
USING s133 CARE OF CHILDREN ACT 2004 REPORTS FOR THE “PROPER
DISPOSITION OF AN APPLICATION”

HELPING PARENTS MAKE SOLOMONIC DECISIONS

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“Bring me a sword, divide the living child in two, and give half to one, and half to the other.” King Solomon’s words resonated around his chambers as two women, both claiming to be the mother of the same baby boy, stood before him.

On hearing these words the first mother dropped to her knees and begged: "O my lord, give her the living child, and by no means kill him!"

The second mother’s words did not echo the pleas of the first as she declared instead “Let him be neither mine nor yours, but divide him.”

Their reactions told the king all he needed to know. "Give the first woman the living child," he ordered, "and by no means kill him; she is his mother."

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INTRODUCTION

With the flick of a sword King Solomon made custody decisions look impossibly simple. However in reality such disputes are often so fraught with complications that they would prove testing even for a man of Solomon's wisdom. In a number of cases before the Family Court today not even the threat of a sword could produce the 'right' answer, as there is so often no such thing.

With no King to rely on, parents are responsible for making their own choices about the care of their children and decisions are often made amidst a mass of emotion, conflict, and uncertainty. Fortunately parents are not left alone in this task but are supported by a network of lawyers, judges, and Family Court professionals whose job it is to help them reach agreements in the best interests of the child. Psychologists, employed as specialist report writers under s133 Care of Children Act 2004 are a vital part of this team. Able to provide important information in the most convoluted of cases, the value of psychological reports is not to be overlooked.

However when one takes a closer look at the role and function of psychological reports concerns about the current process arise. It becomes apparent that the reports are not being used in the way they should or were initially intended to be, and as a result they are not assisting with the 'proper disposition of applications'. It is this notion that will be developed throughout this paper.

Chapter one will examine the wording and purpose of s133 to illustrate that the original rationale for reports was that they would be used to educate parties and help with settlement. Chapter two will outline how, in conflict with their initial purpose the reports are currently being viewed primarily as a form of evidence for court. Chapter three will explain the way in which historical conventions have influenced the current judicial view before chapter four explores what function the reports can serve at pre-hearing discussions. In chapter five the current hindrances in the use of the report will be explored in depth, and chapter six will conclude by proposing a 'where to from here' model so that in the future s133 reports can truly be used to dispose of cases in the 'proper' way.

PART ONE

REQUESTING s133 REPORTS

CHAPTER ONE

WHEN IS A PSYCHOLOGICAL REPORT 'NECESSARY FOR THE PROPER DISPOSITION' OF AN APPLICATION?

In order to discuss the role and function of psychological reports it is necessary to begin with an examination of s133 of the Care of Children Act 2004 (COCA), which reads:

S 133 Reports from other persons

- (1) This section applies to the following applications:
 - (a) an application for guardianship;
 - (b) an application for a parenting order (other than an application for an interim order about the role of providing day-to-day care for a child);
 - (c) an application under section 105(1).

- (2) *If satisfied that it is necessary for the proper disposition of an application, the court may,¹ -*
 - (a) request a person whom the court considers qualified for the purpose to prepare a written cultural, medical, psychiatric, or psychological report on the child who is the subject of the application; or
 - (b) direct the Registrar of the court to request a person whom the Registrar considers qualified for the purpose to prepare a written cultural, medical, psychiatric, or psychological report on the child who is the subject of the application.

- (3) A cultural report on the child who is the subject of the application may address any aspect or aspects of that child's cultural background (for example, that child's religious denomination and practice).

- (4) In deciding whether to request a report or to direct the Registrar of the court to request a report, the court must, if the wishes of the parties are known to the court or can be speedily ascertained, have regard to those wishes.

The phrase 'necessary for the proper disposition of an application' is of particular interest as it delineates the Family Court's power to request a report. As the phrase is not defined in the COCA we must turn to statutory interpretation tools to help

¹ Emphasis added.

answer this question. The following examination will seek to define the phrase and ascertain when a report is in fact ‘necessary’ and what the legislator envisioned the ‘proper disposition of an application’ to be.

I. A literal interpretation of s133

When is a report ‘Necessary’?

The plain meaning of necessary is ‘essential’ or ‘requisite’. The Court in *K v K* has held that ‘necessary’ has a higher threshold than desirable,² and Principal Family Court Judge Peter Boshier has since suggested an even higher threshold of “demonstrably necessary”.³ It is therefore clear that ‘necessary’ is to be construed as a high standard.⁴

What is a ‘proper disposition of an application’?

The literal meaning of disposition is a ‘final settlement’, and a parenting or guardianship application can be settled a number of ways: by agreement between the parties or by a court order.⁵ The question is which type of disposition is the ‘proper’ one – for a judge needs to know what the preferred outcome is before they can consider whether a psychological report will be ‘necessary’ to help achieve it. The text of s133 alone does not provide the answer.

II. Reading s133 in light of its surroundings

Sections 133, 134 and 135 are the sections under the COCA that relate directly to specialist reports.⁶ Under s133 the discretion to request a report is reserved for the Court, and under s134(2) the Court is able to prevent a parent from reading the

² *K v K* [2005] NZFLR 28 at [53].

³ Peter Boshier, Principal Family Court Judge “Speech to the Auckland Family Courts Association” (21 April 2004). Available at: <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/speech-of-principal-family-court-judge-peter-boshier-to-the-auckland-family-courts-association>> at 8.

⁴ Note the Ministry of Justice’s proposals to amend the legislation so that the Court “may only request specialist evidence where it is necessary to decide the case and cannot be obtained from any other source”; see Family Court Review Cabinet Paper “Family Court Review Paper Proposals for Reform” (2012) at [120.1].

