act 1991 removed first instance decision-making from the Family Court in respect of child maintenance, and set up a new system whereby the Commissioner of Inland Revenue, in accordance with a statutory formula, determines the amount of child support that a liable parent must pay.
- 812 An applicant for child support or a liable parent can appeal to the Family Court against a decision by the Commissioner that he or she does not have jurisdiction to accept or decline an application for a formula assessment of child support.<sup>361</sup>
- 813 Where the Commissioner disallows an objection made under section 90 of the Act, which relates to various administrative decisions made by the Commissioner, the objector can appeal to the Family Court.
- 814 The most common resort to the Family Court under the Child Support Act is, however, for an application for a departure order. Where an applicant is dissatisfied with the level of child support to be paid in accordance with the formula or a liable parent is dissatisfied with the amount directed to be paid, either party can apply for an administrative review of that decision by the Commissioner. That review is undertaken by a review officer. If a party is unsuccessful on review, then that party can apply to the Family Court for a departure order. The matter can also be referred to a Family Court judge, where either the qualifying custodian or the liable parent are parties to another application pending in the Family Court and the Court is satisfied that it would be appropriate for the Court to consider the application for a departure order at the same time as it hears the other application. This opportunity to apply directly to the Family Court and bypass the review officer was presumably given in the hope that it would streamline the number of processes to which any party would have recourse when there were also matrimonial property issues or custody issues to be decided. In fact, it is doubtful that it streamlines the process, as moving those other applications through the Family Court is likely to take longer than the review proceeding.
- 815 Where an application for a departure order is made after a review hearing, the Caseflow Management Practice Note states that all cases should be disposed of within 13 weeks of filing.

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<sup>361</sup> Child Support Act 1991, ss 100–101.

- 816 The Caseflow Management Practice Note requires that the custodial parent and the liable parent both file full affidavits concerning the financial circumstances of the family and the costs and needs of the children in accordance with the 1990 Practice Note that previously applied to child maintenance applications.
- 817 Once the affidavit has been filed, the application is placed in a registrar's list, and if all directions are complied with, a fixture date should be allocated within six weeks.
- 818 Where an application is made without notice for the suspension of a child support order made by the Commissioner, the application is placed before a judge as soon as the application is filed, and the application for suspension is dealt with on an urgent basis.
- 819 The criteria by which an application for a departure order can be made are very limited, and therefore the issues for the Family Court are very confined.
- 820 There is no provision for counselling or mediation, but where the matter has already been before a review officer, it is sensible that the matter is treated more as if it were an appeal and disposed of directly by the Court.

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**Q114** Is there any need for conciliation procedures in relation to applications for departure orders that have already been before a review officer?

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## FAMILY PROTECTION AND TESTAMENTARY PROMISES CLAIMS

- 821 Claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 were formerly dealt with in the High Court, as they related to deceased estates. Since July 1992, the Family Court and the High Court have had concurrent jurisdiction in these matters.
- 822 In cases involving the widow or widower of a deceased person, the provisions of the Matrimonial Property Act 1963 have also been relevant, and proceedings under that Act have sometimes been combined with Family Protection Act proceedings. The situation will change once the Property (Relationships) Act 1976 comes into force on 1 February 2002. Surviving de facto partners and married partners will be able to bring claims under the Property (Relationships) Act after the death of their spouse. Such a claim can also be combined with a claim under the Family Protection Act.
- 823 In some cases, testamentary promises claims were brought by de facto partners of deceased persons, and those claims are likely to fall away once the Property (Relationships) Act 1976 comes into force, as rights equivalent to those of married partners on death will also be extended to de facto partners.
- 824 Such proceedings are commenced in the Family Court by way of Statement of Claim and Notice of Proceeding<sup>362</sup> or by way of originating application.<sup>363</sup>
- 825 If the claim is under the Family Protection Act, an affidavit in support is required to be filed at the same time as the Statement of Claim or originating application.

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<sup>362</sup> Part V of the District Court Rules 1992.

<sup>363</sup> Part VI of the District Court Rules 1992, rr 440 and 442.



- 826 The defendant named is the personal representative of the deceased person, but as any such claim is in competition with the beneficiaries under the will and other possible family protection claimants, the applicant must file a without-notice application for directions as to service. Information must be provided in accordance with rule 444 of the District Court Rules so that the Court is apprised of the details of the estate, the beneficiaries, and any possible claimants under the Family Protection Act 1955. Parties belonging to the same group may be represented by the same person, and infant children and grandchildren may be represented by their parents, depending on the circumstances.
- 827 Where there are infant children and grandchildren, counsel for the child is usually appointed, and the applicant is required to suggest a lawyer for that appointment, obtain that lawyer's consent, and put the suggestion before the Court.
- 828 Once all this information is filed, the papers are put before a judge who makes orders for directions for service and/or representation.
- 829 The matter is then placed in a registrar's list within 10 weeks, to allow for service to take place. Any person who wants to file an affidavit in opposition must file a defence or a Notice of Appearance.
- 830 The filing of defences and affidavits should then be monitored by the registrar in the registrar's list.
- 831 Evidence in respect of proceedings under the Family Protection Act 1955 and with leave of the Court under the Law Reform (Testamentary Promises) Act 1949 may be given by means of an agreed statement of facts in accordance with rule 500 of the District Court Rules or by affidavit.
- 832 Once all parties have been served and defences filed, or when the time for filing defences has expired, the registrar shall arrange a settlement conference before a judge. Five days prior to that conference, counsel are to file a memorandum as to issues and the value of the property in dispute.
- 833 If the matter is not settled as a result of the conference, normally an issues or setting-down conference will follow, and the matter will then be authorised to be set down for a hearing.
- 834 Many cases will settle after proceedings have been issued and served or after a settlement conference. Where there are infant children or grandchildren, settlement cannot be made by consent, and the proposals must be put before a judge for the approval of the Court before orders can be made.
- 835 The delays in these types of proceedings are most often caused by the number of parties involved, the need to seek instructions from all of them, and the consequent increased opportunity for timetabling orders or agreements not to be met.
- 836 The Caseflow Management Practice Note suggests that all cases will be disposed of within 26 weeks of the date of filing, but it is doubtful that this aim is achieved except in the most straightforward of cases.

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**Q115** Should conciliation procedures be available for Family Protection and Testamentary Promises claims, for example, counselling, mediation, and judge-led mediation?

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## PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

- 837 Applications are made under this Act for the appointment of a property manager, for the appointment of a welfare guardian, or for personal orders in respect of a person who is suffering from some disability, such as an elderly person suffering from dementia or a person who has a mental or physical disability, which means they are not able to manage their own financial affairs or their day-to-day living circumstances.
- 838 An application under the Act should be filed together with an affidavit in support, applications for directions for service, and medical evidence supporting the exercise of the Court's jurisdiction.
- 839 The Court may dispense with service on the subject person where it is satisfied that the person wholly lacks the capacity to understand the nature and purpose of the proceedings, or where there are other exceptional circumstances. If it is proposed that a person be appointed as a welfare guardian or manager, that proposed appointee must also be served.
- 840 The Court shall appoint a barrister or solicitor to represent the person for whom the application is made. The role of that person is to: ascertain whether there is evidence to justify the application, that is, that the subject person is not able to handle his or her own affairs; ascertain whether the person proposed for the appointment as property manager or welfare guardian is an appropriate person; and to make recommendations as to the least restrictive intervention possible in the life of the subject person. The Family Law Section has raised the issue of whether the Court should more often make enquiries and appoint as representative for the subject person, a solicitor who has been acting for the person before their disability became apparent.
- 841 The application should be given a date three weeks later in the registrar's list by which time the appointed counsel should file a report.
- 842 If the application is undefended and all matters are in order the registrar makes the appropriate recommendations and refers the matter to the judge for orders on the papers. The applicant or the subject person or the lawyer appointed for the subject person or any other person who has been served may ask the registrar to convene a pre-hearing conference. This would be requested if any of those persons had doubts about any aspect of the application that had been filed.
- 843 Agreement can be reached at a pre-hearing conference, but if that is not possible then a record is made of that pre-hearing conference, and the application is set down for a judicial conference within three weeks. If, at that conference, there is again no settlement, the matter will be timetabled for any further evidence and set down for hearing.
- 844 The Caseflow Management Practice Note states that all undefended cases should be disposed of within 13 weeks of filing, and that defended cases should be disposed of within 26 weeks.
- 845 Such applications may be disposed of quickly in cases where there is consensus as to what is necessary and the subject person is not in a position to make any objection. In other cases the subject person may oppose the order, or relatives or others close to the subject person may oppose the person who is to be appointed manager or welfare guardian. There could also be opposition to an application for

a specific personal order such as a sterilisation operation. As in other defended proceedings, where there is objection there can be delays brought about by the necessity for evidence to be filed and hearing time to be found.

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**Q116** Are there applications made under the Protection of Personal and Property Rights Act 1988 where the availability of such procedures as counselling, mediation, or judge-led mediation would be of assistance?

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## PATERNITY

- 846 Applications to prove paternity are made under the Family Proceedings Act 1980. Since the advent of DNA evidence of paternity, these cases consume far less of the Court's time.
- 847 The Caseload Management Practice Note requires all applications to be filed with an affidavit in support. As service is sometimes a problem with this type of application, there is specific reference in the Practice Note to a without-notice application for directions, which must set out fully all steps taken to locate the respondent.
- 848 Where requirements as to service have been met and the time for filing a defence has expired and the respondent has taken no steps, the matter is set down for a formal proof hearing. If possible, a memorandum as to consent orders should be filed, and orders made.
- 849 If the respondent is unwilling to consent to DNA blood testing, then an application for directions may be made to the judge. Directions as to payment for such tests are also often required.
- 850 Once DNA evidence is available, the matter will normally be resolved and a defence will not be proceeded with.
- 851 Time lapses in such proceedings are more likely to relate to delays in service and delays associated with obtaining DNA evidence rather than with delays in the Court process.
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**Q117** Is a paternity application merely a matter of proof of fact, or should conciliation services such as counselling and mediation be made available for applicants seeking to establish paternity?

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## SPOUSAL MAINTENANCE

- 852 Applications for spousal maintenance are made under the Family Proceedings Act 1980. The number of applications for spousal maintenance reduced considerably after the introduction of that Act and the Child Support Act 1991. Under the Family Proceedings Act 1980, a spouse can only claim maintenance if his or her reasonable needs are not being met. The 1980 Act provided that the determination of reasonable needs did not have reference to the living circumstances of the

couple prior to separation. Therefore, if an applicant were in employment or were in receipt of a social welfare benefit, his or her reasonable needs were deemed to be met. Also, if there were dependent children of the relationship, then in most cases the liable parent's capacity to provide support would be fully utilised in meeting the needs of the children. If a potential applicant was in receipt of a social welfare benefit, then his or her benefit would be reduced if any order was made in excess of \$60 per week. The general effect of all these circumstances is that only if the respondent was relatively wealthy would there be any point in making a claim for spousal maintenance. The amendments that have been made to the Family Proceedings Act, and which will come into force on 1 February 2002, have liberalised the criteria for claiming spousal maintenance. It may be that there will be an increase in those claims, as under the new provisions there can be reference to the standard of living during the relationship.

853 That there have been relatively few applications for spousal maintenance is reflected in the fact that such applications are not given specific reference under the Family Court Caseflow Management Practice Note. However, they are applications under the Family Proceedings Act and would be subject to the standard directions. Where the parties are still married, a judge may direct the matter to counselling, and where the parties are not already divorced, there is jurisdiction for a judge to order a mediation conference.<sup>364</sup>

854 Once applications are filed and served they would be entered in a registrar's list, and the matter then timetabled in accordance with the standard directions for the filing of affidavits. Such proceedings are unlikely to be complex. Once the affidavits have been filed the matter should be able to be put in a ready list for hearing.

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**Q118** Would the conciliation service, information sessions and mediation proposals set out in chapter 3 be useful in respect of applications for spousal maintenance?

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## MENTAL HEALTH

855 The Mental Health (Compulsory Assessment and Treatment) Act 1992 provides the statutory basis for compelling treatment for mental disorder on those who are unwilling or unable to agree to treatment. To achieve this, it is often necessary to authorise the detention of the patient with mental illness. In this respect, the mental health legislation represents an exception to the guarantees affirmed by the New Zealand Bill of Rights Act 1990 that "everyone has the right to refuse to undergo any medical treatment".<sup>365</sup> It is also an exception to that Act's principle of freedom of movement.<sup>366</sup> There is a tension between individual and societal rights to liberty and the public and private interest in treatment of those with a

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<sup>364</sup> Family Proceedings Act 1980, ss 10(4) and 13.

