

“Why the Family Court Needs an Early Intervention Process”

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Introduction

In introducing the Early Intervention Process on the 12th April 2010 the New Zealand Family Court launched one of the most significant reforms in family law since the inception of the Court as a specialist jurisdiction in 1981. This process offers a clear, co-ordinated and efficient case-flow management process for all Care of Children Act applications received from the 12th April 2010, and, quite simply, radically changes how New Zealanders wanting access to justice in the Family Court receive it.

Moving towards an Early Intervention Process

In 2003 the Law Commission published a highly critical report of the Family Court and its processes.¹ Since that time, we have made significant improvements, addressing a number of the issues raised in the report. However, one area that we have historically been unable to satisfactorily address is the delay in accessing justice that users of the Family Court face.² In order for the Court to retain its credibility, this matter has had to be addressed. Methods and practices that operated effectively in the past have had to be revisited and, where appropriate, replaced.

To this end, I foreshadowed the work we were to embark on last year when I spoke at this conference on the subject of “Solving Custody Battles: Is the Family Court serving us well?”.³ I suggested that while the Family Court Caseflow Management Practice Note (promulgated on 1 November 1998) had been an

¹ New Zealand Law Commission *Dispute resolution in the Family Court* (NZLC R92, 2003)

² Due, in part, to the increasing volume and complexity of applications filed in the Family Court

enormous step forward in setting management expectations for our stream of work, we may have unsuspectingly made a rod for our own backs. I opined that “in requiring every case to be channelled through the increasingly bureaucratic system, non-contentious applications were simply taking too long to reach a conclusion”.⁴

This belief, coupled with a long held favour for a more inquisitorial style of justice in the Family Court, has, for a number of years, driven us to consider what alternatives to the present caseload management system might reduce delay; and a number of initiatives have been piloted with this goal in mind.

Previous Family Court Pilot Projects

Non-Judge Led Mediation

In partial response to the Law Commission’s 2003 report,⁵ the New Zealand Government decided to trial mediation led by specialist mediators rather than by judges. The Family Mediation Pilot was undertaken in the North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.

Although the Pilot Courts adopted different practices with respect to referral,⁶ 540 cases were offered family mediation during the pilot,⁷ of which 380 were subsequently referred to a mediator.⁸ Of the cases that entered pre-mediation, 284 proceeded to mediation, and of these, 257 were completed by the end of June 2006.⁹ The evaluation noted that 61% of the mediations were convened within five weeks and another 15% within six weeks.¹⁰

Of particular interest was the common duration of the mediation; the data indicating this to be 3-4 hours,¹¹ with further data indicating that 89% of the

³ Peter Boshier, Principal Family Court Judge “Solving Custody Battles: Is the Family Court serving us well?” (Paper presented to the Child and Youth Law Conference 2009, Stamford Plaza, Auckland, 26 March 2009)

⁴ Ibid, at 3-4

⁵ New Zealand Law Commission *Dispute resolution in the Family Court* (NZLC R92, 2003) at Para 308

⁶ Helena Barwick and Alison Gray *Family Mediation – Evaluation of the Pilot* (prepared for the Ministry of Justice 2007) at 11

⁷ Ibid, at 28

⁸ Ibid, at 31

⁹ Ibid, at 40

¹⁰ Ibid, at 32

¹¹ Ibid, at 57

mediations were completed in one session while only 10% were adjourned for review at a future date.¹²

Of the 257 completed mediations, agreement was reached on all matters in 59% of mediations, and on some matters in another 27%. No agreement was reached in only 5% of completed mediations.¹³ Where no agreement was reached, mediators believed this was mostly because one party was unwilling to compromise or to put the children's needs ahead of his or her own.¹⁴

Following the mediation, completed survey forms were received from 109 parties to mediation and these were supplemented by 26 interviews.¹⁵ Most were positive about the experience of mediation; 80% stated that they were well informed about the mediation beforehand;¹⁶ 75% noted that they were able to say what they wanted to; and 78% commented that the children's views were quite well or very well presented.¹⁷ The figures also suggested that there were issues about how cases were referred to mediation; but that once families reached mediation the experience for most was very positive.¹⁸ The process was further seen to be faster than judge-led mediation, as the participants did not have to wait for a judge to be available.¹⁹ Skilled mediators were found to keep the process focused on the child's interests and not to allow the parents' interpersonal issues to take over.

This evaluation²⁰ provided important information to the Court in assessing how it could intervene more quickly using specialist mediators rather than judges. Non-judge led mediation had proven to be useful, but it was felt that this alone would not result in an early intervention model that suited the Court.