⁵ A parenting agreement can occur at any stage of the proceedings after conciliation, mediation, or negotiation. Failing an agreement disposition can occur via a court issued parenting order.

report.⁷ Under s134 the Court may also call the psychologist as a witness and the parties may offer evidence on issues in the report. The accumulation of these factors could infer that a ‘proper disposition’ is a parenting order and that the role of the report is to provide expert evidence at a hearing.

On the other hand, the court cannot act in isolation when making the decision to request a report as s133(4) states that the wishes of the parties ‘must’ be taken into consideration. Furthermore s135 provides that the cost of the report lies firstly with the parties. This could be read as implying a possessory interest and a right to use the report in settlement should they desire.

Evidently reading these three sections together does not clarify what a ‘proper disposition of an application’ is or when a report should be considered ‘necessary’.

III. Comparing s133 with the wording of s178 Children Young Persons and their Families Act 1989 (CYPF Act)

S178 CYPF provides the Court with a similar power to that under s133 COCA. However under s133 the Court may ‘request’ a report rather than ‘order’ one as is their power under s178.⁸ This is a contradistinction worth analysing. ‘Ordering’ a report denotes an authoritative direction or instruction to provide the Court with information. ‘Requesting’ a report however appears to suggest something less adversarial, as one would ‘order’ an evidential report but is more likely to ‘request’ assistance. Following this reasoning it is submitted that by using the term ‘request’ Parliament anticipated that psychological reports would be requested by the Court to help assist the parties in the pre-hearing stage.

Furthermore, under s178(1) it states that the Court may order a psychological report to be made “available to the court in respect of any child or young person”⁹

⁶ Full sections attached in appendix.

⁷ The Court can prevent a parent reading the report “if the Court is satisfied that information in the report would, if provided directly to that party, place the child concerned or another person at risk of physical abuse, sexual abuse, or psychological abuse.”

⁸ Children, Young Persons, and their Families Act 1989, s178(1)(a).

⁹ Emphasis added.

but s133 does not contain a similar statement. This could suggest that the s133 report was envisioned for a wider audience than the Court.

Therefore when comparing s133 COCA with s178 CYPF Act it appears that the 'proper disposition' under s133 is a settlement by the parties, and that the report was intended to assist with this.

IV. Comparison with the Australian Family Law Rules 2004

Comparing s133 COCA with international provisions sheds further light on the fact that a 'proper disposition' under s133 is unlikely to be a court order. The Australian Family Law Rules 2004 state that 'the Court may, on application or on its own initiative, order that expert evidence be given by a single expert witness'.¹⁰ The phrase 'expert evidence...by an expert witness' makes it clear that the report is for courtroom litigation. The phrasing 'reports from other people' under s133 is far more ambiguous.

Under the Family Law Rules regulation 15.46 the Australian courts may make a number of orders in relation to the appointment and instruction of a single expert witness. 15.46 (f) allows the Court to settle the instructions for the expert, and importantly 15.46(g) provides that the Court may authorise and give instructions about any inspection, test, or experiment to be carried out for the purposes of the report. These provisions give the Court control over the assessment process and final report and are strong indicators that the report has an evidential function. The COCA does not have similar provisions and in contrast to the Australian approach the Court in *K v K* ruled that "The Court can only "request" a report; it cannot "order" one. There is, therefore, no jurisdiction for the Court to impose terms as to the manner in which the report ought to be completed."¹¹ This again shows that while the Court has the power to request a report under s133, there is no condition that it be used as courtroom evidence.

¹⁰ Family Law Rules 2004 (Cth), reg 15.45.

¹¹ At [92].

V. Interpreting s133 in light of its purpose

Taking into account the founding philosophy of the Family Court and the principles expressly outlined in the COCA it is clear that the intended function of a s133 report is to educate parties and to assist them with settlement.

The principles and purposes of the COCA - the welfare and best interests of the child

A disposition by settlement as opposed to one by court order is in line with the principles and purposes of the COCA. S4 of the COCA states the widely cited consideration for any proceeding under the Act; 'the welfare and best interests of the child must be the first and paramount consideration'.¹² S5(a) expands this consideration by stating that one of the principles relevant to the welfare and best interests of the child is that 'the child's parents...should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing.'¹³

The ethos of the Family Court

It is a founding hallmark of the New Zealand Family Court system that parties are encouraged to reach their own agreements. The 1978 Royal Commission Report envisaged a main conciliation branch of the Family Court with counselling and mediation as the primary means for resolving cases.¹⁴ The central purpose of the Family Court was to be the provision of a non-adversarial method of settling disputes and the aim was to avoid recourse to trial.¹⁵

There are many procedures in place to encourage parents to come to their own agreements. Counselling is available at all stages throughout the Family Court process and the Court will pay for up to six counselling sessions per 12 month period. In most cases parties will be required to attend counselling before a judge will even consider a hearing. If counselling does not help with agreement the parties are likely to be referred

¹² Section attached in appendix.

¹³ Section attached in appendix.

¹⁴ The Honourable David Beattie and others *Report of the Royal Commission on the Courts* (Government Printer Wellington, 1978) at 167.

¹⁵ At 152, the report explicitly stated "[T]he Family Court concept demands that the Family Court should be essentially a conciliation service, with Court appearance as the last resort, rather than a Court with a conciliation service. The emphasis is placed on mediation rather than adjudication."

to either counsel-led mediation or a judge-led mediation conference. If a parenting agreement is reached at any stage of these proceedings the parties can apply to have it turned into an enforceable parenting order.¹⁶ Only 8% of applications for parenting orders are decided after a full hearing, a direct result of the highly successful conciliation services.¹⁷

Over the last decade there has been an increasing focus on the provision of alternative dispute resolution within the Family Court. During the transition from the Guardianship Act 1968 to the COCA in 2003 the Law Commission reviewed the Family Court and recommended that “legislation be amended so services such as counselling and mediation are available for a wider range of matters than they are now.”¹⁸ In partial response to the report the non-judge led family mediation was piloted in selected Family Courts in 2005. In 2008 the scope for mediation within the Family Court was enhanced further by the enactment of the Family Court Matters Bill, which gave parties the option of requesting mediation before applying for a parenting order.¹⁹ In early 2009 the Christchurch Early Intervention Programme was introduced and following its success the National Early Intervention programme was developed and launched in April 2010.