<sup>365</sup> New Zealand Bill of Rights Act 1990, s 11

<sup>366</sup> New Zealand Bill of Rights Act 1990, s 18.

mental disorder. Precisely because the legislation has such a restrictive effect on individual liberties, it is prescriptive as to the time periods that should apply.<sup>367</sup>

- 856 The role of District Court judges (in most circumstances, Family Court judges) is primarily to determine the patient's legal status.
- 857 If an applicant believes a person to be suffering from a mental disorder and the medical practitioner agrees there are reasonable grounds for such a belief, the person becomes a "proposed patient"<sup>368</sup> under the Mental Health (Compulsory Assessment and Treatment) Act until an assessment examination is arranged and conducted by a different health professional, usually a psychiatrist, in accordance with section 9 of the Act. The person making the initial application must have seen the proposed patient and the medical practitioner must have examined the proposed patient within the three days immediately before the date of application.
- 858 Appropriately qualified and approved health professionals can confirm and extend a compulsory assessment and treatment status for up to 33 days from the initial assessment, without any non-health professional reviewing the matter.
- 859 During this period, the patient and a range of other people may challenge the compulsory status by way of a review provision set out in section 16 of the Act. The review of the patient's condition and status must be carried out by the judge "as soon as practicable". The review provision empowers the judge to make a finding contrary to a mental health professional's contention that a patient requires compulsory assessment and treatment. The review provision contemplates that the judge "examine the patient". This requires the judge to step outside of his or her usual environment to meet and evaluate the patient, usually at the hospital. The judge should identify him or herself and explain and discuss matters with the patient. The judge should also consult with the responsible clinician and at least one other health professional and any other relevant person. In this way, the judge's role might be said to be inquisitory.
- 860 The statute does not prescribe a timeframe for section 16 reviews, but the practice is that such applications should be disposed of within days of the filing of such an application.<sup>369</sup> Whilst not all section 16 reviews are determined within 48 hours, they are generally determined within a few days, and those responsible for the allocation of judge time prioritise this work. In larger cities, mental health hearings are likely to occupy Family Court judges for several days each week.

### **Compulsory treatment hearings**

- 861 The structure of the mental health legislation leads to a cycle of judicial proceedings concerning the legal status of a particular patient. The decisions of the Family Court judges and the Review Tribunal do not build up a body of binding precedent, as the decisions of neither body are binding on the other. Nor is there the possibility of an appeal to the High Court, so there is no opportunity for the

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<sup>367</sup> The timeframes are very tight. *Re H* (3 October 2001) unreported, Court of Appeal, CA 290/00 and CA 293/00.

<sup>368</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 8.

<sup>369</sup> The timeliness of s 16 review hearings is the subject of a memorandum from the Chief District Court Judge dated 4 May 1995.

High Court to interpret the statute definitively. The High Court has some limited jurisdiction over mental health issues<sup>370</sup> in that judicial review proceedings may be brought in the High Court. However, a judicial review proceeding does not make findings on the facts of the particular case. A judicial review can only review the process by which a decision was reached and not the content of that decision.

- 862 If a compulsory treatment order (CTO) is made, legal proceedings do not end there. Judges make the first judicial determination of the patient's status. If the judge makes the patient subject to a CTO, the Review Tribunal (created under a different part of the Mental Health (Compulsory Assessment and Treatment) Act) can, on its own motion or upon application of various people, immediately review the patient's status. After three months, the patient can also apply to the Review Tribunal for a review of the CTO. If the Review Tribunal decides that the patient is not fit to be released from compulsory status, the decision can be appealed in accordance with section 83 of the Mental Health (Compulsory Assessment and Treatment) Act. The appeal is not an appeal in the usual legal sense, but is in fact a review by a Family Court judge of the refusal to release the patient from the CTO.<sup>371</sup> The Court, again with prescribed time periods, can extend the CTO after six months have passed, and this requires a further hearing. The same CTO can be further extended after another six months. If the patient continues under a CTO, the order becomes an indefinite order.
- 863 Patients subject to a CTO can be released from the CTO by their responsible clinician at any time. Many patients are released from this status, but a significant proportion of them may subsequently require further compulsory intervention to help them manage their mental illness.
- 864 The procedures under the Mental Health (Compulsory Assessment and Treatment) Act are unique within the Family Court and are driven solely by the requirements of the Mental Health (Compulsory Assessment and Treatment) Act. Therefore, there is little that can be altered within the procedures without legislative change.

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**Q119** Are there any ways in which the processes available through the Family Court, in respect of other types of applications, would be useful for patients with mental health disorders or their families?

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<sup>370</sup> Mental Health (Compulsory Assessment and Treatment) Act, s 84.

<sup>371</sup> Mental Health (Compulsory Assessment and Treatment) Act, s 16.

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## Summary of questions

- 865 **T**HIS PAPER has described the history of the Family Court, the social context  
in which it operates, the stages in the dispute resolution process and the  
players in the system. All this information provides the background against which  
we consider the terms of our reference.
- 866 In the course of the paper, we have highlighted a range of problems that we  
understand to be of concern to the users of the system and those who work in it.  
We have proposed some suggestions for changes.
- 867 We now invite submissions on this preliminary paper. We are interested to know  
if we have described the background information correctly. We seek your views on  
the problems with the present operation of the Family Court and our suggestions  
for new procedures.
- 868 Below, we reproduce the questions highlighted throughout the paper. We have  
reproduced the original paragraph numbers for the questions so that you can locate  
them in the text for further information.
- 869 We will be pleased to receive one or two comments on matters of particular  
concern as well as full submissions on major aspects of the paper.
- 870 The Commission is happy to receive written submissions by post or by email as  
set out in the front of the paper. If you would like to make a submission by some  
other means (for example, audiotape or videotape) please contact the Commission  
before sending it in such a format.
- 871 The closing date for submissions is 2 April 2002.

### *The Players in the System – Paragraph 18*

- Q1 Does the way the players are described accord with your experience of the Family  
Court?
- Q2 Is there any further comment or criticism you would add about any of the players?
- Q3 What should the Family Court expect from these players?
- Q4 What should the users of the Family Court expect from these players?

### *Court Staff – Paragraph 98*

- Q5 Do you have comments about how the Family Court staff operate and are organised  
in your area? (We are especially interested to hear about the practice in Court  
offices that are functioning well.)

### *Family Court Co-ordinators – Paragraph 99*

- Q6 What tasks does the Family Court co-ordinator undertake in your area?



*Family Court Counsellors – Paragraph 127*

- Q7 Should clients be encouraged to make use of the conciliation services of the Family Court before they engage their own lawyer?

*Counsel for the Child – Paragraph 143*

- Q8 What do you think should be the role of the child's representative?
- Q9 Could this task (or part of it) be undertaken by a non-lawyer?
- Q10 What skills and training are necessary for the person who presents the child's view to the parents and the Family Court?
- Q11 At what stage should the child's representative be appointed?
- Q12 Are there different skills for different stages of the process?  
(See the discussions of children and case management in chapter 3.)

*Counsel to Assist the Court – Paragraph 165*

- Q13 Are there tasks now given to counsel to assist the court that could be better undertaken by a person such as a social worker?

*Specialist Report Writers – Paragraph 174*

- Q14 At what stage of proceedings should a section 29A report be obtained?  
(See Background 3 for the usual sequence of events on Case Management.)

*Programme Provision – Paragraph 199*

- Q15 Should protected persons programmes be made available on request to the Family Court, without the necessity for a court order?

*Child, Youth and Family Services – Paragraph 229*

- Q16 Would it be of assistance for the Family Court to contract with social workers for services in the same way as the Court contracts with counsellors?

*Lack of Information – Paragraph 277*

- Q17 What sort of information about the users and operation of the Family Court might usefully be collected?
- Q18 Who should be responsible for collecting such information?
- Q19 What information should be publicly available?
- Q20 Should there be an independent unit monitoring the performance of the Family Court, or should this responsibility rest with the Department for Courts?

*Dissatisfaction and Disempowerment of Family Court Users – Paragraph 308*

- Q21 What are your dissatisfactions with the Family Court based on your experience?  
(Please be as specific as possible.)
- Q22 What problems have you experienced with Family Court processes?

- Q23 What changes to the process and procedures of the Family Court would address your concerns?
- Q24 Do you consider that providing education and information to Family Court users about changing social relationships in information sessions and counselling sessions would be helpful?
- Q25 Do you think training for counsellors, which encouraged them to raise the following kinds of issues, would be helpful?
- What is each parent prepared to do to cater to the new family circumstances after separation?
  - Are the mother and father willing to share parenting information?
  - Are the mother and father willing to acknowledge the gaps in their parenting capacities?
  - How can children be empowered to state their needs?
  - How can parents learn to engage with their children about their concerns in the changed family circumstances?

### *Children – Paragraph 321*

- Q26 How can parents be encouraged to explore relevant issues with their children without involving the children in adult arguments?
- Q27 Should children be included in counselling where the issues relate to the children?
- Q28 Would there need to be further qualifications, training or monitoring procedures for counsellors if children were to be included in the counselling process?
- Q29 Should children be present at mediation concerning their future arrangements?
- Q30 How could the involvement of children in mediation be managed so that they are not burdened with adult issues?
- Q31 If children were to be included in the mediation would such mediators need special qualifications or training?
- Q32 Should counsel for the child be appointed at an earlier stage in the procedure rather than introducing a “new” player, that is, the child advocate?
- Q33 Should there be a new role created of child advocate who would be appointed at an early stage when there was any dispute involving children?
- Q34 Would such a person be an alternative to the counsel for the child or be involved only in the early stages and give way to counsel for the child if the matter were to go further down the Court track?
- Q35 What should the role of a child advocate be?
- Q36 What would be the training and background for a child advocate?
- Q37 How could the work of the child advocate be monitored?
- Q38 Would child advocates be paid?
- Q39 Should parents or caregivers contribute to the cost of a child advocate?

- Q40 How can the working relationship between the Family Court and the Child, Youth and Family Service be improved?

*Māori Issues – Paragraph 337*

- Q41 Do Māori view the Family Court as relevant to them?
- Q42 Are there ways in which the Family Court deals insensitively or inappropriately with Māori?
- Q43 Have some Family Courts provided processes incorporating Māori values that could be made more widely available? Can you tell us about them?
- Q44 Should persons other than the immediate parties be invited to a Court-referred mediation?
- Q45 Should persons other than the immediate parties be invited to a judge-led mediation conference?
- Q46 If those who are invited to mediation include a wider group, are there privacy issues or intimidation issues which are of concern?
- Q47 Should Pākehā lawyers, counsellors, judges and psychologists receive more training on Māori cultural issues?
- Q48 If so, how could that training be provided?
- Q49 Should cultural or community reports be available in cases involving Māori children?
- Q50 Should cultural or community reports be available in cases involving Māori adults?
- Q51 Are there marae or iwi-based services for Māori families that could become referrals for the Family Court?
- Q52 Should the Family Court contract with marae or Māori provider groups to provide information, education, counselling or mediation specifically for Māori families as part of the conciliation service of the Court?
- Q53 Is the prospect of making an application to the Family Court for the appointment of welfare guardians or property managers for incapacitated relatives alien to Māori society?

*Conciliation Services in the Family Court – Paragraph 365*

- Q54 Do you consider that an initial intake interview that guided people to an appropriate first process would be useful?
- Q55 What are your suggestions for such an interview and referral procedure?
- Q56 What sort of person could do that job?
- Q57 What training and qualifications would such a person require?
- Q58 What would be the range of referral possibilities (for example, information, legal advice, counselling, mediation)?
- Q59 Do you consider that a procedure to identify high-conflict litigants would be helpful?

*Information Sessions and Parenting Programmes –  
Paragraph 389*

- Q60 Should there be more information about the Family Court and its processes?
- Q61 What sort of information do you think people need to know?
- Q62 Should there be self-help kits to enable people to commence proceedings?
- Q63 Should special information for children be created?
- Q64 How might such information best be delivered?
- Q65 Should there be programmes for separating parents?
- Q66 Should such programmes be voluntary or mandatory?
- Q67 Should all parents attend, or just those who are unable to agree upon custody and access matters?
- Q68 What should be the aim of such programmes?
- Q69 How should they be structured?
- Q70 Should the State fund the total cost of the programme, or should parents be required to make a contribution (possibly on the basis of their means)?

*Mediation in the Family Court – Paragraph 428*

- Q71 Do you consider that mediation by a trained mediator (rather than a judge) should be offered as part of the conciliation services of the Family Court?
- Q72 What training and qualifications would a mediator require?
- Q73 How would mediators be selected?
- Q74 Should mediators be employed by the Family Court or contracted to undertake mediations for the Court?
- Q75 For what proceedings or applications should mediation be offered?
- Q76 When should mediation be offered?
- Q77 When should mediation not be offered?
- Q78 Should there be different forms of mediation depending on the type of case being mediated, or should one model of mediation be used in all cases?
- Q79 Should such an option be available in addition to the Family Group Conference where there is an application for a declaration under the Children, Young Persons, and Their Families Act 1989?
- Q80 Who should be invited to mediation?
- Q81 Who should decide who is to be invited to mediation?
- Q82 Should the mediation conference chaired by a Family Court judge be retained?
- Q83 Should the mediation conference chaired by a Family Court judge be retained but redefined as a settlement conference or something similar?

### *Case Management in the Family Court – Paragraph 459*

- Q84 What are the problems with present case management practices? (Please specify the part of the country you are referring to in your answer.)
- Q85 Are there particular problems relating to certain categories of applications? (See Background 3 Stages in the Court Dispute Resolution Process.)
- Q86 Does the current system provide the best intervention at the right time? (Please give specific examples.)
- Q87 How can these problems be addressed?
- Q88 Would it help if only one or two judges handled each case?
- Q89 Would the allocation of files to case officers be of assistance?

### *“Special Masters” or “Parenting Co-Ordinators” for Problem Cases – Paragraph 480*

- Q90 Should we consider implementing the role of a special master in New Zealand?
- Q91 What sort of qualifications, training and experience should be required of a special master?
- Q92 What powers, if any, should a special master have?
- Q93 Should the parties have to consent to a special master?

