

Narrowing the Gateway: Introducing Mandatory Family Assessments into the New Zealand Family Court

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A dissertation submitted in partial fulfilment of the Degree of Bachelor of Laws
(with Honours) at the University of Otago – Te Whare Wananga o Otago

October 2012

Acknowledgements

To Donna, I cannot thank you enough for the endless support and encouragement you have given me over this past year. I could not have wished for a better supervisor!

To Mark, your enthusiasm towards Family Law has been so inspiring, thank you for providing direction for this thesis.

Most importantly I would like to acknowledge my parents. Mum, I could not have completed this thesis without the endless love and guidance you have given me, and of course your great proofreading skills. Dad, thank you for always encouraging me to study hard, and supporting me throughout my uni years. Robbie, thank you for all the help you have given me over the years, you are a fountain of endless knowledge. Finally, thank you to Andrea for your support, especially in the form of delicious care packages.

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INTRODUCTION

“I think judges favour much more rigorous gatekeeping of what are genuine welfare issues requiring court consideration and what are not,” Peter Boshier.¹

Gatekeeping

The gateway into the Family Court is wide open. There are almost no checks on what applications are accepted and receive court time. The words of the Principal Judge, quoted above, are part of an acknowledgement that the Court is facing major problems with the efficiency (in both an economic and a welfare sense) of its processes and the effectiveness of the subsequent decisions.

More rigorous gatekeeping can be achieved by two means. First, encouraging and supporting parties to settle at a pre-court stage filters out applications that do not need judicial intervention. Secondly, a screening system whereby the genuine welfare issues needing court consideration are identified will help to narrow the court’s focus.

This thesis will explore whether introducing assessments of all families making applications for a parenting order in the Family Court would help improve efficiency (in both senses referred to above) of the Court processes, and effectiveness of the subsequent decisions reached.

¹ Peter Boshier, Principal Family Court Judge “Cabinet Review of the Family Court: Response of the Principal Family Court Judge” (speech to Hawke’s Bay Family Courts Association, Havelock North, 13 May 2011).

Terminology

'Efficiency' and 'effectiveness' are malleable concepts, and their meaning depends upon the context in which they are used. For the State these concepts introduce economic considerations such as cutting costs and shortening processing times.² However from a child-focused perspective, efficiency and effectiveness call for a welfare focus: early identification of relevant issues, and stable arrangements in the best interests of the child to be made as soon as possible.

A balance must be struck between these two perspectives in any reform: "... the rights, interests and welfare of children should not be compromised in the name of efficiency and cost-effectiveness." – Children's Commissioner.³

The idea of a 'Family Assessment' is taken from what are termed 'Child Custody Evaluations' in America or 'Custody and Access Assessments' in Canada. These involve observing the whole family unit, looking at the relationships between the parents and their children, the needs of the children, and the abilities of the parents to meet to those needs. Western Australia also has an assessment type process known as a 'Case Assessment Conference'. These too look at the family unit but in a little less detail.

For the purposes of this thesis, the term 'Family Assessment' will be used to globally describe these instruments. This is in keeping with s4 of the Care of Children Act 2004 (COCA), as the overarching purpose of the assessments is to highlight the welfare and best interests of the child within the family unit.

² New Zealand Law Society "Review of the Family Court" March 2012 at 24.

³ Ministry of Justice *Summary of Submissions in Response to 'Reviewing the Family Court: A public consultation paper'* (April 2012).

A Vehicle for Evaluation: The “Addams Family”

The “Addams family” is a hypothetical family constructed by the author as a vehicle for evaluating both the Family Court system as it now stands and the proposed new system involving a Family Assessment. The different issues the Addams family presents with are modelled from cases that have been through the Family Court system.⁴ Their involvement with the current system will highlight the difficulties the Family Court is facing, and the dangers of vulnerable people getting lost in the system. The Addams family will then run through the revised Family Court system to illustrate the potential benefits of the Family Assessment as a form of gatekeeping, particularly in increasing efficiency (in both senses) of the Family Court processes and effectiveness of decisions reached.

Sarah and Peter met in 1996 while both working at the hospital: Sarah as a doctor, Peter as a nurse. They married in 2000 and bought their first house in Karori in Wellington a year later, where they have resided since.

Sarah fell pregnant with twins late 2004, and Patrick and Alice were born August 2005. Peter picked up extra shifts to financially support the family while Sarah was on maternity leave. However a few months after the twins were born, Sarah began to display signs of post-natal depression. Peter stopped work and took on the role of sole caregiver for the children, while Sarah sought help. She recovered well and Peter went back to work after the children’s first birthday while Sarah stayed at home as primary caregiver. She returned to work part time as a General Practitioner at the Karori Medical Clinic while Patrick and Alice attended pre-school.

⁴ *D v J* FC New Plymouth FAM 2003-0430116, 17 January 2008; *T v J* FC Tauranga FAM-2006-070-000504, 27 November 2006; *RG v IB* FC Lower Hutt FAM-2004-085-000776, 15 December 2009; *JEB v AF* [Parenting orders] [2009] NZFLR 529; *JRB v AQB* FC Hamilton FAM-2002-019-001615, 16 August 2011; *FJS v RKS* FC Porirua FAM-2005-091-000055, 14 February 2011.

In July 2009 the couple's third child, Jack, was born. Once again Sarah stopped working to stay at home as primary caregiver. Peter continued to work 50 hours week to support the family, however he always made sure he was home in the evenings to spend time with the children and put them to bed. Sarah began working again in 2010 when the twins reached school age and Jack began pre-school.

Alice is doing well at school however Patrick has fallen behind. He struggles socialising with the other children and easily becomes distressed when confronted with challenging work. A psychologist assessed Patrick and suspects he is suffering from a mild form of Asperger's Syndrome. He will need additional assistance throughout his schooling life as well as at home. Unfortunately Karori Primary School cannot provide such assistance so Sarah is attending school with Patrick three hours a day to provide the additional support.

Patrick's behaviour at home is also causing problems. Both Sarah and Peter have caught Patrick being violent towards his siblings, biting and hitting them when he does not get his own way. Sarah and Peter have continually argued over how best to discipline Patrick when he misbehaves. Sarah insists on the use of the 'naughty corner' and 'time out'. However Peter prefers a traditional strict approach and strongly believes a good slap on the backside will keep the children on the straight and narrow. On one particular occasion when Patrick hit his sister drawing blood, Peter slapped him hard on the leg, leaving a handprint mark for days. Peter believes Sarah is too soft on the children and is undermining his authority.

Over the last year there has been increased conflict in the Addams family's household, and in December 2011 Sarah chose to end the relationship with Peter. She suggested that it would be best for him to move out to minimise the disruption to the children's care arrangements. Peter was most unimpressed by such a suggestion and replied "over my dead body, and don't think you're taking the children". Sarah felt she had no choice but to leave.

She moved into a house nearby with a friend Jessica. Sarah has continued regular contact with the children, dropping them to school and pre-school and picking them up afterwards. However the children are still spending every night at the family home with Peter. In January this year it came to light that Sarah's friendship with Jessica has progressed to something more serious, and they are now in a relationship.

With the assistance of a lawyer, Sarah filed a parenting order application in the Family Court in late February applying for full day-to-day care. After being served, Peter consulted a lawyer and filed a defence and a cross application for full day-to-day care.

The Question

This thesis will assess the question of Family Assessment in the light of a comparative analysis and propose whether and how those initiatives might be successfully transplanted to New Zealand, to act as a form of gatekeeping.

Structure

Chapter One will explore the policy reasons behind the need for change in the New Zealand Family Court. The serious issues causing inefficiency (in both senses) of the Family Court's processes and resulting in ineffective decisions will be identified. Chapter Two will provide an overview of the current processes involved in the Family Court, and the context in which a Family Assessment might arise. Two Family Assessment models will be described in Chapter Three, drawn from assessments used in overseas jurisdictions. These models will be used in Chapters Four and Five to provide guidance as to what Family Assessment would be best for New Zealand to increase the efficiency of its processes (in both senses) and effectiveness of subsequent decisions reached. Chapter Four will focus primarily on how the assessment can be used in the New Zealand jurisdiction, and whether explicit recommendations should be a part of

the assessment report. Chapter Five will describe and evaluate each element to be incorporated in the New Zealand Family Assessment. Finally Chapter Six will demonstrate how the Family Assessment will increase efficiency (in both the welfare and economic sense) of the Courts' processes, and effectiveness of decisions made, through evaluating the Addams family's experience with the revised Family Court system.

Note:

The Family Court is in a state of flux due to the recent review of the Court and subsequent announcement in early August of impending changes.⁵ These aim to address some of the problems facing the Court, however the proposed legislation will not reach Parliament until late in 2012.⁶

A major proposed change is the introduction of an out-of-court Family Dispute Resolution (FDR) service.⁷ The service is intended to help people resolve parenting disputes out of court quickly and inexpensively. It will replace most of the current counselling and mediation services offered through the Family Court processes. Lawyers will not be part of this process and parties must pay for the service themselves unless they meet the Legal Aid threshold.⁸ FDR services will be mandatory for most parties wishing to make a parenting order application with the Family Court.⁹

If the FDR service is implemented in the near future, the author believes the Family Assessment may still be nested in the new system as an effective gatekeeper. However this thesis will primarily deal with the law as it stands to date, as the author cannot speculate on exactly how the New Zealand Family Court system will look in the future.

⁵ Judith Collins "Family Court reforms put children first" (press release, 2 August 2012).

⁶ Ibid.

⁷ Ministry of Justice "Family Court Review" <<http://www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1>>.

⁸ Ibid.

⁹ Collins, "Family Court reforms put children first", above n 5.

CHAPTER ONE: THE PROBLEM IN CONTEXT

In April 2011 the Government directed the Ministry of Justice to undertake a review of the Family Court. The purpose of this review was to ensure the Court is sustainable, efficient, cost-effective, and responsive to those who need access to its services.¹⁰ The review was directed because the Family Court is facing increasing issues that must be addressed. Four main issues are particularly relevant to this thesis; sustainability and delay, the lack of support for people to resolve matters out of court and early on, the unclear role of the State in family disputes, and the tendency to lose sight of the needs of the children involved in the Family Court processes.¹¹

Sustainability and Delay

Family Court costs have been increasing at an unsustainable rate. Figures show a 63% increase in costs from 2004/2005 to 2009/2010¹², with no corresponding increase in the number of applications made to the court.¹³ A major driver of the increase is the COCA, the source of the single largest category of Family Court applications.¹⁴

Delay is also of major concern. On average a parenting order application takes close to a year to complete.¹⁵ There are increasing concerns about the harm

¹⁰ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 7.

¹¹ Ministry of Justice, *A public consultation paper*, above n 10, at [2].

¹² *Ibid* at [21].

¹³ However when looking at the different types of applications made, it can be seen that there has been an increase in the number of Care of Children Act applications and a slight decrease in the number of other applications made; *Ibid* at [47] and [56].

¹⁴ Care of Children Act 2004 cases make up 39% of all applications; *Ibid* at [48].

¹⁵ *Ibid* at [17].

delay has on the children involved, as they have a different sense of time to adults.¹⁶

Both cost and delay are impacting negatively on the efficiency and effectiveness of the Family Court, in the economic and welfare sense.

Lack of Support for Self-Resolution Early on in the Process

Decisions agreed to by the parties through participative processes are generally better than those created by outside decision-making services.¹⁷ Agreement allows for the parties to feel empowered and is likely to lead to more durable and lasting arrangements.¹⁸ Early decision-making is important, as prolonged exposure to conflict can be profoundly damaging to children.¹⁹

The current Family Court system, as at August 2012, does include some first stage support for self-resolution in the form of a Parenting through Separation course and counselling services. The course is highly regarded but not compulsory and attendance is relatively low.²⁰ Counselling can either be requested by the parties or it may be court ordered.²¹ While it may be helpful, only about 25% of cases exit the Family Court process immediately after counselling.²²

¹⁶ Care of Children Act 2004, s4(5)(a); Children Act 1989 (UK), s1(2) 'the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child'.

¹⁷ G Firestone and J Weinstein "In the Best Interests of Children: A Proposal to Transform the Adversarial System" (2004) 42 Family Court Review 203 at 211.

¹⁸ Ministry of Justice, *A public consultation paper*, above n 10, at [116].

¹⁹ E Mark Cummings and Patrick Davies *Children and Marital Conflict: The Impact of Family Dispute and Resolution* (Guilford Press, New York, 1994) at 61 and 110; *GMS v SCS [Relocation]* [2011] NZFLR 256 at [90].

²⁰ Ministry of Justice *Reviewing the Family Court: "Parenting through Separation" Participation Feedback* (September 2011) at 2; Ministry of Justice, *A public consultation paper*, above n 10, at [125].

²¹ Family Proceedings Act 1980, ss 9 and 10; Care of Children Act 2004, s 65.

²² Ministry of Justice, *A public consultation paper*, above n 10, at [203].

Although the Family Court provides some support for self-resolution, there is room for improvement. If better support is given to help parties resolve matters early on, efficiency will be improved in the economic and welfare sense. In particular, encouraging parties to have a primary role in the decision-making increases efficiency in the welfare sense as more stable and effective outcomes can be expected.

The Unclear Role of the State in Family Disputes

Closely related to support for self-resolution is the issue of the unclear role of the State in family disputes. Currently the Court's gateway is wide open, with almost no restrictions on what applications are dealt with and a very limited economic burden upon the parties.

A crucial role of the State is to maintain peace and order within the community by aiding the resolution of disputes between citizens.²³ The State has an obligation to its citizens to provide a legal forum for the resolution of family disputes.²⁴ However parents also have responsibilities to attempt to resolve private family matters for themselves.²⁵ A compromise must be made between these two roles. The children involved in family disputes are vulnerable and rely on both their parents and the state to protect them.²⁶

To improve efficiency and effectiveness in the Family Court, there is opportunity to implement new procedures to ensure parents take responsibility for attempting to resolve issues primarily by themselves. Requiring them to contribute to costs recognises their role in the matter and will promote economic efficiency.

²³ New Zealand Law Society, "Review of the Family Court", above n 2, at [3.1].

²⁴ Ibid at [2.6].

²⁵ Ministry of Justice, *A public consultation paper*, above n 10, at [23] and [26].

²⁶ New Zealand Law Society, "Review of the Family Court", above n 2, at [8.5].

Losing Sight of the Needs of Children

The overarching purpose of the COCA is to promote the welfare and best interests of the child.²⁷ However there is a tendency to lose sight of this purpose. The resolution process can appear more focused on parents' rights to pursue their case rather than the needs of the children involved.²⁸ Currently a Lawyer for Child is commonly appointed early on in the process to represent the child's views.²⁹ Concerns have been raised about the financial cost of this and it has been announced that a Lawyer for Child will only be appointed in the most serious cases.³⁰ This change creates the risk that children's views and interests will not be represented at all pre-hearing.

There is strong evidence to suggest that children's participation at an early stage results in better outcomes for the children. They generally cope better with the effects of separation, have better mental health outcomes, and there is a greater stability of care and contact arrangements.³¹

Conclusion

There are some serious issues facing our Family Court. The increase in costs is worrying and inefficient in an economic sense. However this must be balanced against efficiency in the welfare sense. Implementing services to help parents to resolve disputes early is highly important in keeping with the overall purpose: to promote the welfare and best interests of children.³² This will create efficiency in the welfare sense, and improve the effectiveness of the Court's decisions.

²⁷ Care of Children Act 2004, s4.

²⁸ Ministry of Justice, *A public consultation paper*, above n 10, at [30].

²⁹ *Ibid* at [104].

³⁰ Ministry of Justice, "Family Court Review", above n 7.

³¹ Ministry of Justice, *A public consultation paper*, above n 10, at [93]; Nicola Taylor, Pauline Tapp and Mark Henaghan "Respecting Children's Participation in Family Law Proceedings" (2007) 15 *Intl J Child Rts* 61 at 80.

³² Care of Children Act 2004, s4.

The question therefore arises: will mandatory Family Assessments help with these public interests in the efficiency and effectiveness of the Family Court?

CHAPTER TWO: HOW THINGS WORK NOW

The COCA allows an ‘eligible person’ to apply to the Court for a parenting order.³³ An ‘eligible person’ is exhaustively but widely defined as: a parent or guardian of the child, a partner of the parents, any member of the child’s family who has the court’s permission to apply, and any other person who has the court’s permission to apply.³⁴

The only other conditions to fulfil before a parenting order application will be accepted are completion and filing of the prescribed forms together with a filing fee of \$220.³⁵ No screening of the merits of the case occurs.

The Early Intervention Process

In April 2010 the Early Intervention Process (EIP) was launched in response to the increasing concerns with delay in the Family Court.³⁶ The Principal Family Court Judge Peter Boshier had high hopes that the EIP would dramatically change the management of cases in the future, and allow for care arrangements to be determined faster, with lower costs.³⁷

The EIP involves a triage system, whereby every COCA application is screened by the Registry and directed to either the urgent or standard track.³⁸ The focus of the urgent track is on direct judicial involvement, while the standard track encourages alternative dispute resolution.