It is apparent that since receiving the Law Commission’s critical report in 2003 the Family Court has endeavoured to pay more than just lip-service to its founding ethos. Developments in alternative dispute resolution mechanisms illustrate the transition the Family Court has made away from the traditional adversarial system by adopting more therapeutic mechanisms. To say that s133 reports should be used primarily as evidence in court would contradict these advancements and undermine the very purpose for which the Court was created.

VI. The most likely interpretation of s133

Reading s133 in light of other COCA provisions, the CYPF Act, and the Australian Family Law Rules 2004 shows that the function of the s133 report is not limited to courtroom

¹⁶ Care of Children Act, s40(1).

¹⁷ Roy Wyatt and Su-Wuen Ong *Family Court Statistics in New Zealand in 2006 and 2007* (prepared for the Ministry of Justice, 2009) at 30.

¹⁸ Law Commission *Dispute Resolution in the Family Court* (NZLC RN82, 2003) at [63].

evidence. Instead of using phrases such as 'ordering' a report to provide 'expert evidence' the legislator opted for more subtle phrasing such as 'request' and 'specialist reports'. Using these terms was an intentional act by the legislator to distinguish s133 reports from other forms of expert evidence and allow them to be made available for settlement. As discussed above, this interpretation would be consistent with the principles of the COCA and founding ethos of the Family Court.

In light of this conclusion it appears that, with respect, the High Court in *K v K* erred in their assertion that:²⁰

Both the text and the purpose of s29A make it clear that the medical, psychiatric or psychological report requested by the Judge ought to be directed to an issue of expert evaluation likely to assist the Court when resolving the particular dispute before it.

As shown by the above analysis the text of s133 is quite ambiguous and the purpose of the provision is likely to be settlement-focused rather than a hearing.

This paper submits that the correct interpretation of 'proper disposition of an application' would be a settlement and the report would be 'necessary' if, in the opinion of the judge, a report would give parties information about their children that could aid settlement. Under s133 a report should initially be utilised as tool to educate the parties and failing that as evidence in court. It is important that the Court does not give up on the idea that parties may be able to come to an agreement. Once the psychological report is requested it does not mean that a hearing is the only option; the report should be used to aid settlement as this was Parliament's intention.

¹⁹ Family Court Matters Bill 2008 (143-2); yet to be implemented.

²⁰ At [53].

CHAPTER TWO

THE PSYCHOLOGIST AND THE s133 REPORT: HOW THEY ARE VIEWED AND USED IN PRACTICE TODAY

Given the difficulty in deducing the proper interpretation of s133 it is not surprising that the reports are being used for a different purpose than what is indicated by the legislation. As this chapter will examine, there are currently two main themes in how the report is being viewed by the courts, neither of which aim for settlement.

I. Treating the report as expert evidence for court

In 2009 Judge Von Dadelszen addressed the annual Psychological Society Conference where he proclaimed:²¹

As a Family Court Judge, I cannot overemphasise the importance of such reports when adjudicating on issues involving children and family dynamics. The availability of expert evidence is an important part of the jigsaw puzzle which a judge must assemble in order to determine the best way forward for a family in crisis.

He then proceeded to give the attending psychologists a lesson in cross examination, offering advice on how to “stand up” under questioning in court.

Exchanges such as this illustrate how the role of ‘specialist report writer’ has become analogous to that of an ‘expert witness’. As acknowledged by Judge Von Dadelszen, a report is requested by a judge when the case before them has a “jigsaw puzzle” of complicated issues.²² The Court commissions the report, provides a referral, and briefs the psychologist on the issues they are to examine.²³ The assessment and reporting process takes 6-8 weeks to complete and once finished the report is property of the

²¹ Paul Von Dadelszen, Family Court Judge “Conflict ... Process ... Resolution” A Judicial Perspective” (Psychological Society Conference, Palmerston North Convention Centre 27-30th August 2009).

²² Von Dadelszen, above n 21. See also the comment of Judge Carruthers in *Ah H v T* Family Court Porirua FP 4/87, 14 September 1988 at [24].

²³ Boshier, Peter, Principal Family Court Judge “Practice Note: Specialist Report Writers” (Issued 24 May 2006; took effect 1 June 2006) at [10] states that the referral includes; an engagement letter, a brief, information sheet G7, a copy of the original application, a copy of the notice of defence, any affidavits of

Court and is distributed in accordance with s134 COCA. Although in practice the report may be used to reach settlement it is very unusual for a psychologist to attend settlement meetings; generally the only time the psychologist has post-assessment contact with the parties is if they are called as a witness to the hearing. At a hearing the psychologist is called as the Court's witness and their primary duty is to the Court as outlined in the Code of Conduct for expert witnesses.²⁴ This process does not fit comfortably with the purpose and function of s133 reports discussed in chapter one as the psychologist is completely removed from the pre-hearing stages of a trial.