### *A Brief History of the Family Court – Paragraph 506*

- Q94 How have the changes in the substantive law and the increased jurisdiction of the Family Court affected those who use the Family Court?

### *The Social Context: A Statistical Overview – Paragraph 604*

- Q95 How has social and economic change affected family members and how has that impacted on the work of the Family Court?

### *Stages in the Court Dispute Resolution Process – Paragraph 684*

- Q96 Is the process that you have experienced (as a party, as a lawyer, as a Family Court co-ordinator etc) described correctly?
- Q97 Do you have any other comments or criticisms to make on these processes?
- Q98 Are there particular stages within the system at which delays occur?
- Q99 Are there interventions and referrals, other than those described, which would be useful?
- Q100 Is the timing of the interventions offered appropriate?

### *Applications for Guardianship, Custody and Access Under the Guardianship Act 1968 – Paragraph 691*

- Q101 In chapter 3 we make the following suggestions for improving this process:
- an initial interview with intending applicants and an appropriate referral to follow;

- information sessions for intending applicants;
- views of children ascertained early and discussed with parents;
- availability of mediation with an experienced mediator (not a judge);
- more focussed and individualised case management; and
- special masters for on-going difficulties.

Which suggestions in chapter 3, if any, would improve the process for custody and access cases?

Q102 What advantage would these improvements have, if any, in comparison with the present process?

#### *Domestic Violence Act Applications – Paragraph 721*

Q103 Are there problems with the enforcement of the 42-day rule? What is your experience?

Q104 Should there be a special procedure where the respondent to a protection order has children, so that arrangements for children are put in place quickly?

#### *Children, Young Persons, and Their Families Act 1989 – Paragraph 763*

Q105 Are there ways in which the Family Court can take a more active part in achieving the earlier disposal of applications for declarations that a child is in need of care and protection?

Q106 Would a settlement conference chaired by a judge and attended by the social workers and the parents assist with early resolution?

Q107 How would the child's views be represented at such a conference?

#### *Matrimonial and Relationship Property – Paragraph 775*

Q108 Should the Family Court impose sanctions such as costs penalties or bans on filing late evidence where parties do not comply with directions?

Q109 How could the procedure be streamlined so that one matter does not require repeated calls in the registrar's list or short cause time?

Q110 Should there be more emphasis on conciliation, such as mediation, when an application is first filed or as a prerequisite for filing?

#### *Adoption Act 1955 – Paragraph 798*

Q111 Does the Family Court need to have a procedure to enquire about the father of the child who is not registered on the birth certificate?

Q112 Are applications to dispense with consent dealt with quickly enough?

Q113 Are applications to revoke interim orders dealt with quickly enough?

#### *Child Support Act 1991 – Paragraph 811*

Q114 Is there any need for conciliation procedures in relation to applications for departure orders that have already been before a review officer?

*Family Protection and Testamentary Promises Claims –  
Paragraph 821*

- Q115 Should conciliation procedures be available for Family Protection and Testamentary Promises claims, for example, counselling, mediation, and judge-led mediation?

*Protection of Personal and Property Rights Act 1988 –  
Paragraph 837*

- Q116 Are there applications made under the Protection of Personal and Property Rights Act 1988 where the availability of such procedures as counselling, mediation, or judge-led mediation would be of assistance?

*Paternity – Paragraph 846*

- Q117 Is a paternity application merely a matter of proof of fact, or should conciliation services such as counselling and mediation be made available for applicants seeking to establish paternity?

*Spousal Maintenance – Paragraph 852*

- Q118 Would the conciliation service, information sessions and mediation proposals set out in chapter 3 be useful in respect of applications for spousal maintenance?

*Mental Health – Paragraph 855*

- Q119 Are there any ways in which the processes available through the Family Court, in respect of other types of applications, would be useful for patients with mental health disorders or their families?
-



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## APPENDIX A

### Projects and research on the Family Court

#### GUARDIANSHIP ACT REVIEW

- A1 **T**HE MINISTRY OF JUSTICE is currently reviewing the Guardianship Act 1968. In August 2000, it produced a discussion paper called *Responsibilities for Children: Especially When Parents Part – The Laws about Guardianship, Custody and Access*. This discussion paper included a section called “Procedures in the Family Court”. Submissions received by the Ministry of Justice on this section are an important reference for our review.

#### BOSHIER REPORT

- A2 In December 1992, the Principal Family Court Judge established a committee, chaired by Judge Boshier, to review the Family Court. That review was finalised in 1993.<sup>373</sup> It made a number of recommendations for improvements that could be made to the Family Court. It called for the establishment of a Family Conciliation Service. This recommendation was not endorsed by the Government of the day. Many of the other recommendations relating to case management, the role and payment of counsel for child, domestic violence, legal aid and judicial practice, however, have been taken on board.

#### CUSTODY AND ACCESS RESEARCH

- A3 Between 1989 and 1994, the Policy and Research Division of the Department of Justice carried out an extensive research programme on Family Court proceedings dealing with custody and access.<sup>374</sup> During the course of the research many issues were examined, leading to a considerable number of suggestions for changes to aspects of Family Court proceedings. The research also confirmed that the Family Court was an improvement over the previous procedures for dealing with family disputes and that the Family Court was generally well regarded.

<sup>373</sup> Judge PF Boshier “A Review of the Family Court: A Report for the Principal Family Court Judge” (Auckland, 1993, mimeographed).

<sup>374</sup> *The Family Court: A Discussion Paper*, J Leibrich and S Holm. (Monograph series no 6, 1984); Report 1: *The Welfare of the Child: A Literature Review*, G Hall (1989); Report 2: *A Survey of Parents who have Obtained a Dissolution*, Angela Lee (1990); Report 3: *The Views of Counsel for the Child, Specialist Report Writers and Department of Social Welfare Report Writers*, B Hong (1991); Report 4: *Interviews with Parents About Their Court Experience*, A Harland (1991); Report 5: *Counselling Co-ordinators Group Discussion*, A Harland (1991); Report 6: *A Survey of Family Court Judges*, G Hall, A Lee, A Harland (1993); Report 7: *The Lawyers’ Perspective*, G Hall, A Lee, A Harland (1993); Report 8: *Discussion Paper*, G Hall and A Lee (1994).

## FAMILY COURT COUNSELLING RESEARCH

- A4 An extensive research programme on Family Court counselling was carried out between 1989 and 1994.<sup>375</sup> Its principal objective was to assess the effectiveness of counselling services. The reports produced from the research, with their extensive input from those involved on both sides of the counselling process, made a number of important findings. These reports provide valuable insight for us on where counselling has been used with greatest effect and where it has been less successful.

## CONSOLIDATION OF FAMILY COURT RULES

- A5 There is an ongoing Ministry of Justice project to consolidate all rules relating to Family Court matters into one document. This is expected to be completed sometime in 2002. Once this is complete, there will be a consistent set of rules for all proceedings in the Family Court, and one format for applications and other documents filed in the Family Court.

## CHILDREN'S ISSUES CENTRE RESEARCH

- A6 The Children's Issues Centre at Otago University has carried out various research studies on children in the Family Court system in New Zealand.<sup>376</sup> It is currently looking at children's and parents' experience of, and satisfaction with, Family Court procedures in custody and access matters. This body of research will be valuable and should be considered in any Family Court changes.

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<sup>375</sup> Department of Justice Family Court Counselling Research Series: G Maxwell and J Robertson *Family Court Counselling Services and the Changing New Zealand Family* (1989); G Maxwell and others *A Counsellor's Perspective on the Family Court and its Clients* (1990); G Maxwell and J Robertson *Moving Apart: A Study of the Role of the Family Court Counselling Services*, two volumes: a full report and an overview of the findings and their policy implications (1993); G Maxwell and J Robertson *Deciding About the Children After Separation: A Client's Perspective on the Contribution of the Family Court* (1994).

<sup>376</sup> See paras 30–47.

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APPENDIX B  
Joint Protocol:  
Department for Courts and  
Department of Child, Youth and  
Family Services  
1 July 2001

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## Referral by the Family Court to Child, Youth and Family

### Introduction

This protocol details the service requirements to ensure that there is an effective and efficient child protection network for vulnerable and at risk children, young people and families.

This protocol specifies three tracks for referral by the Family Court to Child, Youth and Family. The fourth track details the reciprocal arrangements for the lawful exchange of information between the two departments and between the Court and Child, Youth and Family.

The tracks are:

1. S15 CYP&F Act 1989 reporting of ill treatment or neglect of child or young person.
2. S19 (1)(b) CYP&F Act 1989 referrals of care or protection cases to the Care and Protection Co-ordinator.
3. S29 Guardianship Act 1968 reports from Director General for social work report.
4. Requests for information.

### Liaison

The Department for Courts liaison person in each location will be the Family Court Co-ordinator. Each Child, Youth and Family site will identify a Court liaison person.

The liaison role will be to jointly monitor timeliness, quality of referrals and reports, and to facilitate regular meetings, including the judiciary and other relevant parties, to ensure that the protocol is working effectively in each area.

The liaison contacts at National Office will be:

- Child, Youth and Family - Carmel McKee – phone: (04) 916 3718  
Email: carmel.mckee007@cyf.govt.nz
- Department for Courts - Judy Moore – phone: (04) 918 8817  
Email: judy.moore@courts.govt.nz

### Process for Referral

The Family Court has a number of legislative options for requesting either information to assist the Court or requiring care and protection action by Child, Youth and Family.

Child, Youth and Family may approach the Court to review the track option chosen by the Court or the time frames, if either appears to be inappropriate.

The Court will make referrals to Child, Youth and Family on the appropriate form:

- Form 001, Track 1 S15 Referral to Child, Youth and Family.
- Form 002, Track 2 S19 Referral to Care and Protection Coordinator.
- Form 003, Track 3 S29 Referral for Social Work Report.

**See:** *Appendix A: Table for a summary of the referral tracks.*

*Appendix D: For sample referral forms.*

*Appendix E: For S14 Definition of Child or Young Person in Need of Care or Protection.*

## S15 CYP&F Act 1989 Reporting of Ill-treatment or Neglect of Child or Young Person

### Track 1

#### Referrals

If the Court in any proceedings before it believes that any child or young person may have been, has been, or is likely to be, harmed (whether physically, emotionally or sexually), ill treated, abused, neglected or deprived, a S15 referral may be made to Child, Youth and Family by the Court for an investigation under S17.

This referral will be made to the National Call Centre or Duty Social Worker not the Care and Protection Co-ordinator.

The referral will be made on Form **001**, and on judicial direction will include copies of relevant affidavits, orders and reports.

***Any request by a third party to Child, Youth and Family for the information provided by the Court should be referred to the Court.***

If a critical or very urgent risk is suspected, the notification should be immediately phoned to the National Call Centre or Duty Social Worker and the forms faxed.

---

#### Child, Youth and Family Action

1. On receipt of the notification, the receiving Child, Youth and Family site will advise the Court **preferably within one working day** or as soon as possible:
    - the date the notification was received;
    - the response time assigned to it (see 2 below);
    - if there is a current investigation and;
    - the allocated social worker (where possible).

*(See S15 response form 001: initial report)*
  2. Child, Youth and Family will prioritise cases according to the time within which an investigation will commence.  
Initial response requirements are:
    - critical (same day);
    - very urgent, (same day plus 1);
    - urgent, (within 7 days);
    - low urgency, (within 28 days) or
    - no further action.
  3. When the investigation into the S15 notification is completed Child, Youth and Family will provide the Court with a brief **written** report, **as soon as is practicable**, conveying the outcome of the investigation and any further actions planned. (S17(3))  
*If the Court requires substantive details regarding the outcome of the case the Court will request a S29 report to provide such details.*  

*(See S15 response form 001: outcome of investigation)*
- 

#### Response times

1. Acknowledgement of receipt of notification and initial response time; 1 working day.
  2. Report on outcome of investigation; as soon as is practicable.
-

*S15 continued:*

**Information  
sharing with  
S15  
notifications**

Communication and relationship building between the two departments is seen as the key to ensuring that S15 notifications are effectively managed. Child, Youth and Family and Courts staff are encouraged to keep in touch about the progress of the case.

Until a case has been allocated the liaison person will ensure that the Court is kept informed of the progress in allocating the case and the expected final response time from Child, Youth and Family to Courts.

The allocated social worker in Child, Youth and Family and the Family Court Coordinator in Courts should ensure that each department is kept fully informed, as soon as possible, of any changes in the child's circumstances or significant events - such as care arrangements, related orders, Family/Whanau meetings or Family Group Conferences.

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## **S19 (1)(b) CYP&F Act 1989 Referrals of Care or Protection Cases to the Care and Protection Co-ordinator by Court**

### **Track 2**

#### **Referrals**

Where in any proceedings the Court **believes** that any child or young person is in need of care or protection on one or more of the grounds specified in section 14(1) of the Act, the Court may refer the matter to a Care and Protection Co-ordinator under S19(1)(b) of the CYP&F Act.

The referral will be made on Form **002**, and upon judicial direction will include copies of all relevant affidavits, orders and reports.