³³ Care of Children Act 2004, s48.

³⁴ Care of Children Act 2004, s47.

³⁵ Family Court Rules 2002, r20; Family Courts Fees Regulations 2009, sch2.

³⁶ Peter Boshier, Principal Family Court Judge “Family Court to Fast Track Child Care Cases” (media statement, 9 April 2010).

³⁷ Ibid.

³⁸ Peter Boshier, Principal Family Court Judge “Why the Family Court Needs an Early Intervention Process” (speech to the Child and Youth Law Conference 2010, Auckland, 22 April 2010).

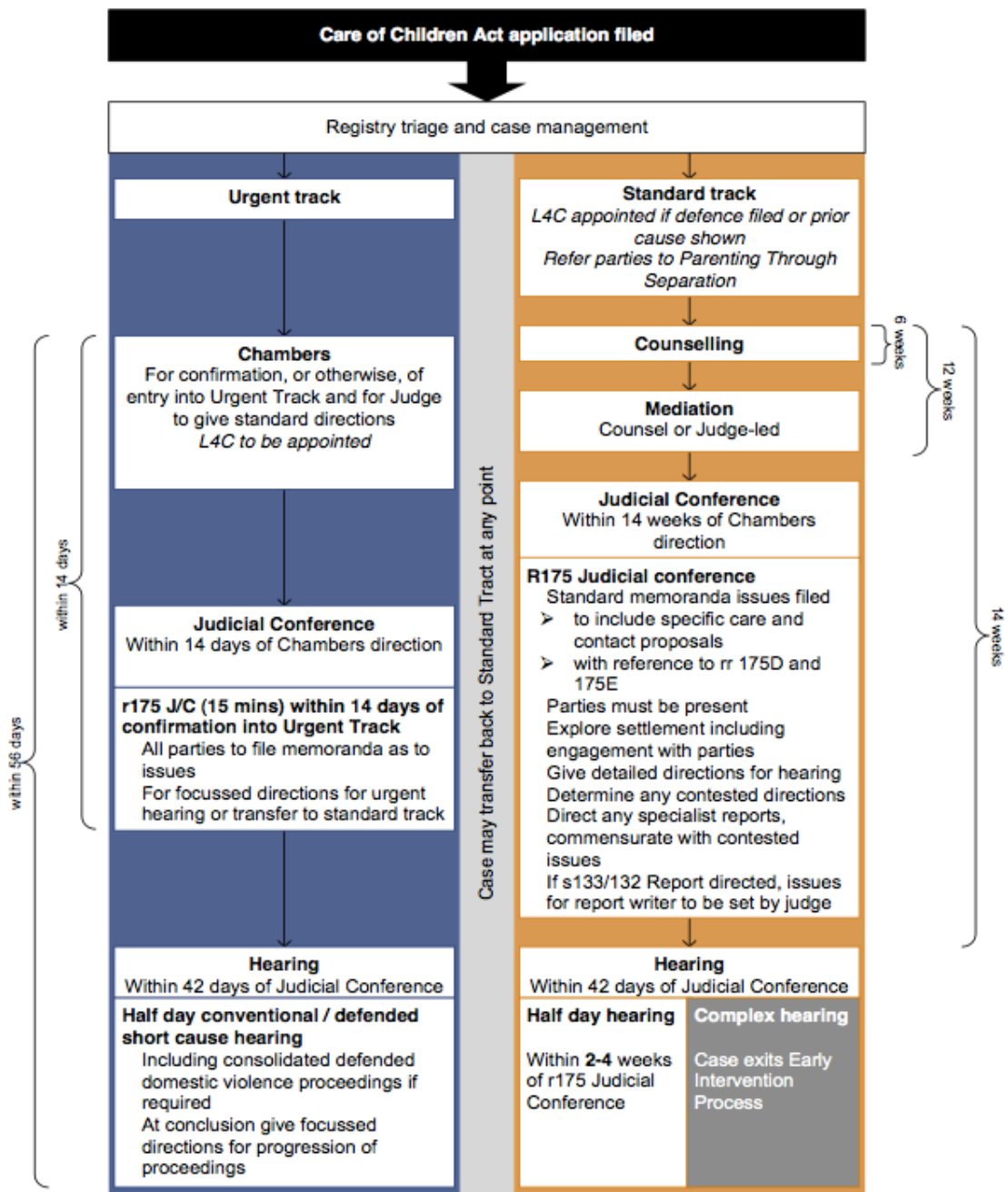


Figure 1 Flow Chart of the Early Intervention Process³⁹

Urgent Track

Urgent Track applications present with serious issues needing immediate judicial intervention: for example family violence, mental health issues, sudden relocation, or ex parte applications.⁴⁰

³⁹ Family Court Caseflow Management Practice Note, Appendix 7.

After placement on the urgent track, confirmed in chambers, a Lawyer for Child is appointed and a judicial conference held within 14 days. There, focused directions are given for hearing,⁴¹ or the case may be transferred to the standard track if no longer considered urgent.⁴²

A hearing is to take place within 42 days of the judicial conference.

Standard Track

For cases without immediate urgent issues, the Standard Track focuses on alternative dispute resolution. Parties are simultaneously referred to a Parenting through Separation course and to counselling, neither of which are compulsory. The course is to educate parents on helping their children through separation,⁴³ while counselling is to help parents work through the emotional issues of separation.⁴⁴

If counselling fails, the lawyers involved usually request the appointment of a Lawyer for Child and mediation, to take place within 12 weeks of filing the application. Mediation involves the parties sitting down together with a specially trained mediator in an attempt to resolve matters.⁴⁵

If this is unsuccessful a judicial conference is to take place within 2 weeks from the mediation. The lawyers file a memorandum explaining the facts and issues prior to the conference, and the judge then gives directions. At this stage a s132

⁴⁰ Boshier, “ Why the Family Court Needs and an Early Intervention Process”, above n 39.

⁴¹ Family Court Rules 2002, r175.

⁴² Caseflow Management, above n 40, at 6.10.

⁴³ Ministry of Justice, “*Parenting through Separation*”, above n 20, at 1.

⁴⁴ Ministry of Justice “Counselling” (Family Court of New Zealand) <<http://www.justice.govt.nz/courts/family-court/what-family-court-does/counselling>>.

⁴⁵ Boshier, “ Why the Family Court Needs an Early Intervention Process” above n 39.

social worker report, or a s133 specialist report may be requested, and a date set down for hearing.⁴⁶

The final stage of the Standard Track is a hearing. The matter will be set down for a half-day hearing or a complex hearing if the issues are challenging.⁴⁷ The matter should be heard within 2-4 weeks of the judicial conference.

How Things Work in Practice

On paper the EIP seems a rigorous gatekeeper. Only urgent applications receive immediate judicial intervention, while the rest first go through alternative dispute resolution services. All processes are to take place within reasonable timeframes.

Unfortunately the EIP is implemented through a practice note and not contained in the Family Court Rules or other legislation. Therefore its successful implementation is reliant on compliance by court administration, the judiciary, lawyers and the litigants.⁴⁸ As explained in Chapter 1, there are still major problems with the efficiency (in both senses) of the Court processes, and with the effectiveness of the decisions made.

The Addams Family's Experience

After Sarah and Peter filed respective parenting order applications in the Wellington Family Court, their case was triaged to the Standard Track. They were each directed to attend a Parenting through Separation course. Sarah attended the course, while Peter refused saying he “already knew how to parent his children”. They were also referred to counselling: two separate sessions then

⁴⁶ Caseflow Management, above n 40, at 6.17.

⁴⁷ Ibid at 6.17 and 6.18.

⁴⁸ Peter Boshier “The Family Courts Early Intervention Process” (2012) 797 Lawtalk 17 at 17.

one session together. The process of counselling took eight weeks and was ineffective; no progress was made nor agreement reached.

After counselling, Peter and Sarah's lawyers requested the appointment of a Lawyer for Child. The lawyer met with the children and could clearly see they were distressed by the whole situation. He attempted to negotiate a settlement between Sarah and Peter however both were very firm in their positions. A mediation conference was directed and set down for four weeks time. By this stage over four months had passed since Sarah first filed the parenting order application. The children remained living with Peter, however Sarah had frequently been needed to take the children overnight when Peter was scheduled to work night shifts.

The parties and their lawyers and the Lawyer for Child attended the mediation conference convened by a court appointed mediator. Both Peter and Sarah were strongly fixed in their views. Peter was adamant that the children were better off living with him in the family home they had grown up in with a strong father figure, not two mother figures. Sarah on the other hand emphasised the great difficulties she was experiencing in juggling caring for the children and continuing work. The unpredictable nature of Peter's work schedule meant she often had to spend late nights at the family home caring for the children.⁴⁹ She strongly believed it would be easier for her and the children if they lived solely with her at Jessica's house. The Lawyer for Child agreed with this view and attempted to convey that this would be best for the children, and that the continued conflict and disruption was upsetting them. Unfortunately Peter was not interested in this and asserted it was his right to have his children living with him. Mediation was unsuccessful.

After the failed mediation, all lawyers involved consulted about what needed to happen next to be timetabled for a hearing. A request for a s133 psychologist's report was made, particularly to look into the best way to manage the behaviour

⁴⁹ *LAM v NSM* FC North Shore FAM-2006-044-001245, 19 August 2011.

of Patrick who was becoming increasingly distressed by the disruption in routine.

In the meantime the arrangements for childcare became more unpredictable. Poor communication between Sarah and Peter resulted in late pick-ups for the children from school and day care on numerous occasions, as well as verbal conflict in the presence of the children. The s133 report took five months to obtain.⁵⁰

The report showed the continued conflict between Sarah and Peter was having an immense effect on Patrick. He was refusing to cooperate at school and lashing out at both students and teachers. The s133 report emphasised that Patrick needed a continuous stable routine to manage his behaviour. Alice expressed a view that “Daddy was sad and angry” and she wanted to stay with him “to make him happy”,⁵¹ while Jack seemed relatively unperturbed by the situation.

After the report was obtained both parties filed their final evidence and a two-day hearing was allocated to take place in two months time.⁵² The children continued to live with their father but were primarily cared for by Sarah. By the time the case reached hearing Peter and Sarah were embroiled in conflict. The judge made a decision based on the principles of the COCA, particularly looking at the best interests of the children. The final decision was for Sarah to have day-to-day care Monday to Friday, while Peter had contact every three out of four weekends.

⁵⁰ Average time frame for receiving a s133 psychologist report is between 4-6 months in the Wellington Family Court mainly due to the lack of psychologists willing and available to conduct such reports; Email from Family Court Family Coordinator (Wellington) to Rebecca Dempsey regarding the average time frame for receiving a section 133 report (19 September 2012).

⁵¹ Taylor, Tapp and Henaghan, “Respecting Children’s Participation”, above n 31, at 76 and 77; *LAM v NSM*, above n 50, at [18].

⁵² Average waiting time for scheduled hearing in the Wellington Family Court is 61 days; Ministry of Justice “District Court Family Waiting Time for Scheduled Hearing” (31 December 2011) Courts of New Zealand <<http://www.courtsofnz.govt.nz/from/statistics/annual-statistics/december-2011/district-court/district-court-family-waiting-time-for-scheduled-hearing-as-at-31-december-2011>>.

Six months down the track neither Sarah nor Peter were particularly happy with the outcome of the case. Sarah would have preferred more time with the children on the weekends and shared care during the weeks, while Peter was upset about losing much of his time with the children. After showing many signs of distress over the past year, Alice and Jack both seemed to be coping well with the new arrangements. Patrick's behaviour was improving with the stable arrangements made, however he was still far behind in school as a result of the past year of conflict.

The Addams family's experience highlights the dangers of the current system in losing sight of the needs of the children. The family becomes entangled in the Family Court processes, and the conflict between Sarah and Peter is strengthened and prolonged. The parents' focus was always on their own interests and wants, rather than the needs of their children.⁵³

Clearly the processes within the EIP system were inefficient in both senses. The children's welfare was endangered from exposure to continued conflict, while expenses grew with each stage and continued delay in the court processes. The final result was relatively effective although both parents had their reservations.

Conclusion

The EIP provides the structural framework for case management. Within this framework there is room to implement an additional stage to the process to assist parties in reaching agreement, and help the court to identify the genuine welfare issues needing consideration. The following chapter will provide an analysis of one possible method to achieve this: the Family Assessment.

⁵³ See *P v K* [2006] NZFLR 22 at [81] and [89].

CHAPTER THREE: THE OVERSEAS MODELS

Family assessments have been introduced in different forms in the US, Canada and Australia. They share the common concern with the best interests of the child reflected in s 4 of the COCA.⁵⁴ The primary principle creates an opening for the mental health profession to offer its expertise regarding the social and psychological best interests of the child.⁵⁵ While their forms differ in terms of when the report is created and by whom, all can be tendered as evidence on the ultimate question of how the child's interests are best to be served.

To describe all versions of the family assessments would be near impossible due to numerous jurisdictional differences. Therefore the methodology adopted in this thesis is to analyse the assessments, identify their common core features, and develop two distinct models, which this writer terms the 'Comprehensive Family Assessment' and the 'Brief Summary Family Assessment'.

The 'Comprehensive Family Assessment' Model

This thesis draws the 'Comprehensive Family Assessment' model from what are termed 'Child Custody Evaluations' in America, or 'Custody and Access Assessments' in Canada. There are jurisdictional differences in the legislation concerning the assessments, however the ultimate reports produced are alike.

⁵⁴ Illinois Marriage and Dissolution of Marriage Act 750 ILCS §5/602; California Family Code §3020; Divorce Act RS C 1985 c3, s16; Children's Law Reform Act RS O 1990 c12, s19; Children's Law Act RS S 1997 c8.2, s8; Family Law Act 1975 (Cth), s60CA.

⁵⁵ Michael A Saini "Evidence Base of Custody and Access Evaluations" (2008) 8 Brief Treatment and Crisis Intervention 111 at 112.

Use of the Assessment

A Comprehensive Family Assessment has a primary and a secondary goal.⁵⁶ The primary purpose is to assist the court in determining the best interests of the child, through focussing upon parenting attributes, the child's psychological needs and the resulting fit.⁵⁷ In this role the assessor is a neutral expert for the court.

The secondary goal of Comprehensive Family Assessments is to assist families in reaching an agreement.⁵⁸ Settlement is encouraged by motivating resolution of conflict, minimising unnecessary negatives and refocusing the parent's attention on their children's needs.⁵⁹ 70-90% of cases settle after a Comprehensive Family Assessment.⁶⁰ Some argue that the reason for settlement is often because the parties and lawyers believe the judge at trial will follow the recommendation of the assessor.⁶¹ However others emphasise that it is the assessment process and information provided to parents, from a neutral party focussed on their children's best interests, which promotes settlement.⁶²

⁵⁶ Jonathan W Gould and Philip M Stahl "The Art and Science of Child Custody Evaluations: Integrating Clinical and Forensic Mental Health Models" (2000) 38 Family Court Review 392 at 408.

⁵⁷ American Psychological Association "Guidelines for Child Custody Evaluations in Family Law Proceedings" (2010) at 1 and 3.

⁵⁸ Gould and Stahl, "The Art and Science", above n 57, at 408; Government of Saskatchewan "Social Work Unit: Custody and Access Assessments" <<http://www.justice.gov.sk.ca/custody-access>>.

⁵⁹ Gould and Stahl, "The Art and Science", above n 57, at 409.

⁶⁰ Saini, "Evidence Base", above n 56, at 120.

⁶¹ Timothy M Tippins and Jeffrey P Wittmann "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance" (2005) 43 Family Court Review 193 at 217.

⁶² Nicholas Bala "Tippins and Wittmann Asked the Wrong Questions: Evaluators May Not be "Experts", But They Can Express Best Interests Opinions" (2005) 43 Family Court Review 554 at 557.

When an Assessment is Triggered

A Comprehensive Family Assessment may be triggered by a judge on application for a custody order, at a pre-trial conference, or at trial.⁶³ An assessment is not ordered for all contested custody cases, but it is a common method used to obtain additional information about the child's best interests.⁶⁴

A party may also request an assessment. In Illinois a party may upon motion, within a reasonable time before trial, request an assessment in place of or in addition to a court-ordered evaluation.⁶⁵ The court holds the power to refuse the request. A similar option is available in most jurisdictions.⁶⁶

Who Conducts the Assessment

There is little legislative detail specifying who may conduct a Comprehensive Family Assessment: for example Illinois requires 'professional personnel' and Ontario requires persons with the 'technical or professional skill' to complete the assessment.⁶⁷

In the varying jurisdictions, psychiatrists, psychologists and social workers may conduct the assessments.⁶⁸ Although there are inconsistencies in the research in this area, it seems most assessors are psychologists.⁶⁹

⁶³ Illinois Marriage and Dissolution of Marriage Act 750 ILCS §5/604(b) and 604.5; California Family Code §3111; Children's Law Reform Act RS O 1990 c12, s30(1); Queen's Bench Act RS S 1998 cQ1.01, s97; The Queen's Bench Rules, r191(16).