Although the report may be used in settlement, it is clear that the judges are not requesting it for this purpose. The Court in *Powell v Duncan* stated that "a [s133] Report is one made to the Court. The consultant psychologist is the Court's expert. It is the Court who decides what shall happen with respect to the evidence of the consultant."²⁵

Academic writing supports this assertion; Seymour and McDowell have maintained that "the primary [role of the report] is to provide information to the Court",²⁶ while Zelas has noted that the function of the report is to bring skills and information into the Court that might otherwise be unavailable.²⁷ In complete opposition to the findings in chapter one, the 2003 Law Commission's Report on Dispute Resolution stated:²⁸

Report writers are expert witnesses the Court calls to give evidence...the expert evidence of report writers is understood to be independent and non-partisan, because it is obtained by the Court and not by a party to the dispute.

the parties, a copy of the Judge's directions, the date for filing of the report, and an upper limit of authorised hours to complete the brief.

²⁴ Care of Children Act, s134(6) states that the Court can call the psychologist as a witness. See also Practice Note, above n 23, at 8.3; the specialist report writer has a responsibility to comply with the relevant obligations of an expert witness outlined in schedule four of the High Court rules. See High Court Rules, Code of Conduct for Expert Witnesses schedule 4 r1 'an expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise'.

²⁵ *Powell v Duncan* [1996] NZFLR 721 at 725.

²⁶ Fred Seymour and Heather McDowell "The realistic role of psychological reports in custody/access disputes" (1996) 2 BFLJ 35 at 35.

²⁷ Karen Zelas "Comment on 'the limits of s 29A reports in custody hearings'" (1995) 1 BFLJ 194 at 194.

²⁸ Law Commission, above n 18, at [722-724].

II. Limiting the role of the report to safeguard the judicial function

Today the judiciary enjoys a stable and co-operative relationship with psychologists who work as specialist report writers in the Family Court. However as will be discussed in chapter three this has not always been the case. The judiciary was traditionally very wary about the role of psychology in family and child custody cases and fervently guarded their decision-making function. This has resulted in a residual caution regarding the use of psychological reports and the judiciary is careful to limit the role of reports.²⁹

K v K is the leading case on s 133 reports and highlights how important a judge's brief has become in directing and controlling the psychological report. While initially directions were limited to 'provide a report on this family', today briefs have become far more detailed.³⁰ The importance of specificity was highlighted in *K v K* where the Court emphasised that the judge must draft relevant questions with particularity and refrain from asking questions on the ultimate issue or 'catch all' questions. Furthermore, the Court stressed that the report writer should never 'stray beyond the boundaries' of the brief.³¹ The Court also greatly limited the role of the report by stating that it was inappropriate for the Court to use s29A reports solely as a method of obtaining the wishes of the children.³²

In April 2004 Principal Judge Peter Boshier addressed the Auckland Family Courts Association where he spoke about the use of reports. He referred to reports as a helpful way of providing the Court with the 'data' needed to help resolve a case.³³ He questioned however whether the Court had begun to overuse reports, commenting that a reliance on reports would "hardly [be] good litigation practice". He concluded that Family Court judges "should not be seeking psychological or psychiatric assistance unless it is demonstrably necessary to do so".³⁴

²⁹ See chapter three for further discussion.

³⁰ Seymour and McDowell, above n 26, at 35; see also P Boshier and others *A review of the Family Court: a report for the Principal Family Court Judge*, (Auckland, 1993) at 87.

³¹ At [92].

³² At [92].

³³ Boshier, above n 30, at 6.

³⁴ At 7.

It is clear that the judicial rhetoric of today is inconsistent with the role of the report that was envisioned by Parliament. This paper will now turn to explore the reasons for the discrepancy and illustrate how past assumptions have influenced the current view.

CHAPTER THREE

AN OVERVIEW OF THE HISTORICAL USE OF THE PSYCHOLOGICAL REPORT

Before the formation of the specialist Family Court in 1980 child custody cases were heard in the District Court in the traditional adversarial manner. Parties to a dispute were able to offer their own medical and psychological reports that could be taken into consideration by the judge. Unfortunately the questions of how, when, and why psychological reports should be taken into consideration were never defined and the judiciary grew wary of allowing reports too great a role. This historical attitude has influenced the way that reports are used today and despite the multitude of changes that have occurred in the Family Court these underlying conventions and assumptions remain.

I. The traditional approach: safeguarding the judicial function

For over seven centuries the courts have recognised expert evidence and the opinions of expert witnesses.³⁵ However judges presiding over child custody cases have traditionally been reluctant to give weight to psychological opinion on the welfare and best interests of the child. In *J v C* Lord Upjohn summarised this traditional attitude by noting that although evidence of psychological condition may be of value:³⁶

[A] judge in the exercise of his discretion should not hesitate to take risks...and go against such medical evidence if on a consideration of all the circumstances the judge considers that the paramount welfare of the...infant points to a particular course as being the proper one.

In *Epperson v Dampney* Chief Justice Street cited two main reasons for the courts' reluctance towards relying on psychological opinions: an expert is not able to take all relevant matters into account, and allowing experts too much influence over a decision

³⁵ *Buckley v Rice-Thomas* (1554) 1 Plowd 118 at 124, 75 E.R. 182 at 192 as per Saunders J "[I]f matters arise in our law which concern other sciences or faculties, we commonly apply the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, we approve of them and encourage them as things worthy of commendation."

could lead to a trial by expert.³⁷ This traditional view was aptly summarised by Legal academic Mark Henaghan when he wrote “In other words, expert evidence which is given in custody proceedings will have no real effect on the final decision making process.”³⁸

II. A change in attitude

Throughout the 1960s and 1970s there was increased discussion about the role of psychological reports in custody battles. P Vaver wrote about the lack of psychological discussion and participation in custody cases, arguing that judges lacked the psychological expertise to make informed custody decisions.³⁹ Catherine Mallon holds similar views, stating that because custody cases do not rely on the application of strict legal principles judicial decisions may be based on little more than intuitive guesses and personal experience.⁴⁰ She contends that in an area where the central issue is the lives and happiness of human beings, expert opinion should be sought and utilised to its fullest advantage.⁴¹

Despite these advances in academic thought, case law shows a “less than enthusiastic response” from the judiciary.⁴² Richardson J appeared to be one of the first to accept the role of expert opinion, asserting that the benefit of psychological experts could no longer be questioned.⁴³ However his words lacked validation when instead of calling on expert opinion, the case was decided on ‘community attitudes’ and the notion that it would be an “unnecessary complication for the child to live in a de-facto association”.⁴⁴ Cases that did include psychological evidence were careful to limit its role; experts were

³⁶ *J v C* [1970] AC 668 at 726.