***Any request by a third party to Child, Youth and Family for the information provided by the Court should be referred to the Court.***

---

#### **Child, Youth and Family Action**

The Child, Youth and Family C&P Co-ordinator will provide a report to the Court to indicate **intended** action **within 7 days**.

*(See Section 19 Form 002: initial report to be completed.)*

1. When the referral has been accepted and an FGC is to be convened, an invitation will be extended to Counsel for the Child or, in the case of an application under the Domestic Violence Act, Counsel to Assist the Court, to attend the FGC, pursuant to S22(1)(h) of the Act.
  2. The Co-ordinator will advise the Court if a social work report has been requested and the expected time frame for the completion of that report.
  3. The Care and Protection Co-ordinator must report to the Court **within 28 days** (S19 (4)(a) or (b) CYP&F Act).
  4. The final written report will meet the time frames established by/or negotiated subsequently with the Court.
  5. Where an FGC has been held a copy of the FGC recommendations, decisions and plans will be provided to the Court.
- 

#### **Response times**

- 1) Receipt of referral: report to Court on intended action within 7 working days.
- 2) Statutory requirement for report to Court is 28 days, (s19(4) (a) or (b)).
- 3) Final report to Court by agreed date.

## S29 Guardianship Act 1968 Reports from Chief Executive

### Track 3

#### Referrals

Requests for reports under S29 of the Guardianship Act are specific to custody and access issues and are confined to the parties to those proceedings.

S29 requests will not be used to activate general care or protection investigations in place of S15 or S19(1)(b) CYP&F Act, or to investigate placement options for a child other than with the parties to the proceedings.

The referrals will be made on form **003**, and upon judicial direction will include copies of relevant affidavits, orders and reports.

***Any request by a third party to Child, Youth and Family for the information provided by the Court should be referred to the Court.***

Referrals will be forwarded to the Duty Social Worker, or designated person at the relevant site.

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#### S29 Reports

The following table identifies two types of S29 reports:

Report	Information included
Limited report	<p>A report with a specific brief from the Court as to the issues to be reported on, e.g.:</p> <ul style="list-style-type: none"> <li>whether the family is known to Child, Youth and Family, as per Track 4, this may include details of any previous/ current notifications/history with Child, Youth and Family, i.e, a file search.</li> <li>specific details for access arrangements.</li> </ul> <p>Where such a brief is given a short and focussed report will be expected back rather than a lengthy assessment.</p> <p>Whatever the brief the report should always include additional information which may be relevant to the proceedings, e.g.: an acknowledgement that there is a current investigation being undertaken, the parties are known to Child, Youth and Family etc.</p>
General report	<p>A general S29 report will include:</p> <ul style="list-style-type: none"> <li>details of any current or previous notifications/history with Child, Youth and Family,</li> <li>information regarding dates of interviews/contact with the parties, child(ren), other significant adults involved,</li> <li>background information,</li> <li>present circumstances,</li> <li>parenting ability,</li> <li>relationship to the child,</li> <li>future plans,</li> <li>extent of co-operation with other parties.</li> </ul> <p>The report must also address any specific issues identified by the Court.</p>

*S29 continued:*

**Note**

1. If a social worker forms a suspicion in preparing a report that there are care or protection issues, they must take the appropriate action under S15 and advise the Court as soon as possible.
2. S29 reports remain the property of the Court and cannot be provided to third parties. Any request for access to the S29 report must be referred to the Court.

---

**Response Time**

The specific time for reporting back will either be established in the brief or negotiated and recorded subsequently.

A general report would be expected to take 6 weeks to prepare but it is expected that a limited report would be able to be provided within a much shorter timeframe.

*( See Track 4 for additional information.)*

## Request for Information

### Track 4

**Introduction** These are the processes that will establish the arrangements for the lawful provision of information between the Department for Courts, the Court and Child, Youth and Family. Child, Youth and Family may also use this track to get information from the Court as part of a care or protection investigation.

Child, Youth and Family will provide the Court with information under S29 of the Guardianship Act.

The Department for Courts will provide information to Child, Youth and Family in accordance with any requests under S66 of the CYP&F Act 1989.

Court records can be accessed by Child, Youth and Family in accordance with the relevant Search Rules. *(See Appendix B)*

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**Making requests** The following details the procedures for accessing information from:

1. Child, Youth and Family to the Court.
2. The Department for Courts to Child, Youth and Family.
3. The Court to Child, Youth and Family.

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#### 1. Information provided by Child, Youth and Family to the Court by S29 report.

The Court may request a S29 report from Child, Youth and Family specifically to determine whether Child, Youth and Family has had:

1. Previous, or current involvement with the family named in the request and;
2. whether there are any current orders.

It is not expected that this report will provide the substantive details of Child, Youth and Family's involvement. If this information is later required by the Court an additional report may be requested.

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**Response time** A specific and limited report could be provided in one working day. *(See S29 form 003: CYF Response)*

The time frame for a more detailed report will either be established in the brief or negotiated and recorded subsequently.

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*Request for Information continued:*

**2. Information provided by the Department for Courts to Child, Youth and Family under S66 CYP&F Act.**

**Access to Departmental information.**

Child, Youth and Family can request information held by the **Department for Courts**, not the Court, pursuant to its specific statutory powers, under S66 CYP&F Act.

The Department for Courts will provide Child, Youth and Family with information held by the **Department**, not the Court, in accordance with S66 of the CYP&F Act. Departmental information would include information held on the Family Court database or the equivalent manual registers. This could include information about current proceedings, orders etc, but not substantive details.

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**3. Information provided by the Court to Child, Youth and Family : Search Rules.**

**Access to Court files**

Child, Youth and Family may request the Registrar for access to the Court files in accordance with the appropriate search rules.

The most relevant rules for the purposes of this protocol are as follows:

- Rule 8 of the Family Proceedings Rules generally governs access to information concerning proceedings under The Family Proceedings Act 1982 and Guardianship Act 1968 in the Family Court and where a proper interest has been established in the proceedings.
- Rule 95 of the Domestic Violence Rules governs access to information concerning proceedings under the Domestic Violence Act.

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*(See Appendix B for details of search rules for all jurisdictions.)*

**Response time** Information from local **Department for Courts** records could be provided within 1 working day.  
Time frames for access to **Court files** will be negotiated with the Court by Child, Youth and Family.

## Appendix A: Referrals from Courts for Services from Child, Youth and Family

The following table summarises the legislative criteria for each referral track, including its purpose, the action required by Child, Youth and Family, and possible outcomes.

Track	Criteria	Purpose	Action by CY&F	Outcome
<b>S15 CYP&amp;F Act</b>	Belief that a care or protection issue <u>may</u> exist (s14 grounds).	Statutory Child, Youth and Family investigation to determine care or protection issues.	<ul style="list-style-type: none"> <li>Referral accepted. Court advised within 1 working day of priority assigned to case.</li> <li>Consult with Care and Protection Resource Panel (CPRP).</li> <li>Possible SAT/CAT (i.e. joint investigation with police).</li> <li>SW assessment - formulation of <u>belief</u> (s14 grounds).</li> </ul>	<ul style="list-style-type: none"> <li>Social work investigation &amp; assessment completed, identifying any further action required.</li> <li>Brief written report to Court of outcome of investigation.</li> </ul>
<b>S19(1)(b) CYP&amp;F Act</b>	Belief (s14 ground) formed by Court (inc. Counsel) that a care or protection issue exists. Note: All information relevant to this belief needs to be supplied as per the protocol to reduce the necessity for a Child, Youth and Family investigation.	Care and Protection Co-ordinator (CPC) to consider and if appropriate, holds family group conference (FGC) to resolve care or protection issues, or to suggest alternative action.	<ul style="list-style-type: none"> <li>CPC reports to Court of intended action, within 7 days of receiving referral.</li> <li>CPC may ask for s19(3) social work investigation (outcome to CPC, not Court).</li> <li>CPC consults Care &amp; Protection Resource Panel.</li> <li>CPC convenes FGC, (Counsel for Child attends FGC).</li> <li>CPC must report back to Court within 28 days.</li> </ul>	<ul style="list-style-type: none"> <li>FGC Plan</li> <li>Copy of recommendations, decision and/or plan sent to Court.</li> <li>Court Orders possible</li> <li>A report to the Court on action taken.</li> </ul>

*Continued on next page*

## Appendix A: Referrals from Courts for Services from Child, Youth and Family,

Track	Criteria	Purpose	Action by CY&F	Outcome
<b>S29 Guardianship Act</b>	Caregiver dispute (proceedings on guardianship / custody / access) Court requires information as specified, or a general report. The report must include any prior or current Child, Youth and Family involvement with family.	Advice as to applicant / respondent parties' ability to provide care.  Note: If the social worker forms a suspicion or belief there are care or protection issues; s/he must make a S15 notification under S17 of CYP&F Act. The Court is to be advised if this occurs.	<ul style="list-style-type: none"> <li>Social work report prepared for Court as per Judge's direction within agreed time frame.</li> </ul>	<ul style="list-style-type: none"> <li>Court makes decision about orders under Guardianship Act.</li> </ul>
<b>Information Request</b>	<p>Court requires information as specified under a S29 request.</p> <p>Child, Youth and Family may seek information from Department (S66 CYP&amp;F Act), and/ or require access to Court records as specified under the search rules.</p>	<p>The Court has information relevant to any proceedings to ensure the care or protection needs of a child / young person are met.</p> <p>Child, Youth and Family has information relevant to a current investigation.</p>	<ul style="list-style-type: none"> <li>Information requested by Court is provided in S29 report.</li> <li>Information made available as per protocol.</li> </ul>	



## **Appendix B: Summary of Search Rules**

### **Requests for access to Court records.**

Child, Youth and Family may request access to court files in accordance with the appropriate search rules.

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#### **Family Proceedings.**

- i) Rule 69 of the District Court Rules generally governs access to information concerning family related proceedings in the District Court that have been determined and where a genuine or proper interest has been established.
  - ii) Rule 66 of the High Court Rules generally governs access to information concerning family related proceedings in the High Court and Court of Appeal that have been determined and where a genuine or proper interest has been established.
  - iii) Rule 8 of the Family Proceedings Rules governs access to information concerning proceedings under the Family Proceedings Act and Guardianship Act in the Family Court and where a proper interest has been established.
  - iv) Other relevant search provisions are Rule 95 of the Domestic Violence Rules and S23 of the Adoption Act 1955.
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#### **Criminal Proceedings**

- i) Section 71 of the Summary Proceedings Act permits a certified copy of convictions to be provided to any person with a genuine or proper interest in respect of summary criminal proceedings in the District Court.
- ii) The Criminal Proceedings (Search of Court Records) Rules govern access to files, by application to a Judge, in respect of criminal proceedings in the High Court and Court of Appeal and in respect of Jury trials in the District Court.
- iii) Rule 9 of the Children Young Persons and Their Families Act 1989 Rules governs access to criminal proceedings in the Youth Court where a proper interest has been established.

## **Appendix C**

# **Memorandum of Understanding Department for Courts and Department of Child, Youth and Family Services 1 July 2000**

## Memorandum of Understanding

### Background

This protocol was piloted at four courts and the courts' associated five Child, Youth and Family sites. An evaluation of the pilot found that:

- There was no demonstrated capacity by pilot sites for the Family Court to reduce professional service costs as a result of the pilot.
- Child, Youth and Family funding levels were sufficient to meet the demand for S29 court reports, except in Christchurch where the Court did fund additional reports.
- In sites where there was a dedicated resource, either a staff member or a contracted worker, employed to complete S29 reports, the Court was generally satisfied with the quality of the reports.
- The protocol resulted in improved relationships between the Courts and Child, Youth and Family sites and greater effectiveness in service delivery in three of the four areas involved in the pilot.

### Outcomes and objectives of the joint protocol

The intended outcome of this protocol is to provide an improved model for the delivery of the reporting services Family Courts need from Child, Youth and Family so that complete and accurate information is available to Judges when making decisions which involve the welfare and safety of children.

All Family Courts and Child, Youth and Family sites will implement the protocol from 01 July 2000.

### Approach and plan

The implementation plan will progressively roll out the protocol to provide consistent delivery of Child, Youth and Family services to Family Courts.

The implementation plan is scheduled to meet the following **milestones**:

Milestone	Date
Protocol agreed	1 March 2000
Locations and timetable agreed	20 March 2000
Managers' sign off timetable for briefings	20 March 2000
Training for implementation starts	22 March 2000
Memorandum of Understanding signed	26 June 2000
Implementation of protocol	1 July 2000
Interim Report on implementation to Group Managers in both Departments	30 July 2000
Annual Report on implementation to Group Managers in both Departments	30 July 2001

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*Continued on next page*

## Memorandum of Understanding, Continued

<b>Implementation management</b>	<p><b>Sponsors</b> The implementation is jointly sponsored by the representatives of the Chief Executives of the Department for Courts and the Department of Child, Youth and Family Services.</p> <p><b>Project Co-ordinators</b> Carmel McKee, Advisory Officer, Child, Youth and Family, and Judy Moore, Family Account Manager, Department for Courts have been appointed by each department to implement the protocol nationally.</p> <p>The Project Co-ordinators will be responsible for setting the implementation plan up and co-ordination of its operation within their respective agencies.</p> <p>They will share tasks and undertake responsibilities in their area of expertise. This will include training for staff in both departments and for any new data capture required to meet operational requirements.</p> <p>They will also act as advisors to front-line staff in the operation of the protocol. Judy Moore will be responsible for liaison with the judiciary.</p>
<b>Benefits and risk management</b>	<p>The <b>benefits</b> of implementing this protocol are expected to be:</p> <ul style="list-style-type: none"><li>• improvements to the quality, timeliness and quantity of reports available to Family Courts from Child, Youth and Family,</li><li>• improvements to the specificity and quality of referrals received from Family Courts to Child, Youth and Family,</li><li>• improved communication between Courts and Child, Youth and Family.</li></ul> <p>The <b>risks</b> are that:</p> <ul style="list-style-type: none"><li>• there will be no perceived improvement in the timeliness and quality of reports provided by Child, Youth and Family,</li><li>• work volumes for both Departments will grow beyond current funding and service capacity,</li><li>• inappropriate referrals will be made by Department for Courts.</li></ul>

## Memorandum of Understanding, Continued

### Protocol between the Department of Child, Youth and Family Services and the Family Court

1 July 2000

#### 1 Purpose of Agreement

The Chief Executive, Department for Courts and the Chief Executive, Department of Child, Youth and Family Services have agreed to enter into a memorandum of understanding in relation to the services which Child, Youth and Family provides to the Family Court.