⁶⁴ I Turkat "On the Limitations of Child Custody Evaluations" (2005) 48 Family Court Review 8 at 8.

⁶⁵ Illinois Marriage and Dissolution of Marriage Act 750 ILCS §5/604.5.

⁶⁶ Children's Law Reform Act RS O 1990 c12, s30(2); Queen's Bench Act RS S 1998 cQ1.01, s97(1); The Queen's Bench Rules, r639.

⁶⁷ Illinois Marriage and Dissolution of Marriage Act 750 ILCS §5/604(b); Children's Law Reform Act RS O 1990 c12, s30(1).

⁶⁸ James Bow and Francella Quinnell "Critique of Child Custody Evaluations by the Legal Profession" (2004) 42 Family Court Review 115 at 118.

⁶⁹ Saini, "Evidence Base", above n 56, at 115, and Bow and Quinnell, "Critique by Legal Profession", above n 69, at 118 indicate psychologists as the most common evaluators; In contrast, Leah Horvath, TK Logan and Robert Walker "Child Custody Cases: A Content

In response to concerns over inadequate training of assessors,⁷⁰ the Californian Rules of Court prescribe detailed requirements governing an assessor's profession, training and experience.⁷¹

Methods Used to Elicit Data for the Assessment

Several methods are used to collect data for a Comprehensive Family Assessment.⁷²

Clinical interviews of both parents are a primary method of information collection.⁷³ Data can be gathered about the histories of each family member, the child's development, family conflicts and parenting practices.⁷⁴ A risk of biased responses by parents means other data collection methods are essential.⁷⁵

Child interviews allow information about the child's perception of the family situation, the quality of attachment with each parent, and any preferences the child expresses to be obtained.⁷⁶ This information is recognised as highly important by the legal profession, because of the 'child's best interests' focus.⁷⁷

Analysis of Evaluations in Practice" (2002) 33 Professional Psychology: Research and Practice 557 at 559 indicates social workers conduct most assessments.

⁷⁰ James Bow "Review of Empirical Research on Child Custody Practice" (2006) 3 Journal of Child Custody 23 at 46.

⁷¹ See Appendix 2.

⁷² American Psychological Association, "Guidelines", above n 58, emphasise the importance of using multiple methods to enhance the reliability and validity of the assessments.

⁷³ James Bow and Francella Quinnell "A Critical Review of Child Custody Evaluation Reports" (2002) 40 Family Court Review 164 at 167.

⁷⁴ Saini, "Evidence Base", above n 56, at 116.

⁷⁵ Ibid.

⁷⁶ Stephen Herman and William Bernet "Summary of the Practice Parameters for Child Custody Evaluation" American Academy of Child and Adolescent Psychiatry <<http://www.aacap.org/page.ww?section=Summaries&name=Summary+of+the+Practice+Parameters+for+Child+Custody+Evaluation>>.

⁷⁷ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 124.

Parent-child observations are used to ascertain information regarding parenting skills, parents' ability to respond to the children's needs, signs of reciprocal connection and attention, communication skills, methods by which parents maintain control and parental expectations relating to developmentally appropriate behaviour.⁷⁸ They may be structured or unstructured, and take place in a clinical setting or on a home visit.⁷⁹

Psychological testing of parents occurs in many cases. The most common test administered is the Minnesota Multiphasic Personality Inventory, followed by Parenting Stress Index.⁸⁰ These provide insight into the emotional stability of the parents and how interactions with the child affect the parent.⁸¹ Psychological testing provides objective support for the assessor's findings, and helps balance potential bias and errors from clinical interviews.⁸² Children are tested far less often.⁸³

Secondary sources of information are obtained through interviewing or reviewing documents from collateral contacts,⁸⁴ most commonly wider relatives, therapists, and teachers.

Assessment Components

There is little judicial guidance on the format for Comprehensive Family Assessment reports.⁸⁵ The California Court Rules require the assessor to

⁷⁸ Association of Family and Conciliation Courts "Model Standards of Practice for Child Custody Evaluation" (2006) at 10.2.

⁷⁹ Bow and Quinnell, "A Critical Review", above n 74, at 169.

⁸⁰ Marc Ackerman and Tracy Brey Pritzl "Child Custody Evaluation Practices: A 20-Year Follow-Up" (2011) 49 Family Court Review 618 at 621 and 622.

⁸¹ Randy Otto, John Edens and Elizabeth Barcus "Use of Psychological Testing in Child Custody Evaluations" (2000) 38 Family Court Review 312 at 320.

⁸² Francella Quinnell and James Bow "Psychological Tests Used in Child Custody Evaluations" 19 Behavioural Sciences and the Law 491 at 491.

⁸³ Bow and Quinnell, "A Critical Review", above n 74, at 168.

⁸⁴ See American Psychological Association, "Guidelines", above n 58, Guideline 10.

⁸⁵ Gregory Stevens "Custody and Access Assessments in Saskatchewan: Format, Process, and a Practitioner's Opinion" (paper prepared for the Saskatchewan Legal Education Society Inc. seminar, Family Law Update, September 2004) at 3.

summarise the data gathering procedures, information sources, and limitations, and provide clear recommendations consistent with the best interests of the child.⁸⁶ No report format is prescribed.

The most common components are general recommendations regarding therapy or parenting classes, explicit recommendations regarding custody or visitation, family history, parents' strengths and weaknesses, testing of parents, child interview, parent-child observations and a summary of findings.⁸⁷

The legal profession ranks the parents' strengths and weaknesses, child information, and recommendations as the most important components.⁸⁸

Time Taken to Conduct the Assessment and Who Pays for it

On average an assessor spends 46 hours on a Comprehensive Family Assessment: approximately 15 hours of interviewing and observations, 12 hours reviewing documents and collateral contacts, 10 hours on report writing, 6 hours of psychological testings, and 3 hours on testifying in court.⁸⁹ The average time frame required to complete the assessment is 9.27 weeks,⁹⁰ however the legal profession expressed the optimal time frame to be 5-6 weeks.⁹¹

On average the cost of an assessment of a family of four by a private psychologist is USD 5600.⁹² Often jurisdictions recognise the inability of some parties to meet

⁸⁶ See Appendix 2.

⁸⁷ Bow and Quinnell, "A Critical Review", above n 74, at 171.

⁸⁸ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 118.

⁸⁹ Ackerman and Pritzl, "A 20-Year Follow-Up", above n 81, at 620.

⁹⁰ James Bow and Francella Quinnell "Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years after American Psychological Association Guidelines" (2001) 32 Professional Psychology, Research and Practice 261 at 263.

⁹¹ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 125.

⁹² Ackerman and Pritzl, "A 20-Year Follow-Up", above n 81, at 622.

such costs and employ mental health professionals to provide these services at little or no cost to the parties.⁹³

The 'Brief Summary Family Assessment' Model

The 'Brief Summary Family Assessment' model draws from what are termed 'Case Assessment Conferences' in Western Australia. In July 2004 these assessments were introduced in response to concerns about the division between the judicial and social science functions of the Court.⁹⁴ The judicial role of a court involves hearings, pre-trial conferences, and trials, while the social science function of a court provides counselling and mediation services.

Use of the Assessment

Firstly the Brief Summary Family Assessment is used for risk screening.⁹⁵ Family Consultants look out for warning signs of abuse, mental health problems and other serious issues. Identifying these issues at an early stage is an important component of the assessment.⁹⁶

The assessments also help with case management by identifying the relevant issues for court consideration. The Family Consultant can filter out irrelevant issues, and focus the parties on addressing the needs of their children.⁹⁷ The Magistrate can then assess the best way forward so the parties are in the system

⁹³ Horvath, Logan and Walker, "A Content Analysis", above n 70, at 557; Ministry of Justice "Social Work Unit: Fees" Government of Saskatchewan <<http://www.justice.gov.sk.ca/SWU-Fees>>.

⁹⁴ Paul Murphy and Lisbeth Pike "Developing the Case Assessment Conference Model in the Family Court of Western Australia: Breaking Down the Firewall" (2005) 11 *Journal of Family Studies* 111 at 112.

⁹⁵ *Ibid* at 113.

⁹⁶ Paul Murphy and Lisbeth Pike "Case Assessment Conferences in the Family Court of Western Australia: A Formative Evaluation" (August 2006) Edith Cowan University, Perth at 2.

⁹⁷ *Ibid* at 3.

for the shortest time possible.⁹⁸ The use of Brief Summary Family Assessments has resulted in a 20% reduction in the time that a matter is in the court system.⁹⁹

Finally a Brief Summary Family Assessment may assist parties to reach agreement.¹⁰⁰ Although this is seen as secondary to the above purposes, figures indicate that 30% of cases settle at the assessment stage.¹⁰¹

When the Assessment Triggered

Similar to New Zealand, the Family Court of Western Australia has a case management process focussing on early intervention.¹⁰² Parties must go through a compulsory family dispute resolution (counselling, negotiation or conciliation) process before a parenting order application is accepted.¹⁰³ Applications are then placed on a 'Child-Related Proceedings List' where a Magistrate decides the next stage for each case.¹⁰⁴

A Brief Summary Family Assessment is then triggered for most cases.¹⁰⁵

Who Conducts the Assessment

A Family Consultant and Magistrate jointly conduct a Brief Summary Family Assessment.¹⁰⁶ Family Consultants are psychologists or social workers with

⁹⁸ Ibid at 2.

⁹⁹ Ibid at 17.

¹⁰⁰ Family Court of Western Australia "Case Management Guidelines" (7 May 2012) at 8.3.

¹⁰¹ Murphy and Pike, "Breaking Down the Firewall", above n 95, at 116.

¹⁰² Western Australia, "Guidelines", above n 101.

¹⁰³ Family Law Act 1975 (Cth), s60I; Family Law Rules 2004 (Cth), r5.03.

¹⁰⁴ Western Australia, "Guidelines", above n 101, at 6.1 and 7.1.

¹⁰⁵ The Honourable Justice Stephen Thackray, Chief Judge "Family Court of Western Australia Annual Review 2010/2011" (press release, 2 May 2012) at 9 and 10.

¹⁰⁶ Western Australia, "Guidelines", above n 101, at 8.1.

special expertise in child and family matters.¹⁰⁷ A Magistrate contributes legal expertise towards the end of the assessment.¹⁰⁸

Methods Used to Elicit Data for the Assessment

An interview is the single method used to gather data for a Brief Summary Family Assessment. The Family Consultant interviews each parent separately to ascertain information about what issues are in dispute and identify any indicators of risk.¹⁰⁹ The Family Consultant then meets with the parents together to clarify the issues and identify any areas of agreement.¹¹⁰ No other data collecting methods are used.

Assessment Components

Following the conclusion of a Brief Summary Family Assessment, the Family Consultant must provide the Court with a written report.¹¹¹

There are three components to a Brief Summary Family Assessment. Firstly, *screening and assessment* involves the Family Consultant identifying the main issues in dispute and looking for risk factors.¹¹² Indicators of risk include signs of family violence, child abuse, substance abuse, mental health issues, neglect, and parenting problems.¹¹³

¹⁰⁷ Family Court of Australia “Family Consultants” <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Registers/FCOA_Consultants>.

¹⁰⁸ Murphy and Pike, “A Formative Evaluation”, above n 97, at 3.

¹⁰⁹ Ibid at 2.

¹¹⁰ Ibid at 3.

¹¹¹ Western Australia, “Guidelines”, above n 101, at 8.4.

¹¹² Murphy and Pike, “Breaking Down the Firewall”, above n 95, at 114.

¹¹³ Ibid.

Secondly, the parents are seen together for the *negotiation* stage. The Family Consultant clarifies the relevant issues and encourages resolution by focussing the parents' attention on determining the best outcomes for their children.¹¹⁴

Finally there is the *procedural hearing* component. The Family Consultant briefs the Magistrate on the issues and risk factors identified, and any progress the parties have made.¹¹⁵ The Magistrate assesses the situation and decides on the future case management. This may involve making Consent Orders, appointing a child representative, instructing further mediation, or setting the case down for a hearing or trial.¹¹⁶

Time Taken to Conduct the Assessment and Who Pays for it

Two hours are allocated for Brief Summary Family Assessment. The screening and assessment phase takes approximately 30 minutes, followed by an hour of negotiation, and a 30-minute procedural hearing.¹¹⁷

The Brief Summary Family Assessment is government funded.¹¹⁸ The only contribution required from the parties is a fee payable on filing of parenting order application.¹¹⁹

¹¹⁴ Murphy and Pike, "A Formative Evaluation", above n 97, at 3.

¹¹⁵ *Ibid.*

¹¹⁶ Family Law Rules 2004 (Cth), rr 12.03 and 12.04.

¹¹⁷ Murphy and Pike, "A Formative Evaluation", above n 97, at 3.

¹¹⁸ Email from Family Court of Western Australia Web Administrator to Rebecca Dempsey regarding Case Assessment Conference fees (5 September 2012).

¹¹⁹ Family Court of Western Australia "Fees" (1 July 2012)

<http://www.familycourt.wa.gov.au/F/fees_and_forms.aspx?uid=9339-7089-1873-0177>.

Comparative Critique of the Family Assessments

Both the Comprehensive and Brief Summary Family Assessments can be critiqued on various aspects.

In the past, Comprehensive Family Assessments were primarily criticised for improper use and interpretation of data, inappropriate use of and overreliance on psychological tests, lack of usefulness in court, and inappropriate recommendations on the ultimate issue.¹²⁰

Guidelines were produced to address these issues and the assessments have significantly improved.¹²¹ They are more comprehensive and sophisticated and incorporate data from multiple sources.¹²² Psychological testing is still commonly used in the Comprehensive Family Assessment, however it is no longer seen as a primary procedure, but used to supplement other methods and opinions formed.¹²³ A survey of attorneys and judges across Michigan showed 71% of participants rated court-ordered assessments as very helpful or extremely helpful.¹²⁴

However guidelines for the assessments also contemplate assessor's making recommendations.¹²⁵ Ongoing controversy surrounds assessors addressing the ultimate question of custody. Some argue there is a lack of sound research for assessors to predict how a child will fare under a specific parenting arrangement,¹²⁶ while others claim there is plenty.¹²⁷

¹²⁰ Bow and Quinnell, "A Critical Review", above n 74, at 164.

¹²¹ American Psychological Association, "Guidelines", above n 58; Association of Family and Conciliation Courts, "Model Standards", above n 79; American Academy of Child and Adolescent Psychiatry "Practice parameters for child custody evaluation" (1997).

¹²² Bow and Quinnell, "A Critical Review", above n 74, at 164.

¹²³ Quinnell and Bow, "Psychological Tests", above n 83, at 498.

¹²⁴ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 121.

¹²⁵ American Psychological Association, "Guidelines", above n 58; Association of Family and Conciliation Courts, "Model Standards", above n 79.

¹²⁶ Tippins and Wittmann, "Empirical and Ethical Problems", above n 62, at 203.

¹²⁷ Joanna Bunker Rohrbaugh *A Comprehensive Guide to Child Custody Evaluations: Mental Health and Legal Perspectives* (Springer, Boston, MA, 2008) at 108.

Judges follow assessors' recommendations in approximately 90% of cases,¹²⁸ raising serious concerns about assessors acting as de facto judges, inhibiting the role of the judiciary.¹²⁹ However the traditional counter is that recommendations are only the assessor's opinion and the judge must make the ultimate decision based on all evidence¹³⁰. Despite the academic debate, the majority of the legal profession support assessors making recommendations regarding custody.¹³¹

A number of criticisms can also be made about the Brief Summary Family Assessment and its sole focus upon the parents.

The strict time limitation precludes any in-depth investigation and discussion of any complex emotional and legal issues.¹³² Family Consultants have also acknowledged the insufficient time to consider the practicalities and potential complications of any proposed arrangements.¹³³

Secondly, the strictly limited methods used to gather data mean any allegations made during the interview phase cannot be corroborated by other sources during the assessment.¹³⁴ Using limited methods was recognised as a problem with the Comprehensive Family Assessments but has since been addressed through the introduction of guidelines.

Finally a major problem is the lack of involvement of the children or third parties (such as subsequent partners). Family Consultants attempt to focus parents' attention on what is best for their children. Involving the children in the assessment process would be a helpful step in doing this. Additionally, involving

¹²⁸ Saini, "Evidence Base", above n 56, at 112.

¹²⁹ Rohrbaugh, *A Comprehensive Guide* above n 128, at 108; Tippins and Wittmann, "Empirical and Ethical Problems", above n 62, at 217.