³⁷ *Epperson v Dampney* (1976) 10 ALR at 227 – 229.

³⁸ Mark Henaghan "Expert Evidence in Custody Proceedings" (1978) 4 Otago LR 262 at 263.

³⁹ P Vaver, "Expert Evidence in Custody Disputes in New Zealand" (LLB (Hons) Dissertation, University of Auckland, 1969).

⁴⁰ Catherine Mallon "Joshua Williams Memorial Essay 1973 - A Critical Examination of Judicial Interpretation of a Child's Best Interests in Interparental Custody Disputes in New Zealand" (1973) 3 Otago LR at 191.

⁴¹ At 191. See also at 201 Mallon's recommendation that a psychologist with a completely independent standing as an officer of the court should be appointed to investigate every disputed custody issue.

⁴² *ME Casey* "Custody of Children" (1979) 8 NZULR 345, at 357: Casey J explains that the judiciary continued to hold the traditional common law suspicion and fear that the professionals may usurp their decision making function.

⁴³ *H v H* HC Auckland Registry M614/77, 1977, [1977] NZ Recent Law 316 at 8.

⁴⁴ At 16.

allowed to comment on the psychological health of the child, but could not make recommendations as to their welfare.⁴⁵

The number of judgements that relied on psychological evidence slowly began to increase. In *N v H* a psychiatrist's report was used as evidence that a mother-child bond is not biological.⁴⁶ In *B v B* Casey J was satisfied by the psychological evidence that there were no health or personality problems preventing the mother from being the sole caregiver of the child.⁴⁷ Quilliam J in *W v W* not only read a report from the Psychological Service of the Department of Education but effectively placed the terms of the access order in the control of the Psychological Service.⁴⁸

However for every case that embraced the use of psychological evidence there was a case where the evidence, although available, was not followed, or more dangerously not even considered. In *S v S* custody was awarded to the mother contrary to the express recommendations of the child's counsel, a child psychiatrist and social worker.⁴⁹ Reasons for discounting the weight of specialist evidence were not given. In *McK v McK* overwhelming evidence in support of the father was not mentioned, allowing the court to validate their decision to place the child in custody with the mother.⁵⁰

It is apparent from this historic overview that although the role of the psychological report in custody cases was never defined, clear patterns emerged in its use. An uneasy alliance between the psychological and legal fields was ingrained in the system and the judiciary closely guarded their decision-making function. Psychologists were engaged by one party to the proceedings and were employed only as providers of expert evidence. The judge controlled the way in which reports were handled and gave weight to the evidence when and how they liked. It is submitted that this view and use of

⁴⁵ *S v S* Auckland Registry D1417/77, 1978, [1978] NZ Recent Law 266 at 6: "evidence of the two doctors can be taken that far and that far only. It is not within the province of either of them to usurp the function of this Court in deciding on all the evidence before it, what is in the best interests of D."

⁴⁶ *N v H* Wellington Registry D5/79, 1980.

⁴⁷ *B v B* Christchurch Registry M52/78, 1978.

⁴⁸ *W v W* Nelson Registry D46/77, 22 February 1975, [1978] NZ Recent Law 306: Conditions were placed on the access order requiring travel arrangements be supervised by the Psychological Service, access was to be subject to psychological approval, the child (John) and father were required to attend psychological sessions and a psychologist was required to report annually on John's welfare.

⁴⁹ *S v S*, above n 45.

⁵⁰ *McK v McK* Wellington Registry M63/75, 1975.

psychological opinion, as an evidential tool, has influenced the role of the s133 report today.

III. The creation of the Family Court and s29A of the Guardianship Act 1968

The single most important development for the management of family and child custody cases was the establishment of the Family Court in 1981. As a specialist institution there were a number of unique elements to its jurisdiction including an inquisitorial function and a primary focus of settling disputes through non-adversarial methods.⁵¹ During the same transition period s29A was added to the Guardianship Act to codify the role of specialist reports in the newly established Family Court.⁵² Under s29A it was no longer a question of *if* psychologists should play a role in child care and custody cases, but a question of *when*, with the discretion left for judges to decide when it was 'necessary' to have such assistance.⁵³ No definition of 'necessary' was provided in the Guardianship Act. Thorp J suggested that the reason there were no rules governing the exercise of the discretion was recognition of the difficulty in doing so.⁵⁴

An important change that occurred under s29A was that experts were to be engaged directly by the Court rather than through the parties.⁵⁵ Jan Doogue J noted that this change was in line with the ethos of the Family Court as specialists are required to act in the best interests of the children and as far as possible in a non-adversarial manner.⁵⁶ However despite the settlement focus of the Family Court no moves were made to have psychological reports requested for settlement meetings.

While s29A did codify a place for psychological opinion in the Family Court the role and function of the report was still far from clear. One of the main points of contention was

⁵¹ Beattie and others *Report of the Royal Commission on the Courts*, above n 14, at 167: The Royal Commission emphasised that the main branch of the Family Court was to be a conciliation service aimed at settling issues by agreement without recourse to trial.