#### 2 Memorandum of Understanding

**Signatories to the Memorandum of Understanding** - Operational Managers in each agency, namely Fiona Saunders-Francis, Manager Operational Policy, Department for Courts and Ken Rand, General Manager Service Delivery, Child, Youth and Family.

**Period covered by the Memorandum of Understanding** - The memorandum will come into force on 1 July 2000 and continue at the discretion of the Operational Managers.

**Dispute resolution** - The departments agree that any disputes between them, which cannot be resolved, will be taken to the relevant Operational Managers in the first instance and then to Chief Executives.

**Request for reports from Child, Youth and Family** - All judicial requests for S29 reports under the Guardianship Act 1968, notifications under S15 or referrals under S19 Children, Young Persons & Their Families Act 1989 will be forwarded to the local Child, Youth and Family Duty Social Worker, or the National Call Centre on the forms attached as Appendix D

#### 3 Funding for Services

**Funding** - Referrals from the Courts under S15 and S19 Children Young Persons and Family Act 1989 and S29 Guardianship Act 1968 are included in the service level agreement and will all be funded from Vote: Child, Youth and Family

Signed on behalf of the Department for Courts by  
Fiona Saunders-Francis, Manager Operational Policy

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Acting under delegation pursuant to the State Sector Act 1988

Signed on behalf of the Department of Child, Youth and Family Services by  
Ken Rand, Group Manager Service Delivery

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Acting under delegation pursuant to the State Sector Act 1988

Date:

## **Appendix D: Family Court Referral Forms for Services from Child, Youth and Family.**

### **Table of Forms**

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<b>Court/CYF 001</b>	Track 1 S15 CYP&F Act 1989 Court Referral to Child, Youth and Family Child, Youth and Family interim and final report forms
<b>Court/CYF 002</b>	Track 2 S19(1)(b) CYP&F Act 1989 Court Referral to Care and Protection Coordinator Care and Protection Coordinator interim report form
<b>Court/CYF 003</b>	Track 3 S29 Guardianship Act 1968 Referral for Social Work Report Child, Youth and Family report for S29 Information request

## **Appendix E:**

### **S14(1) Definition of Child or Young Person in Need of Care or Protection. Children Young Persons and Their Families Act 1989**

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- (1) A child or young person is in need of care or protection within the meaning of this Part of this Act if-
- (a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or
  - (b) The child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable; or
  - (c) Serious differences exist between the child or young person and the parents or guardians or the other persons having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or
  - (d) The child or young person has behaved, or is behaving, in a manner that-
    - (i) Is, or is likely to be, harmful to the physical or mental or emotional wellbeing of the child or young person or to others; and
    - (ii) The child's or young person's parents or guardians, or the persons having the care of the child or young person are unable or unwilling to control; or
  - (e) In the case of a child of or over the age of 10 years and under 14 years, the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child; or
  - (f) The parents or guardians or other persons having the care of the child or young person are unwilling or unable to care for the child or young person; or
  - (g) The parents or guardians or other persons having the care of the child or young person have abandoned the child or young person; or
  - (h) Serious differences exist between a parent, guardian, or other person having the care of the child or young person and any other parent, guardian, or other person having the care of the child or young person to such an extent that the physical or mental or emotional wellbeing of the child or young person is being seriously impaired; or
  - (i) The ability of the child or young person to form a significant psychological attachment to the person or persons having the care of the child or young person is being, or is likely to be, seriously impaired because of the number of occasions on which the child or young person has been in the care or charge of a person (not being a person specified in subsection (2) of this section) for the purposes of maintaining the child or young person apart from the child's or young person's parents or guardians





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APPENDIX C

Practice note – counsel  
for the child: selection,  
appointment and other matters

## **PN 20 Practice Note – Counsel for the Child: Selection, appointment and other matters**

### **1. Background**

The terms of this Practice Note have been settled in consultation with the Department for Courts and the Family Law Section of the New Zealand Law Society.

### **2. Contents**

The Practice Note covers the following matters:

- appointment;
- Children, Young Persons, and Their Families Act 1989 – review procedures;
- reports;
- selection process;
- review of lists;
- levels of remuneration; and
- complaints.

### **3. Introduction**

In 1997, the Principal Family Court Judge asked the Department for Courts to undertake a review of the representation of children in the Family Court. Two Focus Committees, including representatives from the department, the New Zealand Law Society and the Judiciary, were established to address the issues associated with the role and administration of Counsel for the Child. The report of the Focus Committees was released in April 1999.

This Practice Note consolidates and supersedes previous Practice Notes only where they concern matters relating to Counsel for the Child appointments and incorporates recommendations from the report.

These are:

- Practice Note issued by Principal Family Court Judge Trapski in January 1982 on Family Court procedure (refer “Separate representation of children”);
- Practice Note issued by Principal Family Court Judge Mahony in April 1988 (refer “Periodic reports from Counsel for the Child and Guardianship Act 1968, ss 29 or 29A”);
- Practice Note issued by Principal Family Court Judge Mahony in April 1988 on Counsel for the Child quarterly reports;

- Practice Note issued by Principal Family Court Judge Mahony in 1992 on CYPF Act 1989 – review procedures;
- Practice Note issued by Principal Family Court Judge Mahony in March 1996 on Matters affecting the appointments and payment of Counsel appointed by the Family Court (only where matters relate to Counsel for the Child);
- Department for Courts Circular issued on 1 April 1998 – outlining new fees for Counsel for the Child.

**In this practice note:**

- References to “Counsel”, unless otherwise stated, refer to Counsel for the Child.
- References to “Specialist Report Writer” means any specialist report writer from whom a report has been requested under s 29A of the Guardianship Act 1968 and s 178 of the Children, Young Persons, and Their Families Act 1989. “Specialist report” has a corresponding meaning.
- The term “child” includes both “child” and “young person” as defined in the Children, Young Persons, and Their Families Act 1989.

**4. Separate representation of children**

- Section 30(1)(b) of the Guardianship Act 1968 authorises the Court to appoint a barrister or solicitor to represent any child who is the subject of or who is otherwise a party to proceedings under that Act.
- Section 162(1)(b) of the Family Proceedings Act 1980 gives similar jurisdiction in respect of a child involved in proceedings under that Act.
- Section 159 of the Children, Young Persons, and Their Families Act 1989 authorises the Court to appoint a barrister or solicitor to represent any child or young person who is the subject of any proceedings under care and protection and, if the Court thinks desirable, for such other purposes (including any other proceedings under this Act or any other enactment) as the Court may specify.
- Section 81(1)(b) of the Domestic Violence Act 1995 authorises the Court to appoint a lawyer to represent the child in any proceedings on an application for a Protection Order (or in any proceedings relating to or arising out of a Protection Order) made on the child’s behalf.
- Section 26(2) of the Matrimonial Property Act 1976 authorises the Court to appoint a solicitor or Counsel to represent children of the marriage if there are special circumstances which render it necessary or expedient.

## 5. Appointment of Counsel for the Child

- 5.1 (a) Appointments must be made by the Court. The Judge is responsible for settling the brief for Counsel for the Child. This will usually be done in consultation with Counsel for the parties. The initial brief (and any extensions approved by the Court) will cover the span of the appointment of Counsel for the Child up until the time of any hearing.
- (b) As far as possible, the brief for Counsel for the Child should be settled at the time the decision is made to appoint Counsel for the Child.
- (c) Unless any risks to the children are identified earlier, appointments under s 30(2) Guardianship Act 1968 generally will not be made until a mediation conference has identified the matters that are really in issue between the parties and, whether custody or access proceedings appear likely to proceed to a hearing.
- (d) Where the solicitor for either party considers that an appointment should be made before a mediation conference, application can be made to the Court through the Registrar.
- 5.2 The Court will consider, in allocating the brief to Counsel for the Child, the following listed factors:
- match of skills to case requirements;
  - availability of Counsel;
  - current workload of Counsel;
  - equitable distribution of work among Counsel on the list.
- 5.3 Every brief should include:
- a description of the issues to be addressed and, if appropriate, the task/s to be undertaken;
  - any reporting requirements both written and otherwise;
  - the time and funding allocated to carry out the brief;
  - the timeframe for completion of the tasks.
- 5.4 The role of Counsel for the Child is referred to in detail in the Code of Practice for Counsel for the Child issued by way of Practice Note on 17 November 2000.
- 5.5 Once the Court has settled the brief for Counsel for the Child, the Registrar will negotiate an estimate for time and cost for undertaking the outlined brief with the proposed Counsel. This will include payment of any disbursements. Once an acceptable arrangement has been reached, the Judge will sign a Minute of Appointment.
- 5.6 A bill of costs should be rendered in a form usually acceptable to the Legal Services Agency and should be calculated in accordance with an agreed hourly rate of remuneration.
- 5.7 Where, during the course of the work, it becomes clear that the estimate of time does not cover the work required for the proper discharge of Counsel's function, Counsel should report the fact to the

Court with reasons. Counsel should use best endeavours to report before the estimate is exceeded. Similarly, where the nature of the assignment changes and Counsel believes a different payment level should apply, Counsel should report to the Court as soon as practicable. Where Counsel and the Registrar cannot agree on any additional cost, the matter should be resolved by the procedures set out in s 30 of the Guardianship Act 1968.

- 5.8 Each Court will maintain a register, listing each appointment of Counsel, the date of appointment, the estimate of fees and actual fees paid for the type of case and the date on which the appointment terminates.
- 5.9 The register will be available for the regular monthly management meeting of each Family Court.
- 5.10 In areas such as Auckland, where several Courts use one pool of Counsel, there should be inter-Court communication to ensure that, as far as possible, there is a spread of assignments to all listed Counsel.

## **6. Children, Young Persons, and Their Families Act 1989 – review procedures**

- 6.1 Counsel for the Child's appointment will continue after the initial proceedings have been finalised or have subsequently been reviewed with a further review to follow. Though Counsel's appointment continues in this way, no active work is to be undertaken until the time of the review, unless specifically authorised by the Court or issues arise unexpectedly or urgently.
- 6.2 Because the appointment continues, Counsel becomes a person who has to agree to the reviewed plan. Early consultation will be required by the person preparing the plan. (Refer s 132(1)(b) and s 135(3)(e) of the Children, Young Persons, and Their Families Act 1989.)
- 6.3 If there is no dispute about the reviewed plan and the direction in which the proceedings are to go, those preparing the reviewed plan should obtain the formal consent of all parties as required. The consent forms should indicate whether parties wish to attend a hearing or whether they consent to the review being conducted without a hearing. The Judge should be advised of any dispute when the plan is filed.
- 6.4 After filing, the plan will be placed before a Judge to consider release of the report and any other steps to be taken, and whether orders can be made on the papers.
- 6.5 The intention of this procedure is to reduce to a minimum any disruption to the lives of children, foster parents and others by having them attend the Court, but at the same time to protect all parties' rights under the Act. This is particularly appropriate where everyone agrees that the status quo should continue. It is also intended to lead to significant savings in time and cost.

## 7. Report from Counsel for the Child

- 7.1 As from the 1 February 2001, the Court will not require Counsel for the Child to provide three monthly reports on each case. Reports will be provided as specified by the brief or as directed by a Judge.
- 7.2 Copies of the reports must be forwarded to Counsel for the parties.
- 7.3 The report should summarise steps taken by Counsel and results that have been achieved. It should then outline further steps to be taken or recommended. The report should be short, factual, and informative, but should be couched in neutral terms and should not introduce any material that ought to come to the Court's knowledge only by way of evidence. Further steps recommended may include one or other of the following:
- that the parties be referred back to counselling;
  - that a mediation conference be held;
  - that a pre-hearing conference be held;
  - that the matter proceed to a hearing;
  - that a report be prepared under s 29 or s 29A of the Guardianship Act 1968 or s 178 or s 186 of the Children, Young Persons, and Their Families Act 1989. Reasons for such a report should be stated;
  - that no steps need be taken and that the matter be left in the hands of Counsel for a further specified period.
- 7.4 Because circumstances differ so much from case to case, Judges have been reluctant to approve a set form or model to be used as a basis for reports required from Counsel for the Child.
- 7.5 Nevertheless, the following draft is included as a useful guideline. It focuses attention:
- on relevant issues;
  - the point that has been reached by the parties;
  - the input to date by Counsel for the Child; and
  - advice to the Court on initiatives that may be appropriate.
- 7.6 It is comprehensive, but concise and to the point. In an appropriate case Counsel may refer in a neutral way to issues settled or still to be determined.