¹³⁰ *Ibid* at 111.

¹³¹ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 124; Guidelines also contemplate assessors' making recommendations, see American Psychological Association, "Guidelines", above n 58.

¹³² Murphy and Pike, "A Formative Evaluation", above n 97, at 33.

¹³³ *Ibid*.

¹³⁴ *Ibid*.

step-parents or new partners in the assessment process may help with durability of agreed arrangements.¹³⁵

Conclusion

Both Family Assessment models serve a gatekeeping type function, through screening for risk factors, encouraging settlement and providing evidence on the key issues needing judicial consideration. The author proposes to adapt these models and fit them into the New Zealand Family Court system to improve the efficiency of its processes (in both senses) and the effectiveness of its subsequent decisions.

¹³⁵ Ibid at 28.

CHAPTER FOUR: USE OF THE NEW ZEALAND FAMILY ASSESSMENT

Before an appropriate family assessment for New Zealand can be formulated, the issue of how the assessment will be used in both principle and practice must be resolved. An analysis of whether the assessor should make final recommendations on the ultimate issues of day-to-day care and access must be conducted to assess whether they will help promote efficiency (in both senses) and effectiveness of the Family Court. The issue is controversial both overseas and in New Zealand. The benefits and risks of including recommendations, and how they affect efficiency and effectiveness, will be balanced in deciding whether the New Zealand Family Assessment should contain recommendations on the ultimate issue.

The New Zealand Family Assessment

The Assessment in Principle

The 'New Zealand Family Assessment' is to act as a gatekeeper of the Family Court. It will be used to facilitate settlement and highlight the relevant issues needing court consideration.

Both the Comprehensive and Brief Summary Family Assessment models are used in the promotion of settlement, albeit as a secondary function. As shown in Chapter 3, settlement rates post-family assessments (both comprehensive and brief summary) are high.

The New Zealand Family Assessment will facilitate settlement through the provision of information from a neutral third party to the parents. The Family Assessment will focus on what is in the best interests of the child and the parents' attention will be directed towards this rather than on their own

desires.¹³⁶ Information about the children’s needs, perspectives and wishes, of which the parents may not have been aware, will help them in coming to an agreement.¹³⁷

The second use of the New Zealand Family Assessment will be as evidence in court highlighting the genuine welfare issues needing consideration, similar to the Comprehensive Family Assessment. If parents were unable to reach agreement after the initial Family Assessment, the report produced would be made available to the court. Each party to a case generally offers affidavits, which contain information about the facts and issues of the case. These have been criticised for containing irrelevant and inflammatory material.¹³⁸ The Family Assessment would help the court to understand the nature of the case immediately, from the perspective of a neutral party, and to identify the relevant issues needing judicial involvement.

Using the New Zealand Family Assessment in these ways is ‘efficient’ in both senses.

Economically, the gatekeeping function results in increased settlement rates that will in turn lead to a decrease in cases reaching costly hearings. If the case does go to hearing, the Family Assessment will immediately inform the court of the main issues of the case. This will reduce the time needed to conduct the hearing and decrease the likelihood that adjournments will be made to obtain additional reports. The less time a case spends in court, the less money that is being spent on lawyers, judges, court staff and resources.

In a welfare sense, using the Family Assessments to encourage early settlement is efficient because children will be exposed to less conflict, which can be profoundly damaging to them. Efficiency is enhanced by the use of the Family

¹³⁶ Bala, “Tippins and Wittmann”, above n 63, at 557.

¹³⁷ *Ibid.*

¹³⁸ Ministry of Justice, *A public consultation paper*, above n 10, at [48].

Assessments in court, allowing for decisions to be focussed on the welfare issues relating to the child's best interests uncovered by the assessment.

Stable and effective decisions can be expected after a Family Assessment. When parents take an active role in decision-making, arrangements are often more durable and lasting.¹³⁹ If the court is required to intervene, their decisions will be more effective as a result of the information provided by the Family Assessment.

The Assessment in Practice

As alluded to in the previous chapter, a significant issue in the structuring of the Family Assessment is that of recommendations: should the assessment address the ultimate issue of what care arrangements are in the best interests of the child? Although this is not the question the author set out to answer in this thesis, it must be dealt with to ensure the New Zealand Family Assessment is used efficiently and effectively.

Historically, the common law 'ultimate issue rule' prescribed that a witness could not express an opinion on the question that the court had to decide i.e. the ultimate issue.¹⁴⁰ Two main fears make up the rationale behind the rule: the risk the expert will take on the role of an advocate, and the risk the expert will impinge on the role of the judge or jury deciding the case.¹⁴¹

The risk of expert witness bias was recognised in *Clark v Ryan* where the plaintiff called an expert witness to testify as to how a road accident occurred.¹⁴² The Court found "What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury."¹⁴³

¹³⁹ Ibid at [35] and [116].

¹⁴⁰ *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378.

¹⁴¹ Bernard Robertson and G A Vignaux *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* (4th ed, John Wiley & Sons, West Sussex, UK, 1995) at 61 and 62.

¹⁴² *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 (5 July 1960).

¹⁴³ Ibid at 491.

However the risk of witness bias in the New Zealand Family Assessment is unlikely as the assessor is a neutral party, not hired by either side. Further more expert witnesses have an overriding duty to assist the court impartially.¹⁴⁴

The risk of the expert intruding on the role of the judiciary is highly relevant to the New Zealand Family Assessment. The traditional fears were focused upon the inappropriate influence expert witness testimony may have on jurors.¹⁴⁵ However in the context of Comprehensive Family Assessments, concerns have been raised that judges place so much weight on the recommendations of the assessor that they almost always follow them, raising the assessors' status to that of de facto judge.¹⁴⁶ Some courts have gone so far as to state that the assessment should not be readily set aside, unless sufficient reason can be given.¹⁴⁷ This will potentially lead to the court making ineffective decisions if it disregards other evidence and factors not considered by the assessor that may affect the child's welfare and best interests.

Although these concerns are still relevant, the existence and scope of the ultimate issue rule has been controversial, and it is now effectively abolished.¹⁴⁸ The Evidence Act 2006 explicitly recognises expert opinion evidence will not be inadmissible simply because it is about an ultimate issue to be decided in the proceedings.¹⁴⁹ The test for admissibility is now one of "substantial helpfulness".¹⁵⁰ Although the Evidence Act does not bind the Family Court, the rules of admissibility should be a "touchstone" in determining whether evidence should be admitted in the proceedings.¹⁵¹ Therefore the question becomes whether an assessor's recommendations regarding the ultimate issue of care arrangements in the best interests of the child is substantially helpful.

¹⁴⁴ High Court Rules, sch4.

¹⁴⁵ Ian Freckelton and Hugh Selby *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Thomas Reuters (Professional) Australia Limited, Sydney, NSW, 2009) at 133.

¹⁴⁶ Tippins and Wittmann, "Empirical and Ethical Problems", above n 62, at 217.

¹⁴⁷ *Rentschler v Rentschler* 611 NYS 2d 523 (NY App Div 1995).

¹⁴⁸ Cross on Evidence (online looseleaf ed, LexisNexis) at [EVA25.8].

¹⁴⁹ Evidence Act 2006, s25(2)(a).

¹⁵⁰ Evidence Act 2006, s25(1).

¹⁵¹ Care of Children Act 2004, s128; *AB v CD* [2011] NZFLR 529 at [13].

Much criticism has surrounded the reliability and helpfulness of psychologists' testimony in family law cases. A lack of empirical data to back up recommendations is a common criticism.¹⁵² It has been said that psychologists have no special expertise in predicting the future behaviour and development of children and their parents, and therefore cannot make an accurate recommendations as to care arrangements that will serve the best interests of the child.¹⁵³ However, in rebuttal, a psychologist's opinion as to the best care arrangements is at least better informed by expertise in family dynamics and children's needs than that of a judge who is untrained in psychology.¹⁵⁴ There is now a large body of scientific evidence surrounding the impact of divorce on children, their developmental needs, and factors influencing the ability of parents' to meet such needs, increasing the reliability and helpfulness of psychologists' testimony.¹⁵⁵ It is likely that psychologists' opinions on the best interests of the child will pass the 'substantial helpfulness' test.

Although psychologists' recommendations may pass the admissibility test for expert witnesses testifying in court, the use of the Family Assessment differs from the use of the evidence of an expert witness. It may be used in court as evidence, but the New Zealand Family Assessment will also be used to help parties settle much earlier on in the Family Court processes.

In this context, including recommendations in the Family Assessment causes additional concerns. Firstly there is the risk that lawyers may perceive a judge will follow recommendations made by the assessor if the matter reaches trial

¹⁵² John Caldwell "The Limits of s29A Reports in Custody Hearings" (1995) 1 BFLJ 188 at 188; Tippins and Wittmann, "Empirical and Ethical Problems", above n 62; Ira Turkat "Questioning the Mental Health Expert's Custody Report" (1993) 7 Am J Fam L 175 at 175.

¹⁵³ Caldwell, "s29A Reports", above n 153.

¹⁵⁴ Ibid.

¹⁵⁵ Rohrbaugh, *A Comprehensive Guide* above n 128, at 109; Philip Stahl "The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Court: A Response to Tippins and Wittmann" (2005) 43 Family Court Review 260 at 261.

and will advise clients accordingly, inducing settlement.¹⁵⁶ This is inappropriate as the assessor effectively becomes a de facto judge and parties settle for the wrong reason. Although the increased settlement rate is efficient in an economic sense, in a welfare sense it is inefficient due to the risk of parties settling for the wrong reasons. Some emphasise that it is the assessment procedure that encourages settlement rather than the explicit recommendations.¹⁵⁷ However if that is the case, then excluding the recommendations should not affect the settlement function of the assessment.

Allowing the New Zealand Family Assessment to include recommendations on the ultimate issue also creates a risk of polarising positions. Parties may disregard any negative findings in the assessment and become set on fighting the assessors' conclusions, inefficiently increasing litigation rates.¹⁵⁸ Any recommendations made may be used for fault finding and parent bashing, reinforcing conflict.¹⁵⁹ The risk of polarisation is further increased because of the early stage at which the assessment may be directed. The increase in conflict that may occur is highly inefficient in the welfare sense.

Another difficulty of allowing recommendations is how to reconcile this with the s133 psychological reports on the child that the court may order. It has been explicitly noted that such reports should not contain recommendations as to the ultimate issue.¹⁶⁰ The Court has often expressed the view that disputes are to be decided by the Judge, not the s133 specialists.¹⁶¹ The purpose a psychological report is to obtain expert opinion to assist the Court in deciding the ultimate

¹⁵⁶ Tippins and Wittmann, "Empirical and Ethical Problems", above n 62, at 217.

¹⁵⁷ Bala, "Tippins and Wittmann", above n 63, at 557.

¹⁵⁸ Robert Silver and Deborah Silver "Child Custody Evaluations: Hindrance or Help?" 8(3) *Journal of Forensic Psychology Practice* 300 at 301.

¹⁵⁹ *Ibid.*

¹⁶⁰ Ministry of Justice "Specialist Report Writers"

<<http://www.justice.govt.nz/publications/global-publications/s/specialist-report-writers-handbook/specialist-report-writers>>; Gabrielle Maxwell, Fred Seymour and Prue Vincent *The Practice of Psychology and the Law: A Handbook* (2nd ed, New Zealand Psychological Foundation, Wellington, NZ, 1996) at [7.5].

¹⁶¹ *M v Y* [1994] NZFLR 1 at 11; *R v S* [2004] NZFLR 207 at [99].

issue, not to seek explicit recommendations on the ultimate issue.¹⁶² It is difficult to reconcile the difference in standards that would be created if a Family Assessment can contain recommendations, but a s133 report cannot.

Although the arguments for and against recommendation are valid, the author proposes that the issue may also be seen as just one of semantics. There is a very fine line, if any, between drawing conclusions as to the child's needs and each parent's ability to meet those needs, and expressly saying what care arrangements are in the best interests of the child. If the assessor expresses the view that one parent is more able to meet the needs of the child than the other, they are effectively expressing an opinion on how the child's best interests will be best served. In *K v G* a psychologist's report explained in great detail that the risk of harm to the child in moving him to his biological parents place was too great, and the benefits of him remaining where he was far outweighed any advantages of moving.¹⁶³ The court concluded that without a doubt the child would have been returned to his biological parents but for the compelling evidence of the psychologist.¹⁶⁴ This situation demonstrates that s133 reporters effectively do give their opinion as to the ultimate issue but do not word it in such precise terms. It is difficult to see what difference it would make in court if a Family Assessment included recommendations on care arrangements for the best interests of the child or simply stated conclusions as to whether each parent could meet the needs of the child.

However it must be remembered that the New Zealand Family Assessment will operate differently to a s133 report. They will be employed much earlier on in the court process and used to facilitate settlement. Although the issue with recommendations is more of semantic matter, the risk of including explicit recommendations in the New Zealand Family Assessment is too great. The unique use of the Family Assessment to facilitate settlement early in the court process requires the assessment to be worded carefully. The assessment is to

¹⁶² *K v K* [2005] NZFLR 28 at [83].

¹⁶³ *K v G* [2004] NZFLR 1105 at [31].

¹⁶⁴ *Ibid* at [47].

focus the parents' attention on the needs of their children, rather than on the deficits of the opposing party. Explicit recommendations risk polarising parties positions, increasing conflict and inducing settlement for the wrong reasons. Therefore the author submits that the New Zealand Family Assessment will not include recommendations as to the ultimate issue.

CHAPTER FIVE: THE NEW ZEALAND FAMILY ASSESSMENT

To formulate an appropriate family assessment for New Zealand, the author proposes to adapt the core features found in the overseas models taking into account the common criticisms and transplant them into the New Zealand Family Court system. Each element of the Family Assessment will be evaluated on the concepts of efficiency of process (in both the economic and welfare sense), and effectiveness of decisions (made by the parties or the Court).

When the Assessment is Triggered

The author recommends that the New Zealand Family Assessment be triggered early on in the Family Court processes. This will enhance its settlement facilitation function, focus alternative dispute resolution on the child's best interests, and highlight any underlying issues early.

The Comprehensive Family Assessment is triggered late in the process, in preparation for trial, while in contrast the Brief Summary Family Assessment is an early step in the Western Australia Family Court system. A compromise between these two positions will best suit New Zealand.

The Family Assessment should not be situated in the urgent track of the EIP. Cases triaged to that track present with serious issues needing immediate judicial intervention. Conducting a Family Assessment would cause delay in these cases reaching hearing, contradicting the purpose of the urgent track in facilitating timely access to court. The focus of the standard track in the EIP system is to encourage alternative dispute resolution before court. The Family Assessment can be placed on this track to enhance the effectiveness of the alternative dispute resolution services and the effectiveness of the Court's decisions should the case reach hearing.