¹² Ibid, at 59

¹³ Ibid, at 75

¹⁴ Ibid, at 78

¹⁵ Ibid, at 65

¹⁶ Ibid, at 83

¹⁷ Ibid, at 69-70

¹⁸ Ibid, at 71

¹⁹ Judge Paul von Dadelszen "Judicial Reforms in the Family Court of New Zealand" (2007) 5 NZFLJ, 267 at 272

²⁰ Helena Barwick and Alison Gray *Family Mediation – Evaluation of the Pilot* (prepared for the Ministry of Justice 2007)

Parenting Hearings Programme (PHP)

At the same time as the non-judge led mediation pilot was running, further thought was being given to how to reduce delay in private child law cases. This gave rise to the Parenting Hearings Programme pilot which offered a less adversarial process with the goal of tightening timeframes, through use of a preliminary hearing. While the final evaluation of the PHP was not available when I spoke here in March last year, the final evaluation came to hand in September 2009 and the essential findings were that:

- Consistency between judges and courts was important;²¹
- Speedy engagement by the Court system and early access to judges was a key advantage for both parents and children;²²
- The PHP was effective in providing a less adversarial experience at the Court hearing than the usual Family Court process;²³
- Most parents appreciated the opportunity to participate in the Court process, and nearly all lawyers agreed that it was useful for parties to be able to speak directly to the judge;²⁴
- The PHP gave judges firmer control over the case by speeding up the process, limiting affidavits or information in affidavits and appropriately limiting cross-examination;^{25,26} and
- Almost three-quarters of lawyers rated the PHP process as being effective in creating fair and appropriate outcomes.²⁷

²¹ Trish Knaggs and Anne Harland *The Parenting Hearings Programme Pilot: Evaluation Report* (prepared for the Ministry of Justice 2009) at 14

²² *Ibid*, at 16

²³ *Ibid*, at 17

²⁴ *Ibid*

²⁵ *Ibid*, at 18

²⁶ Although it should be noted that some lawyers expressed natural justice concerns about this. In particular, surveyed lawyers were concerned about the alleged lack of opportunities for lawyers to speak on behalf of clients and to cross-examine. The Evaluation Report concluded that issues of natural justice may well warrant further attention. For further information please see Berry Zondag "The parenting Hearings Programme halfway through its pilot: A view from the bar" (2008) 6 NZFLJ 12-23; Berry Zondag "The Parenting Hearings Programme pilot: The family bar remains unconvinced" (2009) 6 NZFLJ 134-150; Berry Zondag "The Parenting Hearings Programme – Into a brave new world?" (2009) 6 NZFLJ 189-202 and John Caldwell "Family proceedings concerning children: The nature of natural justice" (In press) Otago Law Review

²⁷ *Ibid*, at 18

However, attempts to build a less adversarial model by having a ‘preliminary hearing’ were not as robust as was hoped for. Many judges began making interim orders and entry into the programme was not uniform. PHP, in and of itself, was not the answer.

Christchurch Early Intervention Programme

While we were waiting for the above evaluation, I was closely watching the Early Intervention Programme which Christchurch had commenced in January 2009.²⁸

As the year progressed I was keen to see how it had worked. Central to the Christchurch model was:

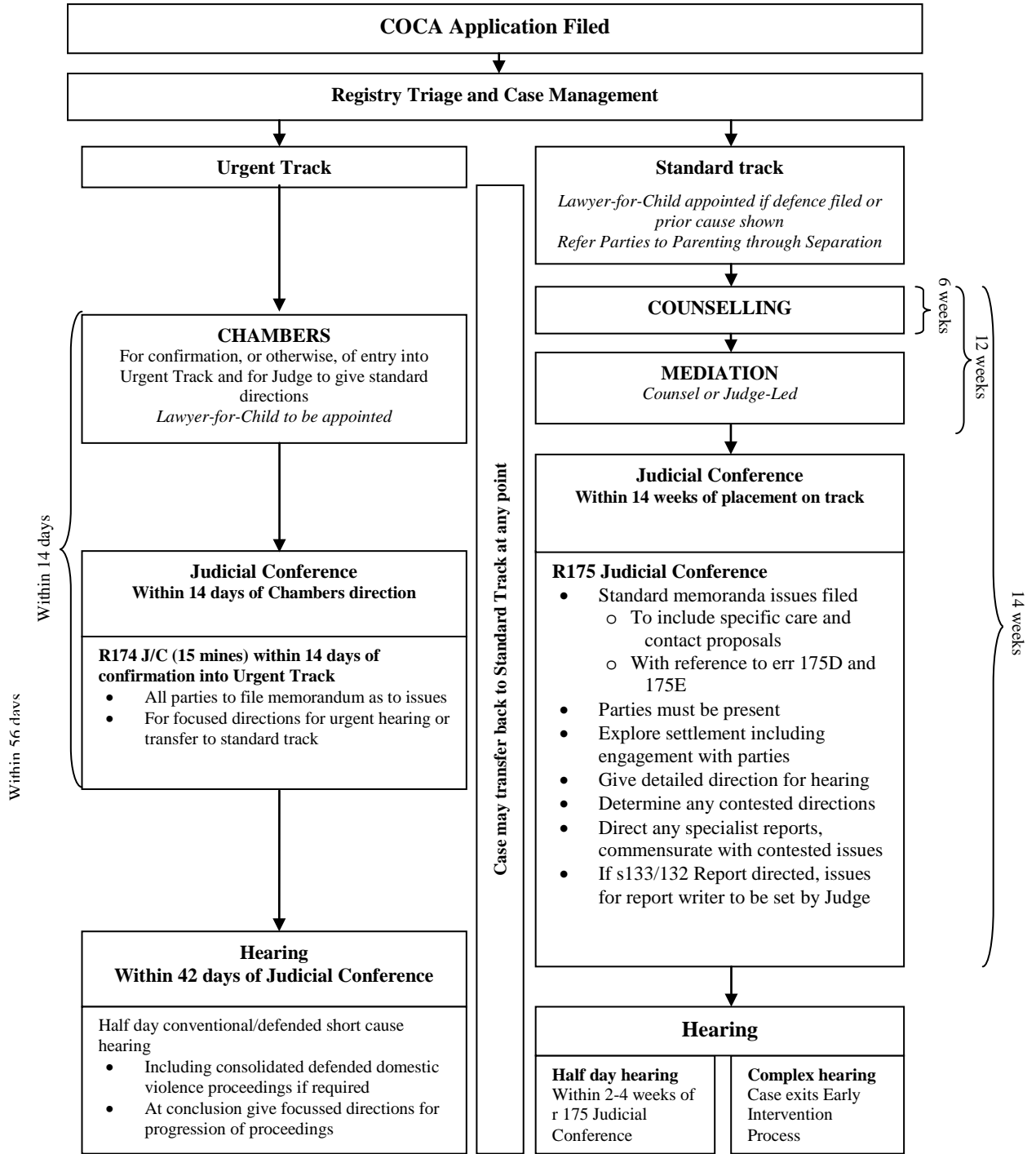
- The usual reference to counselling but in addition, strong emphasis on parent education through “Parenting through Separation” courses;
- If counselling was unsuccessful, prompt reference to mediation;
- If still unsuccessful, the requirement of a Memorandum of Issues to be filed in reference to a thirty minute judicial conference; and finally,
- If after all of those steps the matter was still unresolved a ninety minute hearing would occur before a Judge within a short space of time.

The results of the programme could not be ignored. In 2009, 469 cases entered the programme, approximately 75% of which proceeded to mediation. Of those that went to mediation, an astonishing 81.4% were settled. After that, the vast majority of those remaining were settled at the judge-led conference. Only 11 of the 469 cases, that is, just over 2%, required a hearing.

Early Intervention Process

With the benefit of the evaluations and data on the above three pilots, considerable thought was given to the framework for a national model by the Family Court judiciary. After much discussion, the following Early Intervention Process (‘EIP’) model was developed:

²⁸ The Christchurch Family Court had not been a pilot site for the PHP



A key component of the EIP is a triage system that assesses all Care of Children Act applications coming into the Family Court so that the correct pathway for each case can be determined from the beginning. Applications regarded as urgent, because they are made without notice or according to certain specific grounds, assume a different course from standard cases.²⁹ There are strict expectations in terms of steps to be taken, directions to be given and complied with, and a time for disposal of the case.³⁰ This emphasis on urgent, robust judicial intervention is vital for those parents who separate and have immediate, serious issues.³¹ Cases involving such issues cry out for prompt judicial oversight; for if they are allowed to proceed through counselling and mediation the defaulting or abusive parent may gain an advantage to the detriment of the child.

New Zealand's Family Court has therefore singled out the factors that should give clear indicators as to whether a case is truly urgent. If any of those factors exist, a judge is likely to make interim orders, and, after a short judicial conference, hold a further hearing with the parties present, to make factual findings on essential issues.³² Often, until such findings are made the case cannot move in the correct direction.

However, if urgent factors are not apparent at the outset (as is the situation in the vast majority of cases), the case proceeds along the Standard Track – a new streamlined process that seeks to create better time and event expectations. Until the introduction of EIP, because of the Court's attempts at caseload management, cases became too event based and protracted by the steps taken.

Upon entry into the Standard Track, parties are referred to a "Parenting through Separation" course, to learn more about the effects of separating on their children. This course comprises of two, two hour modules; the first dealing with psychological consequences and the second with legal. The overarching aim of the course is to better equip parents in terms of the pathway they might take towards arriving at a solution to the best care arrangements for their children.