The Registrar

Family Court

Re: B Family – X/X/88

Thank you for your letter of 18 June advising of my appointment as Counsel for the children.

This is my report of my attendance to date.

**Summary of Issues:**

1. The future of Mr and Mrs B's marriage;
2. Custody of three children;
3. Occupation of a state rental home.

**Situation:**

1. Mr and Mrs B and their children presently occupy the home;
2. There are three children directly affected by the dispute;
  - (a) G – pupil Wellington College;
  - (b) R – pupil Wellington College;
  - (c) P – categorised as an autistic child, functioning in the severely handicapped range. P attends a Special School.
3. Mr and Mrs B have attended counselling;
4. A mediation conference was held on Friday 11 July. However, the problems have not been resolved, and an urgent hearing has been sought.

**My attendance to date:**

1. Read Court documents;
2. Formulated an approach;
3. Spoke on telephone and attended on the parties' solicitors;
4. Conference with Mrs B;
5. Conference with Mr B;
6. Conference with Principal, Special School;
7. Telephone conference with school Counsellor, Wellington College;
8. Telephone conference, social worker, Wellington Hospital;
9. Attended mediation conference;
10. Conference with school Principal preparing affidavit;
11. Conference with school Counsellor preparing affidavit.

It appears that the only and most appropriate means of resolution is an urgent Court hearing. I have, at this stage, decided to call witnesses to give evidence at the hearing and, to that end, am in the process of preparing affidavits.

I intend to speak to ..... of the Education Department Psychological Service as she/he has completed an assessment of P for the Education Department. I will also be speaking to G and R and intend to meet further with Mr and Mrs B and their solicitors prior to the hearing.

I have to date spent X hours on the case as detailed by my interim bill, which is enclosed.

Yours faithfully,

## 8. Selection of Counsel for the Child

- 8.1 In each Court there will be a list of Counsel who are available to accept appointments from the Court as Counsel for the Child and from which Counsel may be appointed in individual cases.
- 8.2 The following selection process has been settled following the recommendations from the report of the Focus Committees on the role of Counsel for the Child and associated matters. The Department for Courts and the Family Law Section of the New Zealand Law Society have agreed to this process.
- 8.3 The Registrar will convene a Panel to consider applications for inclusion in the list of Counsel for the Child available to undertake Family Court appointments. This Panel will consist of a Family Court Coordinator, two nominees from the Family Law Section of the New Zealand Law Society, a Specialist Report Writer nominated by the Court, a Family Court Judge nominated by the Principal Family Court Judge and the Registrar, as convenor. The Panel should normally have six people, but a panel of three could be convened in some circumstances (for example, where an interview would be unable to be arranged within a reasonable timeframe). Any Panel of three must include a Family Court Judge, a nominee from the Family Law Section of the New Zealand Law Society and the Registrar (or a Family Court Coordinator).
- 8.4 Panels will be convened as required but no less than twice a year, if there are applications waiting to be considered and a need for Counsel to be appointed.
- 8.5 The following appointment process should be followed:
  - Counsel submit an application form to the Registrar in the Court region in which they wish to practise, nominating the particular Court or Courts where they wish to be on the list. The application is referred to a Panel convened by the Registrar.
  - panel members make such inquiries as may be needed for them to be informed about the applicant's ability to meet the criteria. Panel members will be assisted by the requirement that applicants provide the names of referees who can provide professional, confidential comment.
  - the Panel will interview each candidate. If the Panel has any concerns about a candidate's ability to meet the criteria, these concerns will be put to the applicant who will have the opportunity to reply.
  - it is expected that the Panel's approval will be by way of a consensus decision.
  - the Registrar will advise the applicant, the Court, the Family Law Section of the New Zealand Law Society (if required) and the National Office of the Department for Courts of the decision, in writing.
  - there is no obligation for the Panel to provide reasons for non-selection onto the list, but it is expected that, if an applicant

is not selected, the Panel will have discussed their concerns with the applicant during the selection process.

8.6 Counsel for the Child should meet the following criteria:

- ability to exercise sound judgment and identify central issues;
- a minimum of five years practice in the Family Court;
- proven experience in running defended cases in the Family Court;
- an understanding of, and an ability to relate and listen to, children of all ages;
- good people skills and an ability to relate and listen to adults;
- sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- relevant qualifications, training and attendance at relevant courses;
- personal qualities compatible with assisting negotiations in suitable cases and working cooperatively with other professionals;
- independence; and
- knowledge and understanding of the Code of Practice contained in the Practice Note issued on 17 November 2000 and the Best Practice Guidelines for Counsel for the Child – ratified by the NZ Law Society on 18 February 2000.

8.7 Counsel will be able to transfer their approval from one Court region to another.

**9. Review of Counsel for the Child lists**

9.1 A review of Counsel for the Child lists must be undertaken at intervals of not more than three years. The Registrar in each Court must ensure that lists of approved Counsel are reviewed at such intervals. Where several Courts use one pool of Counsel, the Registrars in those Courts may choose to review the lists of approved Counsel together.

9.2 The Registrar shall give notice to all Counsel who are currently on the list. Such notice will include a requirement for all Counsel whose names appear on the list to indicate, within a period of not more than 28 days:

- whether they wish to continue to receive Counsel for the Child appointments;
- whether they wish to withdraw from the Counsel for the Child list; or
- whether they have any matters relating to present or past appointments which they wish to draw to the attention of the Panel.

- 9.3 The Panel shall meet as soon as practicable and reconstitute the Counsel for the Child list. The Panel shall also consider any matters raised by Counsel that relate to the administration of the list.
- 9.4 The Panel shall notify all Counsel of the revised list and whether their names have been retained or deleted from the list, as the case may be. The reasons for deletion must be specified, and limited to either the practitioner's request or the practitioner's failure to respond within the stipulated time.
- 9.5 The Registrar shall send the revised list to the National Office of the Department for Courts and the Family Law Section of the New Zealand Law Society.

## **10. Levels of remuneration**

- 10.1 Until regulations are made fixing levels of remuneration, the Court notes the levels of remuneration agreed between the Department for Courts and the New Zealand Law Society. Levels applying at October 1995 are:

### **Level 1**

\$130 to \$155 per hour (GST inclusive).

Range to be used in cases where the practitioner appointed has only recently been approved or where no approved Counsel is available and Counsel appointed is not on the list of approved Counsel.

### **Level 2**

\$155 per hour (GST inclusive). This fee will be used in the majority of cases.

### **Level 3**

\$155 to \$170 per hour (GST inclusive). This range will be used to calculate fees:

- in cases where superior skills are required;
- in cases of extreme urgency;
- in cases where there are grave concerns about the immediate safety of children;
- in most Hague Convention cases;
- in cases where there are allegations of sexual abuse.

- 10.2 The Department has reminded Registrars that they have discretion to exceed the rate in exceptional circumstances.
- 10.3 Disbursements are not included in the rates set out above. Disbursements such as reasonable travelling expenses, toll calls, faxes etc, shall be paid by the Registrar on receipt of an itemised account from Counsel. Extraordinary expenses, such as long distance travel, should be approved in advance.
- 10.4 Where there are unresolved differences between Counsel and Registrar, Counsel should do the work, submit an account, and the

provisions of s 30 of the Guardianship Act 1968 will then apply, ie taxation by the Registrar and judicial review where necessary. It is envisaged that this procedure will rarely have to be used. Proper recourse to this procedure will not prejudice the position of Counsel in relation to future appointments.

- 10.5 This Practice Note shall continue to apply following the making of regulations fixing levels of remuneration to the extent that it is not overtaken by the same.


## **11. Complaints**

- 11.1 The Family Court does not have jurisdiction to hear any complaints against Counsel for the Child when the case has concluded. Any such complaint received by the Court should be referred to the New Zealand Law Society.
- 11.2 Applications for release of material to the New Zealand Law Society should be referred to a Family Court Judge.
- 11.3 Any complaints about Counsel for the Child received by the Court, when the case is in progress, should be referred to the presiding Judge. The complainant must put their complaint in writing.

### **Commencement date:**

This Practice Note is issued as at 17 November 2000 and comes into operation on 1 February 2001.

Signed



Judge P D Mahony

**PRINCIPAL FAMILY COURT JUDGE**

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APPENDIX D  
Practice note – counsel  
for child: code of practice



## PN 21 Practice Note – Counsel for Child: Code of Practice

### 1. Background

This Code of Practice for Counsel appointed to represent children in Family Court proceedings arose out of a review of representation for children in the Family Court initiated in 1997.

Two Focus Committees, including representatives from the Department, the New Zealand Law Society and the Judiciary, were established to address the issues associated with the role and administration of Counsel for the Child. The report of the Focus Committees was released in April 1999.

This report recommended that the Principal Family Court Judge issue a Practice Note clarifying the accountability of Counsel for the Child (see para 5.4), and that the New Zealand Law Society develop and ratify Best Practice Guidelines based on a draft in the report. That has been done and the Guidelines were ratified on 18 February 2000 by the Council of the New Zealand Law Society.

At the request of the Family Law Section of the New Zealand Law Society I agreed to incorporate as many as possible of these Guidelines and in an appropriate form, into a Code of Practice to be issued as a Practice Note. I have done so in consultation with the Administrative Family Court Judges. I now issue this Code which also incorporates Counsel's accountability. At the same time I recommend to all Counsel the full set of Guidelines ratified by the New Zealand Law Society as the pathway to consistently high practice throughout New Zealand. In any areas where the Guidelines differ from this Practice Note, the provisions of this Practice Note shall prevail.

### 2. Introduction

The welfare of children is the first and paramount consideration of the Family Court in all proceedings that involve children.

The role and practice of Counsel for the Child as described in this Code of Practice is guided by the United Nations Convention on the Rights of the Child, domestic legislation and a growing body of research and theory on best practice in working with children.

#### In this practice note:

- References to "Counsel", unless otherwise stated, refer to Counsel for the Child.
- References to "Report Writer" means any specialist report writer or social worker from whom a report has been requested under s 29 or s 29A of the Guardianship Act 1968 and s 178 or s 186 of the Children, Young Persons, and Their Families Act 1989. "Report" has a corresponding meaning.

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- The term “child” includes both “child” and “young person” as those terms are defined in the Children, Young Persons, and Their Families Act 1989.

### 3. Discretion

The intent of the Code is to promote quality and consistency of practice without fettering the discretion of Counsel to exercise their professional judgment. As it is essential that Counsel respond to the characteristics of each case and client rather than following a formulaic approach, the Code seeks to establish some benchmarks for good practice while allowing Counsel to tailor their practice to the needs and circumstances of individual children including their age and maturity.

### 4. Guiding principles

- 4.1 Children have the right to be given the opportunity to be heard in any judicial and administrative proceedings affecting them as provided for by articles 9.2 and 12.2 of the United Nations Convention on the Rights of the Child, s 23 of the Guardianship Act 1968 and s 6 of the Children, Young Persons, and Their Families Act 1989.
- 4.2 Child clients have the right to be treated with the same respect as clients who are adults.
- 4.3 Children have the right to express their views and have their views given due weight in accordance with their age and maturity when adults are making decisions that affect their lives.
- 4.4 Children have the right to information about the case in which they are involved including information on the progress and outcome of that case.
- 4.5 Children have the right to competent representation from experienced and skilled practitioners.

### 5. Role of Counsel for the Child

- 5.1 The role of Counsel is to represent the child in accordance with the brief provided by the Court.
- 5.2 Counsel has a duty to put before the Court the wishes and views of the child but should not require the child to express a view or wish if he or she does not want to do so.
- 5.3 Counsel has a further duty to put before the Court other factors that impact on the child’s welfare.
- 5.4 Where a conflict arises between a child’s wishes/views and information relevant to the best interests of the child, Counsel should, where the child is sufficiently mature:
  - attempt to resolve the conflict with the child;
  - discuss the issues and Counsel’s obligations, with the child;
  - advise the Court of Counsel’s position and in the case (anticipated to be rare) where Counsel is unable to resolve the conflict and as a matter of professional judgment can advocate

only the child's wishes, invite the Court to appoint Counsel in respect of best interests issues.

## **6. Relationship with the child**

- 6.1 Counsel should meet with the child he or she is appointed to represent other than in exceptional circumstances where in the opinion of Counsel such a meeting would be inappropriate. The timing for such meeting and any further meetings should be at the discretion of Counsel.
- 6.2 Counsel should attempt to build a relationship of trust and confidence with the child. Counsel should guard against developing a relationship beyond what is necessary for the proper performance of the role. Counsel should assist the child to develop realistic expectations of the role and influence of Counsel.
- 6.3 Counsel should be clear about his or her objectives in meeting with the child and should consider the venue and style of meeting which will best meet those objectives.
- 6.4 Counsel should explore the options for resolution and the implications of each option with the child as appropriate.
- 6.5 Where the child favours an option which Counsel considers may not be in the best interests of the child, Counsel should explain to the child that the child's preferred option may not be acceptable to the Court and encourage the child to consider other options.
- 6.6 Other than is required by law, only in exceptional circumstances should Counsel show affidavits or reports to the child. Counsel should exercise cautious judgment in showing other documents to the child. In every case Counsel should carefully consider the likely impact on the child and the child's relationships.