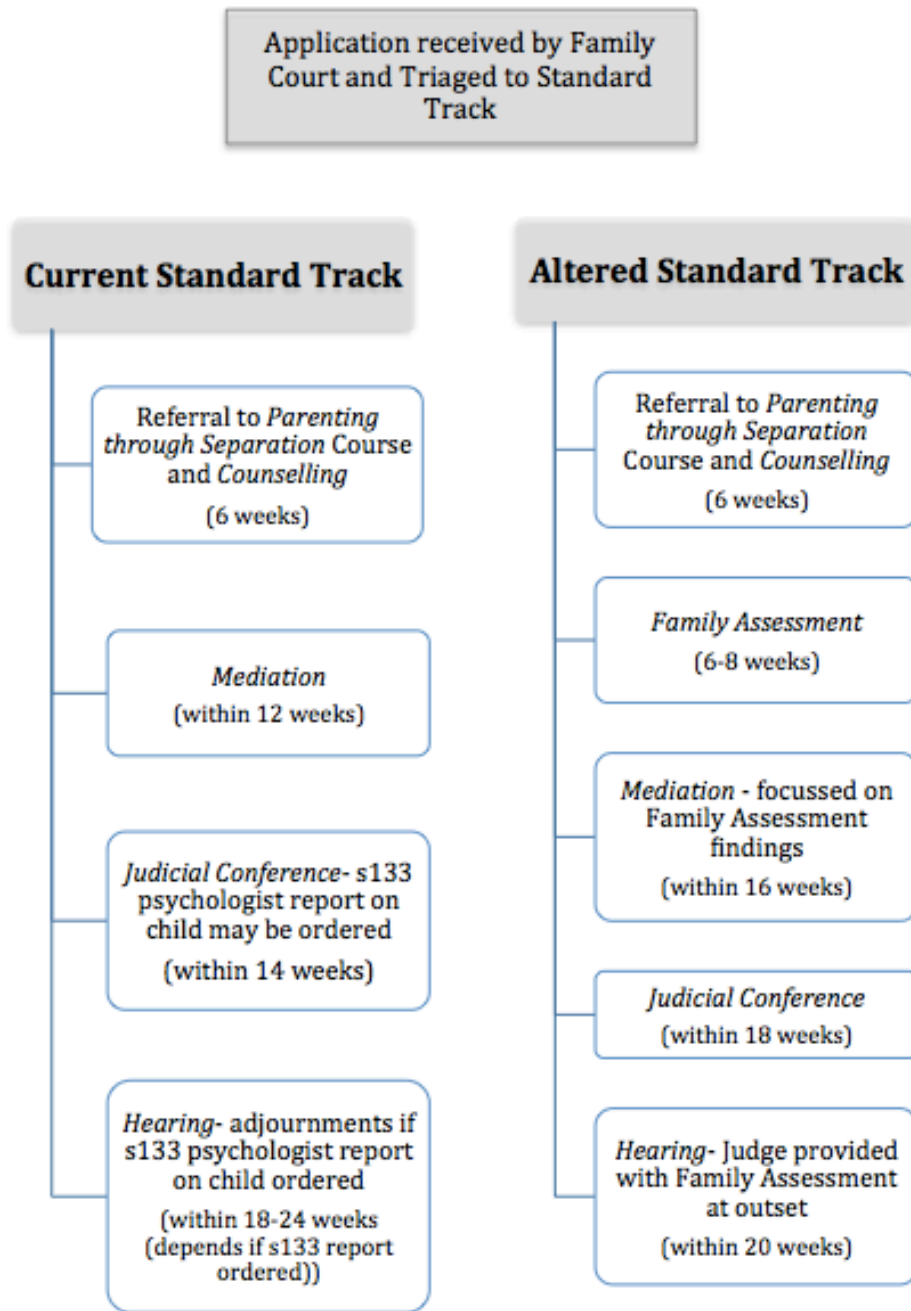


Figure 2 Comparison between Current Standard Track of the EIP and the recommended Altered Standard Track drafted by the author

Referral to counselling and the Parenting through Separation course should be the first step in Family Court system. They have proved to be efficient in helping some parties resolve disputes and educating parents on the issues surrounding separation. Having the Family Assessment prior to this would cause unnecessary delay in those cases. The ability to cease counselling if it is proving ineffective allows for cases to quickly move on to the next stage in the process if necessary.

The Family Assessment should be placed into the Family Court system after counselling, to increase the efficiency (in both senses) of the Family Court processes. Conducting the assessment at this early stage means any underlying urgent issues discovered can be dealt with promptly. For example, if the assessor finds signs of child abuse or mental health issues that were not discovered on triage, the case can be transferred to the urgent track for immediate judicial intervention. Where no urgent issues are apparent, the Family Assessment may facilitate settlement by focussing the parents' attention on the issues at hand. In both situations efficiency in the welfare sense is promoted by the immediate focus always being on the child's best interests, and in an economic sense issues are dealt with immediately, reducing the time cases spend in the court system.

The Family Assessment will be a valuable tool to use in conjunction with mediation if immediate settlement is not reached. There is little provision for the involvement of children pre-hearing. Recent research in Australia indicates child-inclusive mediation is highly effective, and produces better outcomes for children and parents.¹⁶⁵ Currently a Lawyer for Child may be appointed to represent a child's interests during mediation; however this is to become less common in light of the current changes occurring in the Family Court.¹⁶⁶ The Family Assessment will allow for the child's interests, views and welfare to be represented fairly within the mediation, promoting efficiency in the welfare sense. Children have expressed a desire to be involved in the decision-making about living arrangements post-separation.¹⁶⁷ However many also express fear of conflicting loyalties, stress, responsibility and confusion.¹⁶⁸ Giving children an opportunity to contribute their views during the Family Assessment process,

¹⁶⁵ Jennifer McIntosh, Yvonne Wells, Bruce Smyth and Caroline Long "Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment" (2008) 46 Family Court Review 105.

¹⁶⁶ Ministry of Justice, "Family Court Review", above n 7.

¹⁶⁷ Anne Smith, Nicola Taylor and Pauline Tapp "Rethinking Children's Involvement in Decision-Making after Parental Separation" (2003) 10 Childhood 201 at 207.

¹⁶⁸ Rachel Birnbaum and Michael Saini "A Qualitative Synthesis of Children's Participation in Custody Disputes" (2012) 22(4) Research on Social Work Practice 400 at 406; Taylor, Tapp and Henaghan, "Respecting Children's Participation", above n 31, at 77.

which in turn is used in mediation, allows their voice to be heard without fear of consequences.

Conducting the Family Assessment at an early stage therefore allows for more effective decisions to be made at all points in the family court process. More informed decisions can be expected post-assessment, at mediation and at hearing, when all parties involved have a clear idea of the relevant issues at hand.

Who Conducts the Assessment

Psychologists and social workers are primarily responsible for conducting Comprehensive and Brief Summary Family Assessments. The author believes a clinical psychologist should be the assessor for the New Zealand Family Assessment.

Social workers have some insight into the issues surrounding family disputes from training in family therapy and development, child attachment and trauma, and other social issues.¹⁶⁹ They would have the ability to report on such issues in a Family Assessment. However social workers seek to promote and develop wellbeing of families and groups by creating positive change in their lives.¹⁷⁰ Their close involvement with the families they work with creates a risk of conflict of interest with the role of the assessor as an independent expert for the court, rather than an advocate for either party.¹⁷¹ Even though social workers may not be the assessor, information they hold can be incorporated into the Family Assessment through consultancy with collateral contacts.

¹⁶⁹ University of Otago “Sociology, Gender & Social Work”
<<http://www.otago.ac.nz/sgsw/socialwork/index.html>>.

¹⁷⁰ Ibid.

¹⁷¹ Family Court Practice Note: Specialist Report Writers at 8.3.

Clinical psychologists receive extensive training on human behaviour, thinking and emotions, and how these are associated with the brain.¹⁷² They are qualified to assess the nature, causes, and potential effects of personal and social distress or dysfunction and the psychological factors associated with physical, behavioural, emotional, nervous, and mental disorders.¹⁷³ This training allows clinical psychologists to ascertain and interpret a child's opinion, from views expressed and behaviours displayed, and ensure the views of the child are accurately understood and presented.¹⁷⁴ A psychologist is also able to evaluate parents' functional abilities and their parenting strengths and weaknesses in relation to their child's needs.¹⁷⁵ This invaluable information will lead to effective and informed decisions being made.

Although the use of the Family Assessment is wider than that of a specialist report outside of court, their use as evidence in court will be the same. Therefore the author recommends that the criteria for selection of a report writer specified in the *Practice Note: Specialist Report Writers* be applicable to those conducting Family Assessments.¹⁷⁶ The specific training and experience requirements will uphold the validity and reliability of the New Zealand Family Assessment.

Efficiency in the economic sense would call for social workers to conduct the Family Assessment over clinical psychologists.¹⁷⁷ However this must be balanced against efficiency in the welfare sense. Psychologists are better equipped to provide insightful information on the needs of children and the abilities of their

¹⁷² Christchurch Psychology "About Clinical Psychology"
<<http://www.christchurchpsychology.co.nz/clinical-psychology/>>.

¹⁷³ Ibid.

¹⁷⁴ Peter Boshier "Invisible Parties: Listening to Children" (2007) 45 Family Court Review 548 at 552.

¹⁷⁵ Caldwell, "s29A Reports", above n 153.

¹⁷⁶ See Appendix 3.

¹⁷⁷ Average salary of a social worker working at Child, Youth and Family is \$42,000-\$66,000 see Careers NZ "Social Worker- Pay and Progression"
<<http://www.careers.govt.nz/default.aspx?id0=60103&id1=J35311>>; Average salary of a clinical psychologist with 3-10 years experience is \$66,000-\$97,000 and a psychologist private practice earns on average \$170,000 see Careers NZ "Psychologist- Pay and Progression" <<http://www.careers.govt.nz/default.aspx?id0=60103&id1=J25322>>.

parents to provide for those needs. Better-informed and more effective decisions will result in savings in other areas.¹⁷⁸

Methods Used to Elicit Data for the Assessment

The difficulties identified with the lack of sources for information gathered in the Brief Summary Family Assessment must be avoided. To increase the reliability and legitimacy of the New Zealand Family Assessment, multiple methods to elicit data should be utilised, reflecting those used in conducting a Comprehensive Family Assessment.

Interviews with both parents and the children are an essential data collection method for the New Zealand Family Assessment. Information about the family history, contested issues, and the views of all parties involved can be collected. The ability of the assessor to ascertain the child's views is particularly important in light of s6 of the COCA, and such information is highly regarded by the legal profession.¹⁷⁹ Signs of behavioural dysfunction or mental health issues may also be observed during interviews.

Parent-child observations must be conducted during a New Zealand Family Assessment. Data regarding child-parent attachments, communications skills and parenting abilities are highly relevant to the principle of the best interests of the child.

The use of psychological testing in the Comprehensive Family Assessment has been highly controversial. Criticisms surround over-interpreting test findings, utilising tests in isolation and using tests that are irrelevant to the issue of custody.¹⁸⁰ However when the appropriate psychological tests are used, they can provide objective support for the assessors' findings. The Minnesota Multiphasic Personality Inventory can shed light on the emotional stability of the parties,

¹⁷⁸ For example lower repeat applications and earlier settlements will save court costs.

¹⁷⁹ Bow and Quinnell, "Critique by Legal Profession", above n 69, at 124.

¹⁸⁰ Quinnell and Bow, "Psychological Tests", above n 83, at 491.

while the Parenting Stress Index is relevant to how interactions with the child affect the parent, and risks of abuse or neglect.¹⁸¹ Therefore the New Zealand Family Assessment should incorporate psychological testing, within strict rules governing what tests are to be used, the weight to be given to results, and the relevance to the legal issue.¹⁸²

Collateral contacts should be used as a secondary source of information for the New Zealand Family Assessment. Information provided by teachers, doctors or other family members can help to corroborate any allegations made, and provides support for the assessors' findings. Social workers may offer vital information about the family unit collected through past and present engagement with the family. Social worker input has been highly regarded by some in the legal profession, and will increase efficiency in a welfare sense.¹⁸³

The assessor must ensure methods used to collect data about the parents are balanced.¹⁸⁴ For example both parents must be interviewed, each observed with the child, and must be subjected to the same psychological tests. This safeguards against the risk of bias in the assessment process.

Assessment Components

Unlike the Comprehensive Family Assessment model, the author proposes a specific report format is prescribed for the New Zealand Family Assessment. This will focus the assessor's attention on the important aspects of the assessment and ensure all are assessments of a similar nature and scope.

¹⁸¹ Otto, Edens and Barcus, "Use of Psychological Testing", above n 82, at 320.

¹⁸² For example the Minnesota Multiphasic Personality Inventory and the Parenting Stress Index are relevant to emotional stability and risk of abuse and neglect, but must be used in conjunction with other methods (e.g. interviews and observations) to support the assessor's opinions, see Otto, Edens and Barcus, "Use of Psychological Testing", above n 82, at 320.

¹⁸³ Peter Boshier, Principal Family Court Judge "Speech of Principal Family Court Judge Peter Boshier to the Auckland Family Courts Association" (21 April 2004).

¹⁸⁴ Association of Family and Conciliation Courts, "Model Standards", above n 79, at 5.5.

An example template (drafted by the author, drawn from an amalgam of overseas models) of a possible structure for the New Zealand Family Assessment is attached as Appendix One.¹⁸⁵

The *Cover Page* contains the basic information of the family members involved in the assessment and important dates such as date of marriage and date of separation.

Providing the *Limitations* of the Family Assessment is essential. It is placed early in the report so readers are informed at the outset of any limitations that may have affected the reliability of the information gathered, as well as any opinions formed. This could include noting the lack of cooperation of any participants, key information that could not be collected, or inconclusive results from any testing or observations.¹⁸⁶

Listing the *Sources of Information* allows the quality of the assessment to be assessed having regard to the number of sources contacted and number of methods used. A description of from whom information was gathered and how will increase the efficiency of the report, so courts can immediately see the breadth of the investigation conducted.

The *Background Information* section will focus largely on the family history. It will be mostly factual, elicited from interviews of parents and collateral contacts.¹⁸⁷ It will include the nature of the parents' relationship, past and present parenting responsibilities and parents past and present relationship with their children. This will provide the reader with a basic understanding of the family dynamics.

¹⁸⁵ Primarily based off format provided by Stevens, "Custody and Access Assessments in Saskatchewan", above n 86 and California Protective Parents Association "Template 1-Child Custody Investigator Evaluator Report 2003"
<<http://www.protectiveparents.com/agenda.html>>.

¹⁸⁶ Ibid at 4.

¹⁸⁷ Ibid at 8.

The *Attachment and Needs of the Children* is a highly important component. Information for this section will be obtained from collateral contacts, interviews with both the parents and the children and parent-child observations. An overview of the children's developmental history, current developmental state, and needs will be provided.¹⁸⁸ How the children interact with each parent, how the parent meets the needs of the children, and any views expressed by the children on the parenting arrangements will be provided. It is this section which is intended to focus the parents' upon their children's' needs.

The *Parental Attributes* provides in depth information on each parent. Firstly the parental strengths and weaknesses of each parent will help the parents to see where they can improve and the court to see the comparable abilities of each parent. The author proposes these strengths and weaknesses be divided into three categories: physical environment, intellectual environment, and emotional environment.¹⁸⁹ This allows both parents and the court to understand the parent's abilities to meet their children's needs within each important component of the children's lives. The physical environment focuses on housing, financial resources, and a stability of the home environment. The intellectual environment is centred on the parents' expectations, opinions and stimulation in regard to the children's education. Finally the emotional environment is focused on the parents' emotional stability, maturity, parenting approach and ability to hold a positive relationship with the other parent. The aim of this section is to allow the reader to understand the strengths and weaknesses of each parent and how these may impact the children.

The final component of the assessment is the *Observations and Opinions of the Assessor*. The assessor will draw opinions and observations from the relevant information collected. This is a summary section where the assessor may link the various aspects of the children's needs with the parents' attributes and abilities to meet such needs. The assessor must be careful not to make explicit

¹⁸⁸ Ibid.

¹⁸⁹ Ibid at 9.

recommendations as to the ultimate issue of the care arrangements in the best interests' of the child.¹⁹⁰

Time Taken to Conduct the Assessment

The exceptionally short time frame allocated for the Brief Summary Family Assessment is not appropriate in the New Zealand context. The New Zealand Family Assessment more closely reflects the Comprehensive Family Assessment, taking in-depth look at the issues in a case and incorporating a number of data collecting methods. The optimal time frame for the New Zealand Family Assessment to be completed within is 6-8 weeks. This reflects the timeframe expected for the production of a s133 report.¹⁹¹

Efficiency in the welfare sense is promoted by allowing enough time for the assessor to collect data from a wide range of sources, interpret that information, and present it in a report format. While additional delay impacts negatively on efficiency in the economic sense, the downstream effects of the Family Assessment in increasing settlement rates and decreasing litigation times justify this.

How much an Assessment will Cost and Who Should Pay for It

The New Zealand Family Assessment closely mirrors the Comprehensive Family Assessment, therefore the cost of a Comprehensive Family Assessment is a good starting point: USD 5000.¹⁹² This figure represents the average cost of a private psychologist in America conducting the assessment. However a more realistic figure for New Zealand reports would be based on the cost of s133 psychologist

¹⁹⁰ Refer to Chapter Four.

¹⁹¹ Practice Note: Specialist Report Writers, above n 172, at 8.1.

¹⁹² Ackerman and Pritzl, "A 20-Year Follow-Up", above n 81, at 622.

reports, which are similar to the New Zealand Family Assessment: NZD 4100.¹⁹³ This figure is based on the cost of contracting out to private psychologists and is still very high. The author proposes, to increase economic efficiency, that court-employed psychologists, paid on a salary basis, should conduct the New Zealand Family Assessment. An analogy can be drawn with the Public Defender Service whereby the Ministry of Justice has employed lawyers on a salaried basis. This has so far proven to be effective in saving costs.¹⁹⁴

As shown in the Comprehensive and Brief Summary Family Assessment models, there are three options for covering payment for the New Zealand Family Assessment: party funded, government funded, or a combination of both.

Family disputes lie on the boundary between private and public responsibility. Parents have an obligation to attempt to resolve private family matters for themselves. However when children are involved, the State also has an interest in supporting resolution to protect this vulnerable group of citizens.

Until recently, access to the Family Court was free of charge.¹⁹⁵ Parenting through Separation, counselling and mediation are free services. However a shift in ideology is occurring, from the idea that Government should provide free access to a legal forum, to the idea of party-responsibility for resolving issues. Parties must now pay a filing fee to contribute towards court costs,¹⁹⁶ and proposed changes suggest parties will be required to pay for alternative dispute resolution services themselves in the future.¹⁹⁷

¹⁹³ Based off the rates for the Wellington Family Court, set by the National Office of the Ministry of Justice; Email from Family Court Family Coordinator (Wellington) to Rebecca Dempsey regarding the cost of section 133 reports (7 September 2012).