⁵² s29A was added by Guardianship Amendment Act 1980, s17.

⁵³ s29A attached in appendix.

⁵⁴ *LG v LG* [1991] NZFLR 481 at 493.

⁵⁵ This change resulted from the criticism that party-ordered experts lacked objectivity and acted as 'hired guns'. See the comment of Justice Sterling "...all evidence is selective, and it is selected on the basis on what will help the party to win, not on the basis of whether it will help the court to find the facts correctly" Justice Sterling "Expert Evidence: The Problem of Bias and Other Things" (paper presented to Supreme Court of New South Wales Annual Conference, 3 September 1999).

the idea of psychologists making 'recommendations' on the final outcome or the ultimate decision. Despite the judiciary's clear assertion that it was "not ever appropriate for the writer of the report to make recommendations to the Court as to the orders it ought to make or ought not to make,"⁵⁷ a survey that was conducted in 1991 revealed that over half of the 22 specialists interviewed made recommendations 'often', 'very often' or 'always' on custody decisions and only two thought that recommendations should 'never' be made.⁵⁸

These results were not well received and reinitiated the time old debate about the usefulness of psychological opinion in the Family Court. A particularly hostile response was given by John Caldwell highlighting the limitations of psychological reports and criticising their usage.⁵⁹ Caldwell argued that there were 'dangers' of specialist evaluations that should not be overlooked. He claimed that there was a lack of empirical data, a difficulty in assessing parenting skills, and an unconscious bias.⁶⁰ While the academic debate ensued the judiciary continued to recite their now rather familiar position; that "custody and access decisions are to be decided by the judge, not the specialists",⁶¹ and the report is but one piece of the "jigsaw" that judges must consider when making their final decision.⁶²

On a positive note, the number of psychologists working as specialist report writers began to increase and this generated discussion within the psychological profession about the role of reports. There were seminars on s29A reports at the annual New Zealand Psychological Society Conferences in 1994, 1995 and 1996, and following this the Society undertook a review of their guidelines on report writing.⁶³ There was also a healthy increase in dialogue between the legal and psychological disciplines; discussions took place as part of the Boshier Review of the Family Court,⁶⁴ and over 100

⁵⁶ *Androu v Gower* FC Auckland FP 004-492-99, 23 February 2000 at [30].

⁵⁷ *Davies v Davies* FC Nelson FP 042/203/86, 21 September 1988.

⁵⁸ Bev Hong, *The views of Counsel for the Child, Specialist Report Writers and Department of Social Welfare Report Writers* (Department of Justice Policy and Research Division, Wellington, 1991) at 66-67.

⁵⁹ John Caldwell, *The limits of s 29A reports in custody hearings* (1995) 1 BFLJ 188.

⁶⁰ At 3-5.

⁶¹ *M v Y* [1994] NZFLR 1 at 11, per Hardie Boys J.

⁶² *Ah H v T*, above n 22, at [24].

⁶³ Gabrielle Maxwell, Prue Vincent and Fred Seymour *The practice of psychology and the law: A Handbook* (2nd ed, NZ Psychological Society, Wellington, 1996).

⁶⁴ Boshier, above n 30.

specialist report writers were consulted in preparation for the 'Guidelines on Specialist Reports for the Family Court' issued by the Principal Family Court Judge in 1995.⁶⁵

Unfortunately even with the multitude of changes that occurred over this period the judiciary did not waver from their traditional stance, as reiterated by Boshier J:⁶⁶

The extent to which weight will be placed on a s 29A report depends...upon the qualifications, clinical experience and methodology actually used...the more scientific and precise the evidence the more it will be relied upon...After consideration of all the evidence in its totality, a Judge is entitled to reach a view that is inconsistent with expert evidence.

IV. The 2003 Law Commission Review and the Care of Children Act 2004

The 2003 Review provided insight into specialist report writers' views on the Family Court system. The overwhelming opinion was that the Family Court was too adversarial and failed to use a team approach.⁶⁷ The Law Commission acknowledged that "because the report writer has expertise as well as knowledge of the family, his or her input in discussions can be valuable in bringing about a settlement."⁶⁸ Unfortunately such findings did not result in any changes to how the report was utilised by the court. The creation of the COCA was a watershed event for child custody cases, but despite the numerous statutory differences between the COCA and the Guardianship Act s133 COCA was drafted to mirror s29A of the Guardianship Act almost identically.

Evidently the interpretation that the judiciary continues to apply to s133 is inconsistent with both the wording and purpose of the section, which indicate that the 'proper' way to dispose of an application to the Family Court is by agreement between the parties. Cases such as *K v K* demonstrate how the report continues to be viewed and used as an evidentiary tool for the Court.

⁶⁵ P Mahoney "Guidelines on specialist reports for the Family Court Issued" (1995) BFLJ 1 236 at 236-24.

⁶⁶ *De F v De F* [1992] NZFLR 167 at 181.

⁶⁷ Law Commission, above n 18, at [709] the specialist report writers view was that "although the reports still form a basis for discussions about settlement, some of the conciliatory focus has been lost by the new types of brief requested" and "A team approach would entail psychologist, counsel for the child and parties' lawyers working conscientiously together to resolve matters."

⁶⁸ At [756].

An additional problem is that the Family Court falls short of the inquisitorial system that was once envisioned. There are no mechanisms in place to utilise the report or the report writer in the pre-hearing stages of a trial. The entire s133 process is based on the assumption that the report is for court and that the report writer is an expert witness called to testify at a hearing. Both the judiciary's attitude and the structure of the Court are hindering the use of the report at settlement.

PART TWO

PSYCHOLOGICAL REPORTS AT SETTLEMENT

CHAPTER FOUR

WHAT INFORMATION AND ASSISTANCE CAN THE REPORTS PROVIDE THE PARTIES?