## **7. Interviewing the child at school**

- 7.1 Counsel should exercise caution before deciding to interview children at school. The school's consent is required before any such interview is conducted.
- 7.2 If Counsel is to interview the child at school it is desirable to obtain the prior consent of the parents and to notify the school of those consents. If consents are not forthcoming Counsel may need to seek a direction from the Court. Counsel must also comply with any protocols or requirements of the school. If a formal order or letter appointing Counsel is available, this should be shown to the school principal.

## **8. Informing the child**

- 8.1 Counsel should explain his or her role and define Counsel's relationship with the child in a manner and language the child will understand.
- 8.2 Counsel should reassure the child that the child is not responsible for any decision which will be made by the Court.

- 8.3 Counsel should inform the child of the progress of the case at regular intervals or at key points throughout the life of the case.
- 8.4 Counsel should ensure the child knows how to make contact with Counsel.
- 8.5 Counsel should ensure that the child is informed of the outcome of the case and its implications and where appropriate, any grounds for appeal or further applications.

## **9. Confidentiality**

- 9.1 Counsel for the Child should in a manner and language the child can be expected to understand:
  - explain the limits of confidentiality; and
  - advise that the information the child provides may need to be made available to others including on occasions parents and the Judge.

## **10. Systemic abuse**

- 10.1 Counsel for the Child must be aware of and actively manage the risk to children of systemic abuse. Systemic abuse occurs when children are required to talk about themselves, their families and events, sometimes traumatic, in their lives to a procession of professionals with whom they will have little or no on-going relationship and who may ask them to relive the traumas they have been through.

## **11. Case management**

- 11.1 Counsel should be proactive in moving the case towards resolution except where Counsel considers to do so would be contrary to the child's best interests.
- 11.2 Where Counsel wishes to cross-examine the report writer (as opposed to leading evidence), Counsel should advise the Judge at the earliest practicable opportunity.
- 11.3 Counsel should recognise that while the resolution of the dispute may be the most important outcome for the child, the wishes of the child must not be overlooked and the best interests of the child must remain paramount.
- 11.4 In care and protection cases, Counsel should:
  - be proactive in ensuring a Family Group Conference (FGC) is held as soon as possible; and that the matter proceeds to a hearing as soon as possible;
  - be present at the FGC to ensure that the welfare and interests of the child shall be the first and paramount consideration;

- investigate the child’s situation and other than in exceptional circumstances, meet with the child. Prior to every review by the Court, Counsel should investigate the child’s situation and subject to para 6.1 meet with the child.
- 11.5 Counsel for the Child should not delegate the preparation, supervision, conduct or presentation of the case, but deal with it personally.

## **12. Judicial meeting**

- 12.1 Where the child requests a meeting with the Judge, Counsel should discuss the request with the child and if appropriate confer with the Judge, in consultation with other Counsel.
- 12.2 Counsel should be present at any meeting between the child and a Judge.

## **13. Relationship with the Court**

- 13.1 Any information provided to the Court by Counsel must be provided to the parties save in exceptional circumstances, such as where safety issues exist.
- 13.2 Cases involving children should not be unduly delayed. Before accepting any appointment, Counsel should be satisfied that he or she is able to give the time which the case requires to advance matters promptly for the child.
- 13.3 Counsel should ensure that he or she does not exceed the negotiated fee for the appointment without first obtaining approval from the Court.
- 13.4 In addition to the duty as an officer of the Court, Counsel’s role shall be carried out in accordance with the instructions and brief provided by the Court.

## **14. Counsel for the Child and report writers**

- 14.1 Generally, Counsel should liaise with the report writer to ensure that the report writer is properly briefed on the issues for examination and assessment.
- 14.2 Where Counsel has obtained the leave of the Court to lead the report writer’s evidence, Counsel should:
- ensure that the report writer is familiar with Court procedures;
  - alert the report writer to issues which are likely to be raised in cross-examination;
  - ensure the report writer has either data collected from the interviews or theoretical material to deal with issues likely to be raised by the parties or the Judge.

## **15. Role of Counsel in negotiation between parties**

- 15.1 Once Counsel has a clear appreciation of the issues involved in the case, Counsel should be proactive in exploring alternative methods of

resolution where it is clearly in the child's best interests to have his or her parents negotiate a settlement rather than have the matter determined by the Court.

- 15.2 Counsel should not attempt to resolve disputed issues of fact relating to sexual abuse, violence or other safety issues upon which the Court should make findings.

#### **16. Role of Counsel in cases under s 16B Guardianship Act 1968**

- 16.1 If issues are disputed the Court will need to make findings of fact. It is the role of the Court and not of Counsel to make findings covering violence/assessment of risk.
- 16.2 Counsel must not compromise, for the sake of expediency, on issues where findings of fact must be made.
- 16.3 At all times Counsel should be conscious of the provisions contained in s 16B of the Guardianship Act 1968 and in particular Counsel should:
- take all necessary steps to expedite the hearing in accordance with s 16B(2);
  - determine the most appropriate way of ascertaining the views of the child pursuant to s 16B(5)(g);
  - in considering matters pursuant to s 16B(6)(b), advocate measures that will enhance the safety of the child.

#### **17. Role of Counsel for the Child at hearing**

- 17.1 At the hearing, Counsel should endeavour to:
- identify all relevant issues which need to be determined in regard to the child's welfare;
  - ensure the Court has all relevant information, including the views of the child, on which to make an informed decision;
- and:
- call evidence where appropriate eg from psychological and/or medical professionals, teachers and others;
  - ensure Counsel does not give evidence him/herself;
  - cross-examine to ensure all relevant issues are fully explored;
  - make submissions on behalf of the child.

#### **18. Guardianship of the Court**

- 18.1 Counsel should not accept appointment as agent for the Court until relinquishing his/her appointment as Counsel for the Child.

**Commencement date:**

This Practice Note is issued as at 17 November 2000 and comes into operation on 1 February 2001.

Signed

A handwritten signature in black ink, appearing to read 'P.D. Mahony', written in a cursive style.

Judge P D Mahony

**PRINCIPAL FAMILY COURT JUDGE**

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## APPENDIX E

### Counsel for the Child: Best Practice Guidelines

#### NZLS BACKGROUND NOTE TO BEST PRACTICE GUIDELINES FOR COUNSEL FOR THE CHILD

These *Best Practice Guidelines for Counsel for the Child* were developed by the Counsel for the Child Committee of the Family Law Section. They have been ratified by the New Zealand Law Society Board and Chief Family Court Judge Mahony has been asked to consider adopting and issuing them as a practice note.

The guidelines arose out of a 1997 request from Judge Mahony that the Department for Courts review the role and administration of Counsel for the Child. An initial discussion paper set out the issues and draft principles and called for submissions which were analysed by two focus committees comprising representatives from the judiciary, profession and Family Court plus a psychologist and departmental advisers.

Their final report, completed in April 1999, contained recommendations for improving representation of children in the Family Court and a draft set of best practice guidelines for Counsel for the Child.

They recommended that the NZLS be invited to develop and have ratified best practice guidelines for Counsel for the Child practitioners consistent with the committees' draft guidelines. This recommendation was referred to the Family Law Section's Counsel for the Child Committee to action.

In developing the guidelines that committee consulted Counsel for the Child practitioners extensively including:

- writing to all Counsel for the Child seeking views on the report;
- discussing the report with fellow practitioners at the NZLS CLE Advanced Counsel for the Child Workshop held in September 1999;
- meeting in Wellington to modify the guidelines taking practitioners' comments into account;
- placing the draft on the section's website and printing them in the November 1999 issue of *The Family Advocate* with a request for comment; and
- calling for comments from all Counsel for the Child in *LawTalk* 530 (1 November 1999).

Feedback received as a result of *The Family Advocate* and *LawTalk* articles was considered in January 2000 and further modification was made.

The guidelines were then referred to the section's Executive Committee for approval before asking the NZLS Board to ratify them so that they become NZLS guidelines (rule 8.5 Family Law Section Rules). The NZLS Board ratified the guidelines at its meeting of 18 February 2000.

## BEST PRACTICE GUIDELINES

### 1. INTRODUCTION

The welfare of children is the paramount consideration of the Family Court in all proceedings that involve children.

The role and operation of Counsel for the Child as described in this code of practice is guided by the United Nations Convention on the Rights of the Child, domestic legislation and a growing body of research and theory on best practice in working with children.

*NOTE:*

- For the sake of these guidelines, references to 'Counsel', unless otherwise stated, refers to Counsel for the Child.
- Specialist Report Writer means any specialist report writer from whom a report has been requested under section 29A of the Guardianship Act 1968.

### 2. DISCRETION

The intent of the code is to promote quality and consistency of practice without fettering the discretion of Counsel to exercise his/her professional judgement. As it is essential that Counsel respond to the characteristics of each case and client rather than following a formulaic approach, the code seeks to establish some benchmarks for good practice while allowing Counsel to tailor his/her practice to the needs and circumstances of individual children.

### 3. GUIDING PRINCIPLES

- 3.1 Children have the right to be given the opportunity to be heard in any judicial and administrative proceedings affecting them in line with the United Nations Convention on the Rights of the Child.
- 3.2 Child clients have the right to be treated with the same respect as clients who are adults.
- 3.3 Children have the right to have their views considered when adults are making decisions that affect their lives.
- 3.4 Children have the right to information about the case in which they are involved including information on the progress and outcome of that case.
- 3.5 Children have the right to the highest quality representation from experienced and skilled practitioners.

### 4. ROLE OF COUNSEL FOR THE CHILD

- 4.1 The role of Counsel is to represent the child.
- 4.2 Counsel has a duty to put before the court the wishes/views of the child
- 4.3 Counsel has a further duty to put before the court other factors that impact on the child's welfare.

However, where a conflict arises between a child's wishes/views and information relevant to the best interests of the child, Counsel should consider, where the child is sufficiently mature:

- attempting to resolve the conflict with the child
- discussing the issues and Counsel's obligations, with the child
- advising the court of their intention to act on instructions from the child and seeking appointment of separate Counsel to represent welfare issues.

## **5. RELATIONSHIP WITH THE CHILD**

- 5.1 Counsel should meet with the child he or she is appointed to represent except where in the opinion of counsel for the child such a meeting would be inappropriate. The timing of this is at the discretion of Counsel.
- 5.2 Counsel should attempt to build a relationship of trust and confidence with the child. Counsel should guard against developing a relationship more than is necessary for the proper performance of the role. Counsel should assist the child to develop realistic expectations of the role and influence of Counsel.
- 5.3 Counsel should be clear about their objectives in meeting with the child and should consider the venue and style of meeting which will best meet those objectives.
- 5.4 Counsel should explore the options for resolution and the implications of each option with the child.
- 5.5 Where the child favours an option which Counsel considers may be harmful to the child, Counsel should explain to the child that their preferred option may not be acceptable to the court and encourage the child to consider other options.
- 5.6 Other than is required by law, only in exceptional circumstances should Counsel consider showing affidavits or other documents to the child. In deciding whether or not to show the affidavits or documents to the child, Counsel should carefully consider the likely impact on the child and the child's relationships.

## **6. INTERVIEWING THE CHILD AT SCHOOL**

- 6.1 If Counsel wishes to interview the child at school it is desirable to obtain the prior consent of the parents and to notify the school of those consents. If consents are not forthcoming Counsel may need to seek a direction from the Court. Counsel must also comply with any protocols or requirements of the school. If a formal order appointing counsel is available, this should be shown to the school principal.

## **7. INFORMING THE CHILD**

- 7.1 Counsel should explain their role and define their relationship with the child in a manner and language the child will understand.
- 7.2 Counsel needs to reassure the child that he/she is not responsible for any decision which will be made by the Court.

- 7.3 Counsel should inform the child of the progress of the case at regular intervals or at key points throughout the life of the case.
- 7.4 Counsel should ensure the child knows how to make contact with Counsel.
- 7.5 Counsel has a responsibility to ensure that the child is informed of the outcome of the case and its implications and where appropriate, the continuation of the case through the appeal process, or further applications.

## **8. CONFIDENTIALITY**

- 8.1 The child has the same rights to confidentiality entitlements as other clients as stated in clause 1.08 of the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors. Counsel should explain the exceptions to confidentiality to the child in a manner and language that the child understands.
- 8.2 Counsel should advise the child that the information they provide may need to be made available to others, including, on occasions, their parents and the Judge and endeavour to obtain the child's agreement to disclosing such information where in the opinion of counsel for the child this is warranted.
- 8.3 Particular care should be taken when obtaining consent from the child to disclose information.
- 8.4 Counsel should invite the child to clearly identify any information they would prefer remain confidential and discuss the reasons for disclosing that information and a safe process for doing so.

## **9. SYSTEMS ABUSE**

Counsel must be aware of, and actively manage, the risk to child clients of systems abuse.