¹⁹⁴ Nick Davis, Chris Gould, Nicholas Carlaw and Paul Clarke "Public Defence Service Benchmarking" (Report prepared for the Legal Services Agency, 30 June 2011) at [31].

¹⁹⁵ Before 1 July 2012 no filing fee was imposed for Parenting Order Applications.

¹⁹⁶ From 1 July 2012 filing fee of \$220 for a Parenting Order Application, see Family Courts Fees Regulations 2009, sch2.

¹⁹⁷ Ministry of Justice, "Family Court Review", above n 7.

Requiring parties to pay for the Family Assessment would be efficient in the economic sense, but it would be inappropriate and unrealistic. Many parties seeking access to the court require Legal Aid to assist with the cost of lawyers, and could not afford to pay for the Family Assessment. Parents have a responsibility to contribute to the resolution of family disputes, but the government's role must not be forgotten. It is not just the parents who would suffer, but also the vulnerable children.

Providing the New Zealand Family Assessment as a free service is also inappropriate. Economically it is inefficient, and no emphasis is put on parties' responsibility for resolving family disputes.

A compromise whereby the Family Assessment is primarily publicly funded, with parties contributing a nominal fee, will provide the best outcome. This would recognise both the government's role in protecting vulnerable citizens, and the parties' obligation to contribute to the resolution of family disputes. Efficiency would be promoted in both senses: economically parties contribution will help keep costs down, whilst in the welfare sense vulnerable children are provided with the resources to help protect them.

Mandatory Nature of the Assessment

The New Zealand Family Assessment should be a mandatory step in the Family Court system. Currently attendance at Parenting through Separation and counselling is not compulsory. However there is a change in attitude occurring. Proposed changes to the Family Court system include mandatory out-of-court Family Dispute Resolution before access is given to the Family Court.¹⁹⁸ This reflects the underlying principle that parties are obligated to participate in the resolution of private family matters.

¹⁹⁸ Ibid.

However requiring families to undergo psychological assessment may be contrary to the New Zealand Bill of Rights Act 1990 (NZBORA). Section 10 of the NZBORA recognises every persons' right not to be subjected to medical or scientific experimentation without consent, while s11 provides everyone has the right to refuse to undergo any medical treatment.¹⁹⁹ On a literal reading, these sections only cover 'experimentation' and 'treatment', not 'assessment'. However a more liberal reading of these sections shows they are focused on protecting the fundamental human rights of bodily integrity and privacy.²⁰⁰ A psychological assessment would clearly breach such rights if no consent were obtained.

To solve this problem, the author has looked to s178 of the Children, Young Persons, and Their Families Act 1989 (CYPFA). Subsection (2) provides the court with the power to order a parent to undergo a medical, psychiatric, or psychological examination in order for a report to be prepared for the court.²⁰¹ This would be directly in breach with the NZBORA. However subsection (3) states the court shall not make such an order unless the person being examined consents.²⁰² This prevents s178 from being in conflict with the NZBORA, but also limits any power to compel a parent to submit to the examination. To resolve this issue, subsection (4) provides that the Court may draw such inferences from the fact of refusal as it thinks proper.²⁰³ Similar legislative drafting has been used in the Family Proceedings Act in order to encourage parties to submit to parentage tests.²⁰⁴ Parents are unlikely to refuse when they know it may be prejudice their chances in court in the future.

Therefore the author proposes that the New Zealand Family Assessment should be drafted in similar terms to s 178 of the CYPFA. This will promote efficiency in the welfare sense as almost all families will consent to the Family Assessment that promotes the child's welfare.

¹⁹⁹ New Zealand Bill of Rights Act 1990, ss10 and 11.

²⁰⁰ *Jeffcoat v Waetford* (1999) 17 CRNZ 75; (1999) 5 HRNZ 466.

²⁰¹ Child, Young Persons, and Their Families Act 1989, s178(2).

²⁰² Section 178(3).

²⁰³ Section 178(4).

²⁰⁴ Family Proceedings Act 1980, s57.

Method of Implementation

The New Zealand Family Assessment should be incorporated into the EIP system by amending the Family Court Caseflow Management Practice Note to include it.²⁰⁵ An amendment to the COCA will also be required to give the Family Assessment rules-based status and avoid the difficulties highlighted in Chapter Two with the current steps in the EIP system. Finally the Family Court Rules 2002 should be amended to fill out the procedural requirements of the assessment e.g. timeframe for completion, assessor's qualifications, and report format.

Using all three methods will increase the efficiency of the court processes by ensuring all assessments follow the specific procedural requirements.

Relationship with Section 133 Reports

The New Zealand Family Assessment is not intended to replace s133 reports. The Family Assessment has a much wider focus, looking at the family unit as a whole, while the s133 report must be focused on the child.²⁰⁶

Although it is highly likely that less s133 reports will be requested if a Family Assessment has already been conducted, they may still be ordered in some cases. For example the Family Assessment may highlight an issue that the court considers highly important. In such a case a s133 report may be ordered to further investigate the matter.

Section 133 also provides for reports from other disciplines to be ordered.²⁰⁷ A medical report from a doctor may be considered appropriate in some cases. The Family Assessment will only be a psychologist report.

²⁰⁵ Caseflow Management, above n 40.

²⁰⁶ Care of Children Act 2004, s133(2).

Conclusion

The New Zealand Family Assessment will increase the efficiency of the Family Court processes, in both senses, and ensure effective decisions are made. Efficiency in the economic sense is supported through parents contributing to the costs of the Family Assessment, employing psychologists on a salary basis, increased settlement rates, reduced time spent in court and a reduction in the number of s133 reports needed. In the welfare sense the Family Assessment ensures the focus of all parties is on the child's needs at an early stage, increasing settlement rates and decreasing children's exposure to conflict. More effective decisions will be made with the parties being fully informed of their child's needs at an early stage, and the court having an overview of the issues at the outset.

²⁰⁷ Care of Children Act 2004, s133(2)(a).

CHAPTER SIX: THE ADDAMS FAMILY'S EXPERIENCE WITH THE NEW ZEALAND FAMILY ASSESSMENT

The current processes involved in the New Zealand Family Court were inefficient (in both the economic and welfare sense) for the archetypal Addams family. Sarah and Peter were continually focused on their own interests in gaining day-to-day care, while the children suffered unnoticed. The delays in each process as well as the inability to settle early caused increased conflict between the parents, polarising their positions. Neither party particularly favoured the ultimate outcome decided by the court.

The Addams family's experience with the revised Family Court system, including the New Zealand Family Assessment, will be used to evaluate the new system in terms of efficiency and effectiveness. It will demonstrate the potential benefits of using the Family Assessment as a form of gatekeeping. Two outcomes will be explored: firstly that the parties reach an early settlement with the help of the Family Assessment and, alternatively, that the Family Assessment will be used in court as evidence.

Parenting Order Application Filed

The first step on being triaged to the Standard Track of the EIP remains a referral to Parenting through Separation and counselling. As in Chapter Two, no settlement was reached between Sarah and Peter after this stage, and a Lawyer for Child was appointed.

A Family Assessment was then directed. Peter did not like the idea of submitting to such an assessment but knew refusal might prejudice his chances in court, so gave his consent.

The Family Assessment

The assessor conducted separate interviews with Sarah and Peter to ascertain information about the family history and issues identified by each parent. The assessor also interviewed each child separately and together as a group. Parent-child observations were made with Sarah and Patrick interacting with the children on separate occasions. Psychological testing of both parents was conducted to gain information about emotional stability and stress levels. The assessor also contacted Alice and Patrick's school, Jack's day care centre, and Jessica (Sarah's new partner).

The assessor submitted a final report seven weeks after the Family Assessment was directed. The assessment gave a brief summary of the family history and past and present care arrangements for the children.

The children's important attachments and their needs were documented. Here the assessor noted Alice's views that "Daddy was sad and angry" and that she wanted to stay with him to "make him happy and stop him fighting with Mummy".²⁰⁸ The fact that she was feeling responsibility for the conflict between the parents was emphasised as a risk, and supported from observations her teachers had made. No express opinion as to care arrangements was ascertained from Patrick or Jack, probably due to disability and age respectively. However the assessor observed both boys had a stronger attachment with Sarah and were more engaging and outgoing in their mother's presence. This was supported by information provided by Jessica about how the children coped when staying at her house. Patrick's additional developmental needs were emphasised, particularly the need for a predictable routine and intensive supervision.²⁰⁹

The parental attributes of Sarah and Peter were then summarised. Both parents were found to have a suitable physical environment for caring for the children

²⁰⁸ *D v J*, above n 4, at [32] and [33]. Taylor, Tapp and Henaghan, "Respecting Children's Participation", above n 31, at 76 and 77.

²⁰⁹ *W v S* [Hague Convention] [2011] NZFLR 49 at [22].

however Peter's unpredictable work schedule was identified as inhibiting his ability to provide for the children's needs.²¹⁰ Both provided a suitable intellectual environment for the children with reasonable expectations of their needs. The assessor noted the emotional environment that Peter provided had many weaknesses. He was clearly submissive both in interviews and when interacting with the children. He seemed set on casting a negative light on Sarah focusing largely on her new lesbian relationship and past problems with post-natal depression.²¹¹ The assessor noted that these factors were having no obvious detrimental impact on the children.²¹² Peter's parenting style was very strict and inappropriate to deal with Patrick's behaviour. The assessor also noted shared concerns with Sarah in relation to the physical discipline Peter sometimes resorted to. Sarah on the other hand was coping relatively well with the separation and expressed a desire to sort things out with Peter. She did however express some difficulties with caring for Patrick.

The report ended with a summary linking together the children's needs and the parents' abilities to meet such needs. The assessor emphasised both parents had important bonds with each child and were capable of providing for most of their needs. However from a practical point the assessor highlighted that Peter's work schedule limited his ability to cater to the children's needs full time. The more stable environment Sarah could provide was emphasised.

After the report was completed, a copy was sent to both parents and their lawyers. Sarah and Peter were encouraged to settle by their lawyers, however Peter was unwilling and wanted to proceed to a mediation conference. This was directed and set down to take place in three weeks.

²¹⁰ *LAM v NSM*, above n 50.

²¹¹ *JEB v AF*, above n 4, at [18].

²¹² Susan Golombok, Beth Perry, Amanda Burston, Clare Murray, Julie Mooney-Somers, Madeleine Stevens and Jean Golding "Children With Lesbian Parents: A Community Study" 39 *Developmental Psychology* 20 at 30.

Scenario One- Family Assessment used in Mediation

At the mediation conference the Family Assessment was used as a tool, in conjunction with the court appointed mediator's skills, to encourage the parents to settle. The mediator focused the session on the particular needs and views of the children highlighted in the Family Assessment.

Peter was particularly shocked by the worries Alice was expressing about him, and understood that it was not healthy for her to feel this way. He also acknowledged that from a practical manner providing care for the children during the week, particularly Monday to Thursday, was difficult. Sarah on the other hand was upset to learn the continued conflict between her and Peter was having such a profound effect on the children. She also accepted the importance of Peter having a continued relationship with all the children. Both Sarah and Peter agreed that it would be best for the children if they settled matters immediately.

They agreed on shared day-to-day care. The children would stay with Sarah from Monday to Thursday each week, and with their father three weekends out of four. Peter would also be responsible for taking Alice to and from netball on a Wednesday night. It was agreed that changeovers would occur at 5.00pm on Thursday and Sunday evenings to ensure a strict routine could be kept for Patrick.

Scenario Two- Family Assessment used in Court

Alternatively, Sarah and Peter could not reach an agreement at mediation. Although both recognised the continued conflict was having a detrimental effect on the children, they each blamed the other for the problems. Peter remained intent on having full day-to-day care of the children, while Sarah wanted shared day-to-day care. An additional s133 psychologist's report was not considered

necessary as the Family Assessment had covered all issues sufficiently, so a one-day hearing was allocated to take place in two months time. In the meantime the parents undertook to minimise the conflict the children were being exposed to.

At the hearing, the Family Assessment was immediately before the Court, to highlight the genuine welfare issues needing consideration. The Judge accepted that matters relating to Sarah's lesbian relationship and previous post-natal depression were irrelevant and did not have a detrimental effect on the children's welfare and best interests. The Judge acknowledged that all the children were suffering as a result of the prolonged conflict between the parents, and recognised a strict routine needed to be in place for Patrick to promote his best interests.²¹³ The Judge accepted the assessors' observation that all three children had close bonds with both parents, and emphasised that this should be preserved.²¹⁴ The Judge's attention was drawn to the ability of each parent to provide for the children's needs. He agreed with the assessor that although both parties were capable parents, from a practical point of view Peter was unable to care for the children fulltime, particularly on weekdays.

The Judge's final decision was based on the welfare and best interests of the children. Shared day-to-day care was awarded. Sarah was to have care of the children from Monday to Thursday, and the children would stay with Peter Friday to Sunday, three weekends out of four.

Conclusion

The final outcome in both scenarios was similar to the final decision made by the court under the current Family Court processes, in Chapter Two. However under the revised system with the Family Assessment, the Family Court process was far more efficient, and the subsequent decisions made were more effective.

²¹³ *W v S*, above n 210, at [22].

²¹⁴ Care of Children Act 2004, s5(d).

In scenario one, the Family Assessment assisted Sarah and Peter in resolving matters early at mediation. Efficiency was promoted in the welfare sense by minimising the conflict the children were exposed to and focusing the parents' attention on the children's needs. In an economic sense, the matter spent minimal time in the court system and costs of a s133 report and hearing were saved.

In scenario two, the court was immediately informed of the genuine welfare issues needing consideration, promoting efficiency in the welfare sense. Economically, the hearing took less time, as all the issues were immediately obvious, and a s133 report was not needed.

Sarah and Peter were considerably happier with the outcomes reached in both scenario one and two with the support of the Family Assessment, than they were with the final outcome reached through the current system in Chapter Two. Although all outcomes were almost identical, in Chapter Two Sarah and Peter felt the decision was made for them, without their participation. However after undergoing the Family Assessment, Sarah and Peter were empowered to reach their own decision in scenario one with the support of a neutral opinion. Although the court made the final decision in scenario two, Sarah and Peter were more accepting of it after being through the process of the Family Assessment and hearing the neutral expert's opinion. Therefore the decisions made under the revised Family Court system were more effective than the decision made in Chapter Two under the current Family Court system.

CONCLUSION

The gateway into the Family Court must be narrowed to improve the efficiency (in both the welfare and economic sense) of the court's processes and effectiveness of the subsequent decisions made. The author proposes this is to be achieved through introducing the New Zealand Family Assessment.

Firstly the Family Assessment will support early resolution of disputes through focusing parents' attention on the needs of their children, as demonstrated by the Addams family's experience in scenario one in Chapter Six. This will reduce the number of cases reaching Court, essentially narrowing the gateway. Efficiency is promoted in an economic sense by reducing the time cases spend in the Family Court system and reducing the resources used.

Efficiency in the welfare sense is improved by ensuring decisions are made early and are focused on the needs of the children involved. Under the current Family Court system, there is a tendency to lose sight of the overarching purpose to promote the welfare and best interests of the child. There is little provision for the participation of the vulnerable children in the Family Court processes pre-hearing. The introduction of the Family Assessment will ensure the children's views are ascertained and understood early on in the court processes. Parents' are supported to resolve disputes, focused on their ability to meet their children's needs, through the provision of information from a neutral third party. Exposure to prolonged conflict can be profoundly damaging to the children, so supporting early resolution is essential in increasing efficiency in the welfare sense. Any agreements made will be highly effective if the parents take a participative role and focus on the best interests of the children.

Secondly, when parents cannot come to agreement, the Court's focus will be directed to the genuine welfare issues needing judicial intervention, highlighted in the Family Assessment. Therefore only important welfare matters will pass through the gateway for judicial consideration. The Addams family's experience

illustrated this in scenario two in Chapter Six. Economically, costs can be saved in reduced hearing times and lowering the demand for s133 reports. In a welfare sense, the Family Assessment promotes efficiency in the court by ensuring the judge is fully informed of the issues at hand immediately. The assessor will provide a neutral opinion on the welfare issues, mitigating the often irrelevant and inflammatory evidence contained in the parties' affidavits. The Family Assessment is also another mechanism that will ensure the children's views are ascertained and heard, in keeping with s6 of the COCA and promoting their welfare.²¹⁵

As previously mentioned, the Family Court is set to undergo major changes in the near future. Although these changes are said to 'put children first',²¹⁶ they seem primarily aimed at short term cost cutting.²¹⁷ Removing the appointment of Lawyer for Child and the right to legal representation, in the Family Dispute Resolution service, 'simple track' cases and 'standard track' cases has caused significant worry throughout the legal profession.²¹⁸ Lawyers play a vital role in the Family Court system: triaging and assessing cases, providing information to parents and a reality check as to likely outcomes, encouraging conciliation, mitigating power imbalances, and representing children's interests.²¹⁹ Without lawyers' participation in many of the Family Court processes, there is a risk that conflict between parents will become ingrained and the voice of the children involved will be lost. No suggestion has been made about if and how a child's views will be ascertained for the purposes of Family Dispute Resolution pre-hearing, if lawyers are not involved.²²⁰

²¹⁵ Care of Children Act 2004, s6.