Despite there being no assigned place for psychological reports in settlement it appears that cases are often resolved on receipt of the report or in the course of its evaluation.⁶⁹ It would be useful to know exactly how often this occurs, but even without such evidence a report's educative function is regularly acknowledged.⁷⁰ In response to the Ministry of Justice's consultation paper in 2011 Jan Pryor carried out an interview study to elicit the perspectives of Family Court Professionals. The results show an overwhelming agreement among the interviewees that expert reports are essential to complex cases that involve issues of relocation, alienation, mental health, and drug abuse.⁷¹ Lawyers in particular noted the ability of reports to help in settlement, stating that:⁷²

It is usually very helpful to have the kind of evidence that only a person with the professional skill and independence and the child centeredness of a psychologist can give

This chapter will highlight the three main ways the report can assist parties in the pre-hearing stage, before turning to acknowledge the limitations of the report writing process.

I. Educating the parties

Studies have shown that for the 12 month period after separation parents are impaired in their ability to focus on the children's needs as they are preoccupied by their own emotional distress.⁷³ The research also indicates that parents frequently misunderstand

⁶⁹ Zelas, above n 27, at 1.

⁷⁰ *Scotting v Sciascia* (1991) 8 FRNZ 142 at 147.

⁷¹ Jan Pryor and Fred Seymour "Making decisions about children after parental separation" (1996) 8 Child and Family Law Quarterly vol 3 229, at 34.

⁷² At 32.

⁷³ Bob Simpson "Giving Children A Voice in Divorce: The Role of the Family Conciliator" in Mary Jane Kehily and others (ed) *Children and Society* (3rd ed, National Children's Bureau, UK, 1989) vol 3 261, at 261.

what their children need in a post-divorce environment.⁷⁴ There is a danger that any decisions made during this time will be based on erroneous presumptions and emotionally charged attitudes. The s133 report can help prevent this danger by giving parents independent information on their children as to how they are coping with the situation.⁷⁵ The report can include information about the child's views, emotional attachments, personal history, and relationships with significant people. This information can bring a perspective that has been lost in the conflict.⁷⁶

While there are a number of mechanisms in the Family Court that are designed to educate parents, psychologists are appointed as specialist report writers because they are experts in the areas of child development, family dynamics, parenting and divorce, and are able to provide informed discussion on these topics.⁷⁷ Weithorn and Grisso explain that a psychologist is able to elucidate the parents "functional abilities [and] provide explanations for strengths and deficits in the parents functioning", and then make an "interactive comparison" between the parents' abilities and the child's needs.⁷⁸ An example of this is seen in *W v G* when the report writer described interactions between the child and his mother at Barnados Day Care. From their observations the psychologist was able to note that:⁷⁹

The incidents suggested the mother was not aware of [the child's] need for security... it seemed the mother had been responsive to [the child] to a certain degree but perhaps not enough for him to feel really secure in

⁷⁴ Pryor, above n 71, at 229: "When parents approach the Court for help in making decisions about living and visitation arrangements, they are usually in a state of high distress and conflict. The situation is paradoxical, in that generally emotions are running sufficiently high that rational decisions are made only with difficulty. On the other hand, an absence of decision creates both uncertainty and the opportunity to take adversarial positions. We believe that on balance the uncertainty caused by lengthy delays in addressing a case is more destructive for parents and children than the possibility of making a wrong decision in haste".

⁷⁵ Seymour and McDowell, above n 26.

⁷⁶ Seymour and McDowell, above n 26.

⁷⁷ Practice Note, above n 23, at [12]: Criteria for Selection as a specialist report writers includes at 12.1, five years clinical experience and a minimum of three years' experience in child and family work; at 12.2, psychologists need to prove competence in the following areas: (a) assessment/diagnostic skills including child-parent attachment, bonding, child development, and psychological, physical and sexual abuse (b) demonstrate knowledge and understanding of: family systems, family separation impact, parenting skills, family violence and impact on children, child abuse and neglect, alcohol and drug misuse, psychopathology, local community resources for children and families (c) cultural awareness.

⁷⁸ Weithorn and Grisso, "Psychological Evaluations in Divorce Custody: Problems, Principles and Procedures" in *Psychology and Child Custody Determinations* (University of Nebraska Press, 1987) 166-169.

⁷⁹ *W v G* FC Wellington FAM-2006-085-001015, 11 July 2008 at [23].

her care. Her emotional volatility was likely to be experienced as unpredictable by him.

Before writing a report the psychologist conducts a thorough assessment of the child and family. While the process is unique to each case it usually consists of individual interviews with the parties and the child as well as observations of the child with each parent.⁸⁰ Observations will usually occur in the child's own environment at school or at home, as this allows the psychologist to observe ordinary behaviours and interactions. The observations can be unstructured (the parents and children interact as they wish) or structured (the psychologist asks the parents and children to participate in particular tasks), or both.⁸¹ Another important part of the assessment is interviewing third parties such as extended family, teachers, and social workers; this can be informative as their accounts are not subject to the same bias as parents.

As a result of the assessment process a report can educate one parent about the relationship between the child and the other parent.⁸² One of the most useful features of a report is its ability to give insight into *current* parenting practices. Parents often make allegations against the others parenting style, but these accusations are derived from what that parent can remember from the past, from what the child says after being with the other parent, or from what they observe at changeovers. However a psychologist can say "this is what I have observed occurring now" and it is sometimes very different to what the parent remembers. Many people are better parents after a separation because they need to be (they are on their own) or because they don't also have to deal with the relationship conflict at the same time as they parent.⁸³

⁸⁰ See discussion in chapter one of *K v K* at [92] where the Court ruled that "The Court can only "request" a report; it cannot "order" one. There is, therefore, no jurisdiction for the Court to impose terms as to the manner in which the report ought to be completed." Note also the finding in *K v K* that the court cannot order the psychologist to interview the meetings they have with the child.