## **10. CASE MANAGEMENT**

- 10.1 Unless counsel for the child considers it would be contrary to the child's interests, Counsel should be proactive in moving the case towards resolution.
- 10.2 While Counsel can act as negotiator, Counsel is representing the child, who has a point of view in the matter, and Counsel therefore cannot take the objective position of mediator.
- 10.3 Counsel should recognise that while the resolution of the dispute may be the most important outcome for the child, the wishes of the child must not be overlooked in resolving the dispute.
- 10.4 In care and protection cases, Counsel should:
  - be pro-active in ensuring an FGC is held as soon as possible; and that the matter proceeds to a hearing as soon as possible.
  - be present at the FGC to ensure that the focus of the FGC is on the best interests of the child.

## **11. JUDICIAL MEETING**

- 11.1 Where the child requests a meeting with the Judge, Counsel should discuss it with the child and if appropriate confer with the Judge.
- 11.2 Counsel should be present at any meeting between the child and a Judge.

## **12. RELATIONSHIP WITH THE PARTIES AND THEIR COUNSEL**

- 12.1 Counsel should encourage parties and their Counsel to maintain a focus on the child's best interests.
- 12.2 Counsel should ensure that the parties have an understanding of their role as Counsel for the Child.
- 12.3 Any information provided to the Court by Counsel must be provided to the parties except in very exceptional circumstances, such as where safety issues exist.
- 12.4 Where Counsel experiences difficulties with either of the parties, these difficulties should be discussed with that party's Counsel.
- 12.5 Parties should be referred back to their own Counsel in appropriate instances.
- 12.6 Counsel should keep in mind that the child and the parties will generally have to continue their relationship after the resolution of the dispute.
- 12.7 It may be necessary for Counsel to meet with one party and their Counsel to ask that party to confront issues.

## **13. OTHER PROFESSIONAL ISSUES**

- 13.1 Before Counsel accepts an appointment, because the Courts are concerned that cases involving children are not unduly delayed, Counsel should ensure that they are able to give the time to advance matters in as prompt a way as possible.
- 13.2 Where Counsel receives directions in their brief which do not comply with these guidelines, they should put a memorandum before the Judge noting the inconsistency of any specified tasks and requesting their review.
- 13.3 Appointment of Counsel is personal and accordingly Counsel should not delegate substantive steps in the fulfillment of their brief without the leave of the Court.
- 13.4 Counsel should be sensitive to issues including gender, ethnicity, sexuality, culture and religion, in dealing with both the child as a client and the issues in any particular case.
- 13.5 Counsel should ensure they have access to an experienced practitioner as a mentor.

## **14. COUNSEL FOR THE CHILD AND SPECIALIST REPORT WRITERS**

- 14.1 In most cases, Counsel will be expected to liaise with a specialist report writer. If Counsel had been involved with the child prior to the specialist report writer's appointment, Counsel may have relevant non-privileged information to pass on to the specialist to assist them.

- 14.2 Counsel may be involved in drafting the terms of the proposed brief for the specialist report writer for consideration by the Court. In such cases, Counsel should discuss the terms with Counsel for the parties.
- 14.3 The specialist report writer is the Court's witness and although Counsel and the specialist report writer may liaise and discuss the case with each other, Counsel may take a different view from the report writer.
- 14.4 In situations where Counsel considers that there is merit in a different view from that of the Court appointed specialist report writer, it may be appropriate for Counsel to advocate that the Court appoint a second specialist report writer to critique the report of the first specialist report writer or to carry out a second assessment. Alternatively counsel for the child may wish to seek leave to disclose the specialist report to another specialist report writer for the purpose of assisting counsel for the child with the preparation of cross examination.
- 14.5 Where Counsel intends to lead the specialist report writer's evidence, counsel should:-
  - ensure that the specialist report writer is familiar with Court procedures;
  - alert the specialist report writer to issues which are likely to be raised in cross-examination;
  - ensure the specialist report writer has either data collected from the interviews or theoretical material to deal with issues likely to be raised by the parties or the Judge; and
  - ensure the specialist report writer is able to give authoritative references that support interpretation of the facts.
- 14.6 Where Counsel wishes to cross-examine the specialist report writer (as opposed to leading their evidence), Counsel should advise the Judge at the earliest practicable opportunity.
- 14.7 In cases where the Department of Child, Youth and Family Services has engaged a specialist report writer prior to the issue of proceedings, Counsel does not have the same right of access to that report as where the report is obtained through the Court. In this situation, Counsel should make arrangements to talk to the specialist report writer and/or obtain access to the report through the Department of Child, Youth and Family Services.

## **15. ROLE OF COUNSEL IN NEGOTIATION BETWEEN THE PARTIES**

- 15.1 Once Counsel has a clear appreciation of the issues involved in the case, Counsel should be pro-active in exploring alternative methods of resolution where it is clearly in the child's best interests to have his or her parents negotiate a settlement rather than have the matter determined by the Court.
- 15.2 In negotiating, Counsel should not attempt to resolve disputed issues of fact relating to sexual abuse, violence or risk upon which the court should make findings.

- 15.3 When negotiation between parties takes place, Counsel should ensure that counsel for the parties are given the opportunity to be present. This may avoid delays arising from the need for parties to consult their counsel.

**16. ROLE OF COUNSEL IN CASES UNDER s16B GUARDIANSHIP ACT**

- 16.1 If issues are disputed the Court will need to make findings of fact. It is the role of the Court and not of Counsel to make findings re violence/assessment of risk.
- 16.2 Counsel must ensure that all issues are identified and all relevant information put before the Court.
- 16.3 Counsel must take all necessary steps to expedite the hearing in accordance with s16(2).
- 16.4 Counsel must not compromise, for the sake of expediency, on issues where findings of fact must be made.
- 16.5 At the hearing Counsel must ensure all evidence is thoroughly tested in terms of s16B(5)(g).
- 16.6 Counsel should determine the most appropriate way of ascertaining the views of the child pursuant to s16B(6)(b).
- 16.7 In considering matters pursuant to s16B(6)(b) Counsel should advocate measures which will enhance the safety of the child.

**17. ROLE OF COUNSEL FOR THE CHILD AT HEARING**

At hearing, Counsel should endeavour to:-

- ♦ identify all relevant issues which need to be determined in regard to the child's welfare.
- ♦ ensure the Court has all relevant information, including the views of the child, on which to make an informed decision.
- ♦ call evidence where appropriate e.g. expert psychological and/or medical evidence, teachers and other 'neutral parties'.
- ♦ ensure they do not give evidence themselves.
- ♦ cross-examine to ensure all relevant issues are fully explored.
- ♦ make submissions on behalf of the child.

**18. GUARDIANSHIP OF THE COURT**

Counsel should not accept appointment as agent for the Court until relinquishing his/her appointment as Counsel for the Child. They should so that they become NZLS guidelines (rule 8.5 Family Law Section Rules). The NZLS Board ratified the guidelines at its meeting of 18 February 2000.



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## Glossary

(to terms as used in this paper)

Access order	An order allowing a person time with a child, usually the parent who does not have custody
Administration	The management of money and property of a person who has died
Administrative review	Under the Child Support Act 1991 – an assessment by the Review Officer contracted to the Child Support Agency as to whether a formula assessment should be changed
Affidavit	Written evidence that the writer swears is true
Affirmation	Written evidence that the writer declares is true
Associated respondent	Under the Domestic Violence Act 1995, a person who has assisted the respondent in harassing or hurting the applicant
Beneficiary	A person who receives money or property from a trust or under a will
Caseflow management	The management of applications filed in court towards a final hearing, including all preliminary matters
Chambers hearing	An informal hearing before a judge, held in private
Civil jurisdiction	That part of the work of a court that relates to non-criminal matters
Concurrent jurisdiction	Circumstances in which there is a choice as to the court in which an application can be filed, that is, both the District Court and the High Court may have jurisdiction to hear certain matters
Consent orders	Orders where the terms have been agreed by the parties
Court decisions	Rulings made by a court
Cross-applications	Where two parties make applications against each other, for example, a mother and a father of the same child both applying for custody
Custody	Under the Guardianship Act 1968, the right to possession and care of a child
De facto relationship	A relationship similar to a marriage that is not confirmed by a legal ceremony
Decree	An order by a court

Defend	To respond to or oppose an application
Defended hearing	A full hearing where the judge hears all the evidence of the applicant and their respondent and any other party
Departure Order	Under the Child Support Act 1991, an order which alters the formula assessment
Deponent	The person who makes an affidavit
Disclosure	Giving information or documents to the other party that are relevant to the court proceedings
Estate	The money and property of a dead person
Family group conference	Under the Children, Young Persons, and Their Families Act 1989, a meeting of family members to discuss a child
Final order	The ruling of a court that is made to end the matters raised in an application
Fixture	The time set down for the hearing of a matter by a court
Guardianship	The rights and responsibilities over the upbringing of a child, usually exercised by a parent or another person appointed by a court as a guardian of a child
Hague Convention	There are a number of International Conventions that were adopted in the Hague. The common one in the context of the Family Court is the Hague Convention on the civil aspects of International Child Abduction, which was incorporated into our Guardianship Act 1968 by sections 22A–22K
Hearing	The time when a matter is argued before a judge
Inquisitorial	A style of hearing where the judge requests information, asks questions, and exercises control over the information brought before the court
Inspection	The viewing of documents relevant to a case before the court, which have been disclosed by the other side
Interim Order	A temporary order made and enforced until a final order is made
Judge's list	A list of matters to be heard by a judge on a certain day
Judicial conference	A meeting chaired by a judge
Jurisdiction	The range of matters that can be dealt with by a particular court
Justice of the Peace	A person appointed by the Governor-General under a warrant who can witness documents, take oaths and affirmations, and issue warrants.

Legitimacy	Lawfulness
Liable parent	Under the Child Support Act 1991, the parent who pays child support
Maintenance order	An order by a court that one person provide financial support for another
Marriage dissolution	The order ending a marriage – a divorce
Judge-led mediation	A meeting where the judge acts as mediator to attempt to resolve a dispute
Memorandum of issues	A document setting out matters that need to be resolved
MP1 affidavit	Under the Matrimonial Property Act 1976 – an affidavit of assets and liabilities
Narrative affidavit	An affidavit setting out the background to a matter
Non-molestation order	Under the Domestic Protection Act 1982, an order forbidding harassment of the applicant
Non-violence order	Under the Domestic Protection Act 1982, an order forbidding violence against the applicant
Notice of intention to appear	A notice to the court that a person has an interest in a matter but does not wish to oppose or defend it
On-notice application	An application where the respondent is given notice of the hearing and no order is made until the respondent has received the application and been given the opportunity to reply
Party	A person who is joined into a court action
Paternity order	An order that establishes the father of a child
Personal representative	A person who stands in for, and conducts the affairs of, a person who has died
Plan	Under the Children, Young Persons, and Their Families Act 1989, a statement prepared by a social worker setting out what is to happen for a particular child
Practice note	A note, usually about a procedural matter, published by judges, requiring matters to be dealt with in a certain way
Preliminary hearing	A hearing about a matter that needs to be decided before the main issue is decided
Pre-trial conference	A conference with a judge to discuss how matters are to proceed at a hearing
Privileged document (or information)	A document (or information) that must be kept confidential and cannot therefore be disclosed in court

Qualifying custodian	Under the Child Support Act 1991, the person to whom child support is paid
Ready list	A list of the matters that are ready to be set down for a hearing time
Registrar's list	A list of matters to be heard by a registrar on a certain day
Respondent	The person who opposes or responds to an application filed in the court
Restraining order	An order by the court preventing a person from doing certain specified things. Under the Matrimonial Property Act 1976 it may relate to disposing of certain property. Under the Children, Young Persons, and Their Families Act 1989, it may prevent a person contacting a child
Revocation of order	Cancellation or retraction of an order that has previously been made
Rules	Procedures that persons approaching the court are to follow
Service	Delivery of court documents to a party to the court proceeding
Services order	Under the Children, Young Persons, and Their Families Act 1989, an order that certain social work services or other services will be provided to a child or a family
Setting down	Deciding the date on which a matter will have a hearing
Settlement	Finalising a legal arrangement
Settlement conference	A meeting with a judge to discuss whether the matter can be finalised by agreement rather than go to a hearing or be determined by a judge
Short cause	A matter that requires only a brief hearing time of 15 or 30 minutes
Specialist report	Especially under the Guardianship Act 1968 and the Children, Young Persons, and Their Families Act 1989, a report obtained from a psychiatrist or a psychologist or other professional
Spousal maintenance	Financial support for a husband or wife or de facto partner
Standard directions	The Family Court Caseflow Management Practice Note sets out the matters that will normally need to be completed before an application can be brought to a hearing. The standard directions set out the steps that usually should be taken and the time in which they should be completed

Statute law	The law contained in Acts passed by Parliament
Submissions	Arguments by lawyers on behalf of their clients
Supervised access	Contact between an adult, usually a parent, and a child, which is overseen by another responsible adult. Usually ordered where there is some risk to the child if the access is not supervised
Support order	Under the Children, Young Persons, and Their Families Act 1989, an order for financial support for a child in care
Testamentary	To do with a will, for example, testamentary capacity – whether a person has sufficient mental capacity to sign a will
Trust	A form of ownership of assets whereby the trustees of the trust own assets but hold those assets for the benefit of other persons known as beneficiaries
Whenua	Land
Without-notice application	An application heard by a judge, where the respondent has not been given notice of the hearing. Such applications are rare and are only used in emergency situations where there is risk to an applicant or a child if the respondent was told about the application before it was heard. Used under the Domestic Violence Act 1995 and sometimes for an urgent custody application or to prevent one party disposing of property

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