²¹⁶ Collins, "Family Court reforms put children first", above n 5.

²¹⁷ Catriona Doyle "Lawyers help put warring families on right track" *The Dominion Post* (Wellington, 11 September 2012); Catriona MacLennan "Short-term, short-sighted review just a cost-saver" *The Dominion Post* (Wellington, 9 August 2012).

²¹⁸ Doyle, "Lawyers help", above n 218; Letter from Jonathan Temm (President of the New Zealand Law Society) to Judith Collins (Minister of Justice) regarding the Review of the Family Court (10 August 2012).

²¹⁹ Doyle, "Lawyers help", above n 218.

²²⁰ Family Law Section, New Zealand Law Society "Children's voices in the Family Court".

In the context of this changing environment, it is even more important to have a mechanism to promote efficiency in the welfare sense within the Family Court processes. The Family Assessment would mitigate some of the fears expressed by the legal profession by providing a neutral expert to take part in the processes and ensure the child's needs are brought to the forefront.

Although there will be additional costs surrounding the implementation of the Family Assessment, these can be mitigated through requiring parents to pay a nominal fee as discussed in Chapter Five. The gatekeeping function of the Assessment will reduce the time cases spend in the family court system and resources used, in turn cutting costs.

Therefore the author proposes the Family Assessment be incorporated into the Family Court processes as a gatekeeper, to increase the efficiency (in both the economic and welfare sense) of the processes, and effectiveness of any subsequent decisions made.

BIBLIOGRAPHY

Cases

New Zealand

AB v CD [2011] NZFLR 529.

D v J FC New Plymouth FAM-2003-0430116, 17 January 2008.

FJS v RKS FC Porirua FAM-2005-091-000055, 14 February 2011.

GMS v SCS [Relocation] [2011] NZFLR 256.

JEB v AF [Parenting orders] [2009] NZFLR 529.

Jeffcoat v Waetford (1999) 17 CRNZ 75; (1999) 5 HRNZ 466.

JRB v AQB FC Hamilton FAM-2002-019-001615, 16 August 2011.

K v G [2004] NZFLR 1105.

K v K [2005] NZFLR 28.

LAM v NSM FC North Shore FAM-2006-044-001245, 19 August 2011.

M v Y [1994] NZFLR 1.

P v K [2006] NZFLR 22.

R v S [2004] NZFLR 207.

RG v IB FC Lower Hutt FAM-2004-085-000776, 15 December 2009.

T v J FC Tauranga FAM-2006-070-000504, 27 November 2006.

W v S [Hague Convention] [2011] NZFLR 49.

Australia

Clark v Ryan [1960] HCA 42; (1960) 103 CLR 486 (5 July 1960).

Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd (1913) 29 TLR 378.

United States of America

Rentschler v Rentschler 611 NYS 2d 523 (NY App Div 1995).

Legislation

New Zealand

Care of Children Act 2004.
Child, Young Persons, and Their Families Act 1989.
Evidence Act 2006.
Family Court Rules 2002.
Family Courts Fees Regulations 2009.
Family Proceedings Act 1980.
High Court Rules.
New Zealand Bill of Rights Act 1990.

Australian

Family Law Act 1975 (Cth).
Family Law Rules 2004 (Cth).

Canada

Children's Law Act RS S 1997.
Children's Law Reform Act RS O 1990.
Divorce Act RS C 1985.
Queen's Bench Act RS S 1998.
The Queen's Bench Rules.

United Kingdom

Children Act 1989.

United States of America

California Family Code.
California Rules of Court.
Illinois Marriage and Dissolution of Marriage Act.

Books

Joanna Bunker Rohrbaugh *A Comprehensive Guide to Child Custody Evaluations: Mental Health and Legal Perspectives* (Springer, Boston, MA, 2008).

E Mark Cummings and Patrick Davies *Children and Marital Conflict: The Impact of Family Dispute and Resolution* (Guilford Press, New York, 1994).

Ian Freckelton and Hugh Selby *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Thomas Reuters (Professional) Australia Limited, Sydney, NSW, 2009).

Gabrielle Maxwell, Fred Seymour and Prue Vincent *The Practice of Psychology and the Law: A Handbook* (2nd ed, New Zealand Psychological Foundation, Wellington, NZ, 1996).

Bernard Robertson and G A Vignaux *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* (4th ed, John Wiley & Sons, West Sussex, UK, 1995).

Journal Articles

Marc Ackerman and Tracy Brey Pritzl "Child Custody Evaluation Practices: A 20-Year Follow-Up" (2011) 49 Family Court Review 618.

Nicholas Bala "Tippins and Wittmann Asked the Wrong Questions: Evaluators May Not be "Experts", But They Can Express Best Interests Opinions" (2005) 43 Family Court Review 554.

Rachel Birnbaum and Michael Saini "A Qualitative Synthesis of Children's Participation in Custody Disputes" (2012) 22(4) Research on Social Work Practice 400.

Peter Boshier "Invisible Parties: Listening to Children" (2007) 45 Family Court Review 548.

Peter Boshier "The Family Courts Early Intervention Process" (2012) 797 Lawtalk 17.

James Bow "Review of Empirical Research on Child Custody Practice" (2006) 3 Journal of Child Custody 23.

James Bow and Francella Quinnell "A Critical Review of Child Custody Evaluation Reports" (2002) 40 Family Court Review 164.

James Bow and Francella Quinnell "Critique of Child Custody Evaluations by the Legal Profession" (2004) 42 Family Court Review 115.

James Bow and Francella Quinnell "Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years after American Psychological Association Guidelines" (2001) 32 Professional Psychology, Research and Practice 261.

John Caldwell "The Limits of s29A Reports in Custody Hearings" (1995) 1 BFLJ 188.

G Firestone and J Weinstein "In the Best Interests of Children: A Proposal to Transform the Adversarial System" (2004) 42 Family Court Review 203.

Susan Golombok, Beth Perry, Amanda Burston, Clare Murray, Julie Mooney-Somers, Madeleine Stevens and Jean Golding "Children With Lesbian Parents: A Community Study" 39 Developmental Psychology 20.

Jonathan W Gould and Philip M Stahl "The Art and Science of Child Custody Evaluations: Integrating Clinical and Forensic Mental Health Models" (2000) 38 Family Court Review 392.

Leah Horvath, TK Logan and Robert Walker "Child Custody Cases: A Content Analysis of Evaluations in Practice" (2002) 33 *Professional Psychology: Research and Practice* 557.

Jennifer McIntosh, Yvonne Wells, Bruce Smyth and Caroline Long "Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment" (2008) 46 *Family Court Review* 105.

Paul Murphy and Lisbeth Pike "Developing the Case Assessment Conference Model in the Family Court of Western Australia: Breaking Down the Firewall" (2005) 11 *Journal of Family Studies* 111.

Randy Otto, John Edens and Elizabeth Barcus "Use of Psychological Testing in Child Custody Evaluations" (2000) 38 *Family Court Review* 312.

Francella Quinnell and James Bow "Psychological Tests Used in Child Custody Evaluations" 19 *Behavioural Sciences and the Law* 491.

Michael A Saini "Evidence Base of Custody and Access Evaluations" (2008) 8 *Brief Treatment and Crisis Intervention* 111.

Robert Silver and Deborah Silver "Child Custody Evaluations: Hindrance or Help?" 8(3) *Journal of Forensic Psychology Practice* 300.

Anne Smith, Nicola Taylor and Pauline Tapp "Rethinking Children's Involvement in Decision-Making after Parental Separation" (2003) 10 *Childhood* 201.

Philip Stahl "The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Court: A Response to Tippins and Wittmann" (2005) 43 *Family Court Review* 260.

Nicola Taylor, Pauline Tapp and Mark Henaghan “Respecting Children’s Participation in Family Law Proceedings” (2007) 15 Intl J Child Rts 61.

Timothy M Tippins and Jeffrey P Wittmann “Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance” (2005) 43 Family Court Review 193.

I Turkat “On the Limitations of Child Custody Evaluations” (2005) 48 Family Court Review 8.

Ira Turkat “Questioning the Mental Health Expert’s Custody Report” (1993) 7 Am J Fam L 175.

Parliamentary and Governmental Materials

Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011).

Ministry of Justice *Reviewing the Family Court: “Parenting through Separation” Participation Feedback* (September 2011).

Ministry of Justice *Summary of Submissions in Response to ‘Reviewing the Family Court: A public consultation paper’* (April 2012).

Guidelines and Practice Notes

American Academy of Child and Adolescent Psychiatry “Practice parameters for child custody evaluation” (1997).

Association of Family and Conciliation Courts “Model Standards of Practice for Child Custody Evaluation” (2006).

American Psychological Association “Guidelines for Child Custody Evaluations in Family Law Proceedings” (2010).

Family Court of Western Australia “Case Management Guidelines” (7 May 2012).

Family Court Caseflow Management Practice Note.

Family Court Practice Note: Specialist Report Writers.

Press Releases and Speeches

Peter Boshier, Principal Family Court Judge “Cabinet Review of the Family Court: Response of the Principal Family Court Judge” (speech to Hawke’s Bay Family Courts Association, Havelock North, 13 May 2011).

Peter Boshier, Principal Family Court Judge “Family Court to Fast Track Child Care Cases” (media statement, 9 April 2010).

Peter Boshier, Principal Family Court Judge “Speech of Principal Family Court Judge Peter Boshier to the Auckland Family Courts Association” (21 April 2004).

Peter Boshier, Principal Family Court Judge “ Why the Family Court Needs an Early Intervention Process” (speech to the Child and Youth Law Conference 2010, Auckland, 22 April 2010).

Judith Collins “Family Court reforms put children first” (press release, 2 August 2012).

The Honourable Justice Stephen Thackray, Chief Judge “Family Court of Western Australia Annual Review 2010/2011” (press release, 2 May 2012).

Internet Resources

California Protective Parents Association “Template 1- Child Custody Investigator Evaluator Report 2003”

<<http://www.protectiveparents.com/agenda.html>>.

Careers NZ “Psychologist- Pay and Progression”

<<http://www.careers.govt.nz/default.aspx?id0=60103&id1=J25322>>.

Careers NZ “Social Worker- Pay and Progression”

<<http://www.careers.govt.nz/default.aspx?id0=60103&id1=J35311>>.

Christchurch Psychology “About Clinical Psychology”

<<http://www.christchurchpsychology.co.nz/clinical-psychology/>>.

Family Court of Australia “Family Consultants”

<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Registries/FCOA_Consultants>.

Family Court of Western Australia “Fees” (1 July 2012)

<http://www.familycourt.wa.gov.au/F/fees_and_forms.aspx?uid=9339-7089-1873-0177>.

Government of Saskatchewan “Social Work Unit: Custody and Access Assessments” <<http://www.justice.gov.sk.ca/custody-access>>.

Stephen Herman and William Bernet “Summary of the Practice Parameters for Child Custody Evaluation” American Academy of Child and Adolescent Psychiatry

<<http://www.aacap.org/page.ww?section=Summaries&name=Summary+of+the+Practice+Parameters+for+Child+Custody+Evaluation>>.

Ministry of Justice “Counselling” (Family Court of New Zealand)
<<http://www.justice.govt.nz/courts/family-court/what-family-court-does/counselling>>.

Ministry of Justice “District Court Family Waiting Time for Scheduled Hearing” (31 December 2011) Courts of New Zealand
<<http://www.courtsofnz.govt.nz/from/statistics/annual-statistics/december-2011/district-court/district-court-family-waiting-time-for-scheduled-hearing-as-at-31-december-2011>>.

Ministry of Justice “Family Court Review”
<<http://www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1>>.

Ministry of Justice “Social Work Unit: Fees” Government of Saskatchewan
<<http://www.justice.gov.sk.ca/SWU-Fees>>.

Ministry of Justice “Specialist Report Writers”
<<http://www.justice.govt.nz/publications/global-publications/s/specialist-report-writers-handbook/specialist-report-writers>>.

University of Otago “Sociology, Gender & Social Work”
<<http://www.otago.ac.nz/sgsw/socialwork/index.html>>.

Other Resources

Cross on Evidence (online looseleaf ed, LexisNexis).

Nick Davis, Chris Gould, Nicholas Carlaw and Paul Clarke “Public Defence Service Benchmarking” (Report prepared for the Legal Services Agency, 30 June 2011).

Catriona Doyle "Lawyers help put warring families on right track" *The Dominion Post* (Wellington, 11 September 2012).

Email from Family Court Coordinator (Wellington) to Rebecca Dempsey regarding the cost of section 133 reports (7 September 2012).

Email from Family Court Coordinator (Wellington) to Rebecca Dempsey regarding the average time frame for receiving a section 133 report (19 September 2012).

Email from Family Court of Western Australia Web Administrator to Rebecca Dempsey regarding Case Assessment Conference fees (5 September 2012).

Family Law Section, New Zealand Law Society "Children's voices in the Family Court".

Catriona MacLennan "Short-term, short-sighted review just a cost-saver" *The Dominion Post* (Wellington, 9 August 2012).

Paul Murphy and Lisbeth Pike "Case Assessment Conferences in the Family Court of Western Australia: A Formative Evaluation" (August 2006) Edith Cowan University, Perth.

New Zealand Law Society "Review of the Family Court" March 2012 at 24.

Gregory Stevens "Custody and Access Assessments in Saskatchewan: Format, Process, and a Practitioner's Opinion" (paper prepared for the Saskatchewan Legal Education Society Inc. seminar, Family Law Update, September 2004).

Letter from Jonathan Temm (President of the New Zealand Law Society) to Judith Collins (Minister of Justice) regarding the Review of the Family Court (10 August 2012).

APPENDIX ONE: PROPOSED ASSESSMENT FORMAT

Covering page

- Demographic information of parents and children
- Date of marriage/separation

Limitations

- Key information unable to obtain
- Lack of cooperation of participants

Sources of Information

- Who information was collected from
- Methods used to collect information

Background Information

- Nature and history of parents relationship
- Respective parenting responsibilities (past and present)
- Current situation of each parent: employment, relationships
- Issues and concerns each parent holds
- Parents preference on custody arrangements
- Parents relationship with the children (past and present)

Attachment and Needs of the Children

- The children's developmental histories
- The children's current developmental situation
- Developmental needs and challenges of the children
- How the children interact with each parent
- How the children have reacted and adjusted to the family dispute

- How the children's needs are met by each parent
- Children's preferred and expressed (directly or indirectly) parenting arrangement (if any)

Parental Attributes

- Parental strengths and weaknesses
- Physical environment
 - Adequacy/safety of housing
 - Financial resources
 - Stability of environment
 - Work schedules
- Intellectual environment
 - Range and appropriateness of various child-centred learning resources and aids
 - Parent's opinion and expectations regarding education
 - Ability to provide enriched and stimulating environment
- Emotional environment
 - Maturity
 - Stability
 - Parenting approach
 - Communication skills, nurturing ability
 - Likelihood of supporting and fostering positive relationship with other parent

Observations and Opinions of the Assessor

- Relevant aspects of information collected and observations and opinions drawn from such information
- No explicit recommendations on welfare and best interests of the children

APPENDIX TWO: CALIFORNIA LEGISLATION

California Family Code

§3111 (a) In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation in cases where the court determines it is in the best interests of the child. The child custody evaluation shall be conducted in accordance with the standards adopted by the Judicial Council pursuant to Section 3117, and all other standards adopted by the Judicial Council regarding child custody evaluations. If directed by the court, the court-appointed child custody evaluator shall file a written confidential report on his or her evaluation. At least 10 days before any hearing regarding custody of the child, the report shall be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys, and any other counsel appointed for the child pursuant to Section 3150. The report may be considered by the court.

§3117 The Judicial Council shall, by January 1, 1999, do both of the following:
(a) Adopt standards for full and partial court-connected evaluations, investigations, and assessments related to child custody.

§3110.5 (a) No person may be a court-connected or private child custody evaluator under this chapter unless the person has completed the domestic violence and child abuse training program described in Section 1816 and has complied with Rules 5.220 and 5.230 of the California Rules of Court.

(b) (1) On or before January 1, 2002, the Judicial Council shall formulate a statewide rule of court that establishes education, experience, and training requirements for all child custody evaluators appointed pursuant to this chapter, Section 730 of the Evidence Code, or Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4 of the Code of Civil Procedure.

California Rules of Court

Rule 5.220 Court-ordered child custody evaluations

(a) Authority

This rule of court is adopted under Family Code sections 211 and 3117.