²⁹ These grounds are: reduction of time granted, enforcement proceedings (warrants admonishment), repeat proceedings, unilateral relocation, suspension of contact and demonstrable violence issues

³⁰ This pathway therefore adopts many of the Track A attributes of the PHP Pilot

³¹ For example, one party may be violent, have mental health issues or be abusing drugs. One may have unilaterally relocated with one of the children or simply just stopped the other parent's contact

³² For instance, whether there has been family violence or whether one of the parents presents a demonstrable welfare risk

Alongside attending the Parenting through Separation Course, parties attend counselling, preferably together. This counselling involves close oversight by the Court to ascertain whether it is achieving the desired outcomes, and, if it is not, rather than simply waiting until all counselling sessions have been completed, the case is reviewed and moves along the Standard Track to specialist mediation.³³ Specialist mediation is unquestioningly one of the most important steps in EIP; and is conducted by lawyers appointed to assist the Court who have specialist training in mediation. They bring not only mediation skills but expert knowledge of the legislation to their work and the mediations are conducted in a robust manner with a view to an agreement being secured.

However, some parents are so deep in conflict that they are simply unable to come to a meeting of minds at mediation and thus a forty-five minute judicial conference before a judge is necessary. If a judicial conference is convened, lawyers file a memorandum setting out the facts and issues prior to the conference, and detail points of agreement and disagreement so that the judge is fully briefed. Parties are expected to attend the conference and engage directly with the judge. This is an important element for the judicial role is powerful, and some parents who will not settle at mediation choose to settle at this stage because of clear messages conveyed by the presiding judge.

Ultimately, however, a few cases will need to proceed to hearing after this conference, and, if they do, a hearing will be held promptly to prevent a party obtaining the advantage of delay. If this happens, psychological issues for children may need to be reported on and the Court may find a brief, focused report from a psychologist very helpful.

Finally, there will always be some cases that are complex and require days of court hearing, for example, disputed violence, sexual abuse, relocation and alienation cases. Once identified, these cases will leave the EIP and be dealt with as normal cases in the adversarial model, but with much greater control over issues and evidence.

³³ The child's views form part of the process from the point of mediation onwards through the appointment of a lawyer to represent the children. By the time the hearing occurs, if that is necessary, the issues for the child that the Court needs to determine are that much clearer as a result of the steps that have preceded it

In formulating this new EIP, driven by judicial initiatives, the view of New Zealand's Family Court Judges has been that:

- Most Family Court litigants wish to have their cases resolved sooner rather than later;
- A clear differentiation must be made between and those who will benefit from alternative dispute resolution and those who need robust judicial intervention; and
- Those who will benefit from alternative dispute resolution must be assisted to make decisions quickly so that alienation and status quo positions do not develop.

New Zealand research evidence and public submission processes have indicated that parents want a broader range of conciliation and Court services, less delays and cost associated with family law proceedings, earlier opportunities to meet with the Judge, and greater opportunities to resolve their issues and disputes in the most humane way possible.³⁴ Taking these aspirations on board, as the EIP is designed to do, bring the New Zealand Family Court much closer to the 'judicial and therapeutic' functions originally envisioned by the Royal Commission.³⁵

Conclusion

When Parliament passed the Family Court Matters legislation in September 2008, we had hoped for the speedy implementation of vital reforms set out in that legislation which included:

- The creation of the new position of Senior Family Court Registrars;
- The availability of counselling for children in certain situations; and
- The availability of non-judge led mediation.

³⁴ See Judge Peter Boshier and others *A review of the Family Court – A report for the Principal Family Court Judge* (1993); New Zealand Law Commission *Dispute resolution in the Family Court* (NZLC R92, 2003); JP Robertson and others *Putting the children first: Caring for children after separation*. (NZ Families Commission, 2008); Nicola Taylor "Care of children: Families, dispute resolution and the Family Court" (PhD thesis, University of Otago, 2005); and Nicola Taylor and others (2010). *Relocation following parental separation: The welfare and best interests of children*. (Research Report for the New Zealand Law Foundation: University of Otago Centre for Research on Children and Families and Faculty of Law, 2010).

³⁵ DS Beattie and others *Report of the Royal Commission on the Courts* (1978)

At present, none of these statutory initiatives have been implemented. It has therefore been necessary for the Court itself to take a firm lead on reforms able to be introduced through judicial initiative, which give speedier access to justice for parents, and even more importantly, a clear pathway for children whose lives are often thrown into disarray by warring parents.

It is understandable that when relationship breakdown occurs, the ensuing bitterness creates conflict that our present adversarial system keeps alive. I believe we have arrived at a time in the Family Courts' development where our resources must be better used, where economies in expenditure must be accepted as responsible and where parents must be given every chance to resolve their differences. Our time frames need to be more realistic and shorter, and the opportunities to proliferate disputes need to be reined in.

We are embarking on an exciting era. I am very proud to be part of a Court that sees its fundamental goal as providing the best justice to parents and children that is within our grasp.

Speech ends