(b) Purpose

Courts order child custody evaluations, investigations, and assessments to assist them in determining the health, safety, welfare, and best interest of children with regard to disputed custody and visitation issues. This rule governs both court-connected and private child custody evaluators appointed under Family Code

section 3111, Evidence Code section 730, or Code of Civil Procedure section 2032.

(c) Definitions

For purposes of this rule:

- (1) A "child custody evaluator" is a court-appointed investigator as defined in Family Code section 3110.
- (2) The "best interest of the child" is as defined in Family Code section 3011.
- (3) A "child custody evaluation" is an expert investigation and analysis of the health, safety, welfare, and best interest of children with regard to disputed custody and visitation issues.
- (4) A "full evaluation, investigation, or assessment" is a comprehensive examination of the health, safety, welfare, and best interest of the child.
- (5) A "partial evaluation, investigation, or assessment" is an examination of the health, safety, welfare, and best interest of the child that is limited by court order in either time or scope.
- (6) "Evaluation," "investigation," and "assessment" are synonymous.

(d) Responsibility for evaluation services

(1) Each court must:

(A) Adopt a local rule by January 1, 2000, to:

- (i) Implement this rule of court;
- (ii) Determine whether a peremptory challenge to a court-appointed evaluator is allowed and when the challenge must be exercised. The rules must specify whether a family court services staff member, other county employee, a mental health professional, or all of them may be challenged;
- (iii) Allow evaluators to petition the court to withdraw from a case;
- (iv) Provide for acceptance of and response to complaints about an evaluator's performance; and
- (v) Address ex parte communications.

(B) Give the evaluator, before the evaluation begins, a copy of the court order that specifies:

- (i) The appointment of the evaluator under Evidence Code section 730, Family Code section 3110, or Code of Civil Procedure 2032; and
- (ii) The purpose and scope of the evaluation.

(C) Require child custody evaluators to adhere to the requirements of this rule.

(D) Determine and allocate between the parties any fees or costs of the evaluation.

(2) The child custody evaluator must:

- (A) Consider the health, safety, welfare, and best interest of the child within the scope and purpose of the evaluation as defined by the court order;
- (B) Strive to minimize the potential for psychological trauma to children during the evaluation process; and
- (C) Include in the initial meeting with each child an age-appropriate explanation of the evaluation process, including limitations on the confidentiality of the process.

(e) Scope of evaluations

All evaluations must include:

(1) A written explanation of the process that clearly describes the:

- (A) Purpose of the evaluation;
- (B) Procedures used and the time required to gather and assess information and, if psychological tests will be used, the role of the results in confirming or questioning other information or previous conclusions;
- (C) Scope and distribution of the evaluation report;
- (D) Limitations on the confidentiality of the process; and
- (E) Cost and payment responsibility for the evaluation.

(2) Data collection and analysis that are consistent with the requirements of Family Code section 3118; that allow the evaluator to observe and consider each party in comparable ways and to substantiate (from multiple sources when possible) interpretations and conclusions regarding each child's developmental needs; the quality of attachment to each parent and that parent's social environment; and reactions to the separation, divorce, or parental conflict. This process may include:

- (A) Reviewing pertinent documents related to custody, including local police records;
- (B) Observing parent-child interaction (unless contraindicated to protect the best interest of the child);
- (C) Interviewing parents conjointly, individually, or both conjointly and individually (unless contraindicated in cases involving domestic violence), to assess:
 - (i) Capacity for setting age-appropriate limits and for understanding and responding to the child's needs;
 - (ii) History of involvement in caring for the child;
 - (iii) Methods for working toward resolution of the child custody conflict;
 - (iv) History of child abuse, domestic violence, substance abuse, and psychiatric illness; and
 - (v) Psychological and social functioning;
- (D) Conducting age-appropriate interviews and observation with the children, both parents, stepparents, step- and half-siblings conjointly, separately, or both conjointly and separately, unless contraindicated to protect the best interest of the child;
- (E) Collecting relevant corroborating information or documents as permitted by law; and
- (F) Consulting with other experts to develop information that is beyond the evaluator's scope of practice or area of expertise.

(3) A written or oral presentation of findings that is consistent with Family Code section 3111, Family Code section 3118, or Evidence Code section 730. In any presentation of findings, the evaluator must:

- (A) Summarize the data-gathering procedures, information sources, and time spent, and present all relevant information, including information that does not support the conclusions reached;

(B) Describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews;

(C) Only make a custody or visitation recommendation for a party who has been evaluated. This requirement does not preclude the evaluator from making an interim recommendation that is in the best interest of the child; and

(D) Provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interest of the child if making any recommendations to the court regarding a parenting plan.

(f) Cooperation with professionals in another jurisdiction

When one party resides in another jurisdiction, the custody evaluator may rely on another qualified neutral professional for assistance in gathering information. In order to ensure a thorough and comparably reliable out-of-jurisdiction evaluation, the evaluator must:

(1) Make a written request that includes, as appropriate:

(A) A copy of all relevant court orders;

(B) An outline of issues to be explored;

(C) A list of the individuals who must or may be contacted;

(D) A description of the necessary structure and setting for interviews;

(E) A statement as to whether a home visit is required;

(F) A request for relevant documents such as police records, school reports, or other document review; and

(G) A request that a written report be returned only to the evaluator and that no copies of the report be distributed to parties or attorneys;

(2) Provide instructions that limit the out-of-jurisdiction report to factual matters and behavioral observations rather than recommendations regarding the overall custody plan; and

(3) Attach and discuss the report provided by the professional in another jurisdiction in the evaluator's final report.

(g) Requirements for evaluator qualifications, training, continuing education, and experience

All child custody evaluators must meet the qualifications, training, and continuing education requirements specified in Family Code sections 1815, 1816, and 3111, and rules 5.225 and 5.230.

(h) Ethics

In performing an evaluation, the child custody evaluator must:

(1) Maintain objectivity, provide and gather balanced information for both parties, and control for bias;

(2) Protect the confidentiality of the parties and children in collateral contacts and not release information about the case to any individual except as authorized by the court or statute;

(3) Not offer any recommendations about a party unless that party has been evaluated directly or in consultation with another qualified neutral professional;

- (4) Consider the health, safety, welfare, and best interest of the child in all phases of the process, including interviews with parents, extended family members, counsel for the child, and other interested parties or collateral contacts;
- (5) Strive to maintain the confidential relationship between the child who is the subject of an evaluation and his or her treating psychotherapist;
- (6) Operate within the limits of the evaluator's training and experience and disclose any limitations or bias that would affect the evaluator's ability to conduct the evaluation;
- (7) Not pressure children to state a custodial preference;
- (8) Inform the parties of the evaluator's reporting requirements, including, but not limited to, suspected child abuse and neglect and threats to harm one's self or another person;
- (9) Not disclose any recommendations to the parties, their attorneys, or the attorney for the child before having gathered the information necessary to support the conclusion;
- (10) Disclose to the court, parties, attorney for a party, and attorney for the child conflicts of interest or dual relationships; and not accept any appointment except by court order or the parties' stipulation; and
- (11) Be sensitive to the socioeconomic status, gender, race, ethnicity, cultural values, religion, family structures, and developmental characteristics of the parties.

Rule 5.225 Appointment requirements for child custody evaluators

(a) Purpose

This rule provides the licensing, education and training, and experience requirements for child custody evaluators who are appointed to conduct full or partial child custody evaluations under Family Code sections 3111 and 3118, Evidence Code section 730, or chapter 15 (commencing with section 2032.010) of title 4 of part 4 of the Code of Civil Procedure This rule is adopted as mandated by Family Code section 3110.5.

(b) Definitions

For purposes of this rule:

- (1) A "child custody evaluator" is a court-appointed investigator as defined in Family Code section 3110.
- (2) A "child custody evaluation" is an investigation and analysis of the health, safety, welfare, and best interest of a child with regard to disputed custody and visitation issues conducted under Family Code sections 3111 and 3118, Evidence Code section 730, or Code of Civil Procedure section 2032.010 et seq.
- (3) A "full evaluation, investigation, or assessment" is a child custody evaluation that is a comprehensive examination of the health, safety, welfare, and best interest of the child.
- (4) A "partial evaluation, investigation, or assessment" is a child custody evaluation that is limited by the court in terms of its scope.
- (5) The terms "evaluation," "investigation," and "assessment" are synonymous.
- (6) "Best interest of the child" is described in Family Code section 3011.
- (7) A "court-connected evaluator" is a superior court employee or a person under contract with a superior court who conducts child custody evaluations.

(c) Licensing requirements

A person appointed as a child custody evaluator meets the licensing criteria established by Family Code section 3110.5(c)(1)-(5), if:

(1) The person is licensed as a:

- (A) Physician and is either a board certified psychiatrist or has completed a residency in psychiatry;
- (B) Psychologist;
- (C) Marriage and family therapist; or
- (D) Clinical social worker.

(2) A person may be appointed as an evaluator even if he or she does not have a license as described in (c)(1) if:

(A) The court certifies that the person is a court-connected evaluator who meets all the qualifications specified in (i); or

(B) The court finds that all the following criteria have been met:

- (i) There are no licensed or certified evaluators who are willing and available, within a reasonable period of time, to perform child custody evaluations;
- (ii) The parties stipulate to the person; and
- (iii) The court approves the person.

(d) Education and training requirements

Before appointment, a child custody evaluator must complete 40 hours of education and training, which must include all the following topics:

(1) The psychological and developmental needs of children, especially as those needs relate to decisions about child custody and visitation;

(2) Family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;

(3) The effects of separation, divorce, domestic violence, child sexual abuse, child physical or emotional abuse or neglect, substance abuse, and interparental conflict on the psychological and developmental needs of children and adults;

(4) The assessment of child sexual abuse issues required by Family Code section 3118; local procedures for handling child sexual abuse cases; the effect that court procedures may have on the evaluation process when there are allegations of child sexual abuse; and the areas of training required by Family Code section 3110.5(b)(2)(A)-(F), as listed below:

- (A) Children's patterns of hiding and disclosing sexual abuse in a family setting;
- (B) The effects of sexual abuse on children;
- (C) The nature and extent of sexual abuse;
- (D) The social and family dynamics of child sexual abuse;
- (E) Techniques for identifying and assisting families affected by child sexual abuse; and
- (F) Legal rights, protections, and remedies available to victims of child sexual abuse;

(5) The significance of culture and religion in the lives of the parties;

- (6) Safety issues that may arise during the evaluation process and their potential effects on all participants in the evaluation;
- (7) When and how to interview or assess adults, infants, and children; gather information from collateral sources; collect and assess relevant data; and recognize the limits of data sources' reliability and validity;
- (8) The importance of addressing issues such as general mental health, medication use, and learning or physical disabilities;
- (9) The importance of staying current with relevant literature and research;
- (10) How to apply comparable interview, assessment, and testing procedures that meet generally accepted clinical, forensic, scientific, diagnostic, or medical standards to all parties;
- (11) When to consult with or involve additional experts or other appropriate persons;
- (12) How to inform each adult party of the purpose, nature, and method of the evaluation;
- (13) How to assess parenting capacity and construct effective parenting plans;
- (14) Ethical requirements associated with the child custody evaluator's professional license and rule 5.220;
- (15) The legal context within which child custody and visitation issues are decided and additional legal and ethical standards to consider when serving as a child custody evaluator;
- (16) The importance of understanding relevant distinctions among the roles of evaluator, mediator, and therapist;
- (17) How to write reports and recommendations, where appropriate;
- (18) Mandatory reporting requirements and limitations on confidentiality;
- (19) How to prepare for and give court testimony;
- (20) How to maintain professional neutrality and objectivity when conducting child custody evaluations; and
- (21) The importance of assessing the health, safety, welfare, and best interest of the child or children involved in the proceedings.

(e) Additional training requirements

In addition to the requirements described in this rule, before appointment, child custody evaluators must comply with the basic and advanced domestic violence training requirements described in rule 5.230.

(f) Authorized education and training

The education and training described in (d) must be completed:

- (1) After January 1, 2000;
- (2) Through an eligible provider under this rule; and
- (3) By either:
 - (A) Attending and participating in an approved course; or
 - (B) Serving as an instructor in an approved course. Each course taught may be counted only once. Instructors may claim and receive credit for only actual classroom time.

(g) Experience requirements

To satisfy the experience requirements of this rule, persons appointed as child custody evaluators must have participated in the completion of at least four

partial or full court-appointed child custody evaluations within the preceding three years, as described below. Each of the four child custody evaluations must have resulted in a written or an oral report.

(1) The child custody evaluator participates in the completion of the child custody evaluations if the evaluator:

(A) Independently conducted and completed the child custody evaluation; or
(B) Materially assisted another child custody evaluator who meets all the following criteria:

- (i) Licensing or certification requirements in (c);
- (ii) Education and training requirements in (d);
- (iii) Basic and advanced domestic violence training in (e);
- (iv) Experience requirements in (g)(1)(A) or (g)(2); and
- (v) Continuing education and training requirements in (h).

(2) The court may appoint an individual to conduct the child custody evaluation who does not meet the experience requirements described in (1), if the court finds that all the following criteria have been met:

- (A) There are no evaluators who meet the experience requirements of this rule who are willing and available, within a reasonable period of time, to perform child custody evaluations;
- (B) The parties stipulate to the person; and
- (C) The court approves the person.

(3) Those who supervise court-connected evaluators meet the requirements of this rule by conducting or materially assisting in the completion of at least four partial or full court-connected child custody evaluations in the preceding three years.

(h) Appointment eligibility

After completing the licensing requirements in (c), the initial education and training requirements described in (d) and (e), and the experience requirements in (g), a person is eligible for appointment as a child custody evaluator.

(i) Continuing education and training requirements

(1) After a child custody evaluator completes the initial education and training requirements described in (d) and (e), the evaluator must complete these continuing education and training requirements to remain eligible for appointment:

- (A) Domestic violence update training described in rule 5.230; and
- (B) Eight hours of update training covering the subjects described in (d).

(2) The time frame for completing continuing education and training in (1) is as follows:

(A) A newly trained court-connected or private child custody evaluator who recently completed the education and training in (d) and (e) must:

- (i) Complete the continuing education and training requirements of this rule within 18 months from the date he or she completed the initial education and training; and

- (ii) Specify on form FL-325 or FL-326 the date by which he or she must complete the continuing education and training requirements of this rule.
 - (B) All other court-connected or private child custody evaluators must complete the continuing education and training requirements in (1) as follows:
 - (i) Court-connected child custody evaluators must complete the continuing education and training requirements within the 12-month period immediately preceding the date he or she signs the *Declaration of Court-Connected Child Custody Evaluator Regarding Qualifications* (form FL-325), which must be submitted as provided by (1) of this rule.
 - (ii) Private child custody evaluators must complete the continuing education and training requirements within the 12-month period immediately preceding his or her appointment to a case.
- (3) Compliance with the continuing education and training requirements of this rule is determined at the time of appointment to a case.

APPENDIX THREE: PRACTICE NOTE- SPECIALIST REPORT WRITERS

13 Criteria for Selection

13.1 To be eligible for selection onto the list, the report writer must:

- a. be a registered psychologist with a current practicing certificate;
- b. be a current financial member of the New Zealand Psychological Society or the New Zealand College of Clinical Psychologists; and
- c. have five years' clinical experience or its equivalent, including a minimum of three years' experience in child and family work.

13.2 Psychologists will provide evidence of competency in the following areas.

- a. Assessment/diagnostic skills:
 - (i) child-parent attachment, bonding;
 - (ii) child development; and
 - (iii) physical, psychological and sexual abuse.
- b. Demonstrated knowledge and understanding of:
 - (i) family systems;
 - (ii) family separation and impact on children and adults;
 - (iii) parenting skills;
 - (iv) family violence and impact on children and adults;
 - (v) child abuse and neglect;
 - (vi) alcohol and drug misuse and abuse;
 - (vii) psychopathology;
 - (viii) local community resources for children and their families; and
 - (ix) the responsibilities of the report writer in relation to the Family Court.
- c. Cultural awareness, including an understanding of:
 - (i) the need and ability to refer to/make use of specialist cultural advice for families of different cultures;
 - (ii) the significance of cultural prohibitions, customs and language of other cultural groups; and
 - (iii) alternative child and human development perspectives.

13.3 Evidence of competency will be demonstrated by relevant academic and formal training, participation in relevant workshops, seminars and conferences, and by maintaining knowledge with current trends in research and literature.

13.4 On initial appointment to the list, each report writer will:

- a. complete a statement listing any past complaints and outcomes and any current complaints, or confirming that no complaints, past and/or present, have been made; and
- b. agree to advise the Court if they are at any time the subject of a complaint to their professional body and/or the Psychologists Board or the Health and Disability Commissioner, and to provide the Court with information on the outcome of any such complaint.