⁸¹ Gary Groth-Marnat *Handbook of Psychological Assessment* (5th ed, John Wiley & Sons Inc, New Jersey, 2009), at 72: the main advantage of an unstructured observation or interview is that it is flexible and the focus is exclusively on the individuals, rather than how they compare to a larger normative comparison group. Unstructured observations are person-centred which allows the psychologist to pay attention to idiosyncratic factors. Structured interviews on the other hand are held in high regard as they tend to minimise clinical judgement and maximise objectivity.

⁸² Caldwell, above n 59.

⁸³ Interview with Kevin Garner, Clinical Psychologist and Specialist Report Writer (the author, Wellington, 16th July 2012). In relation to making observations Kevin Garner said "One of the most common things I do in an assessment is look for inconsistencies between what the parents or child say a relationship is like

Another part of the educative function of the report is its ability to act as an ‘eye-opener’. The report writer is often able to explain in direct terms how the children are being affected by the on-going conflict. In *GMS v SCS [Relocation]* report writer Ms Grove observed the parents as being in a state of “entrenched conflict”⁸⁴ and that this was negatively affecting the children. In her report at 4.37 she stated:

The established effects of entrenched conflict on children include: heightened aggression, impulsivity, anxiety, poor social skills, emotional problems, dysfunctional behaviour [and] increased physiological arousal which in turn affects brain development.

Hearing this type of stark information from an independent and unbiased party may be a shocking but helpful revelation for some parents.⁸⁵

In a similar fashion the report can provide a reality check for parents by encouraging them to step down from untenable positions. Often by the time a report is requested parties have become so entrenched in their positions and emotions that they are either oblivious to the reality or refuse to submit to it. In these circumstances the report can help them to readjust their perspective.⁸⁶ In *TLW v LCB* the report writer described the strain that the on-going conflict was placing on the children, resulting in a confirmation by the father that “after he had read the second s133 report, he accepted [that] contact between him and the children should be reduced.”⁸⁷

(how a parent or child behave with each other) and what the relationship is actually like when I see them together.”

⁸⁴ Ms Grove explained that the concept of “entrenched conflict”: usually exhibits high rates of litigation and relitigation, pervasive mistrust, covert and overt hostility, ongoing negative attitude to one’s former partner or spouse, the making of unsubstantiated allegations about a former partner’s behaviour and parenting practices. Ms Grove noted as well that entrenched conflict is often found in the post-separation phase and it has the most impact on children. In *GMS v SCS* HC Tauranga CIV-2009-470-511, 31 July 2009 – “The High Court decision” at [107 – 110].

⁸⁵ This type of information can be supported by empirical studies; see for example Joan Kelly and Robert Emery “Children’s Adjustment Following Divorce” (2003) 52 Family Relations 352-362: “Angry, uncooperative, and litigious parents are disruptive to a child’s sense of security and stability, frequently creating loyalty binds and untenable triangulation for children.”

⁸⁶ Law Commission, above n 18, at [755]: “During proceedings, a section 29A psychologist’s report is often requested with a view to gathering information that might help parties agree. Report information can reassure one party with misgivings about the other, or offer a reality check for one who has been maintaining an untenable position regardless of the interests of the child or the practicalities of the situation. Some parties will use the report as a guide for arrangements that meet the child’s needs.”

⁸⁷ *TLW v LCB* [Relocation] [2011] NZFLR 394 at [106].

On a positive note the information contained within a report can also help settle one parent's misgivings about the other. The report writer can use examples to illustrate the strong bonds that exist between a parent and child and explain the negative effects that may result from terminating contact. In *TLW v LCB* psychologist Ms Keith observed that the child had an "intense attachment to the father [that] showed itself in delightful ways." Although the father doted on the children she could see no evidence of distorted parent/child boundaries.⁸⁸ Information such as this can highlight the capabilities of one parent and give reassurance that the children are being well cared for.⁸⁹

II. Promoting conciliation

In some cases the information in a report can provide parents with new insights and perspectives that could encourage them to settle. Sometimes a report can be so negative towards one parent that it enables the lawyer to advise that 'the judge will go with the psychologists findings, you'll be better off agreeing with something less than you want because you'll risk getting even less at a hearing.'⁹⁰ Other times the report might conclude that 'both parents are fine, the main problem is the fighting and conflict, so stop that, agree on shared care, and the kids will be fine.'⁹¹

When the psychologist does believe that shared care would be best for the children it is important that they promote conciliation throughout the assessment process and in the nature/style of the report.⁹² A number of actions can be assumed to ensure that this occurs.

Firstly, it is important that the parents' own questions and concerns are included in the referral and addressed in the report. For example, if one parent is worried that the lifestyle of the other poses a risk to child the psychologist must openly assess and address the likelihood of such risk. Failing to address a parent's concerns gives the impression that the report writer has either not listened to them or does not understand their position. Secondly, the report writer should ensure that the report is

⁸⁸ *TLW v LCB* above n 87, at [56].

⁸⁹ Law Commission, above n 18, at [755].

⁹⁰ Garner, above n 83.

⁹¹ Garner, above n 83.

⁹² Seymour and McDowell, above n 26, at 35.

written from the perspective of the child's needs as this is generally a unifying mechanism.⁹³

It is also vital that the report writer provides an explanation of the methodology used. If there are errors in the methodology it not only affects the validity of the report but it directs parties' attention away from the actual findings as they concentrate instead on challenging the report. The required methodology is outlined in the 2006 Practice Note where it states that psychologists must comply with their obligations as experts as outlined in Schedule 4 of the High Court Rules. These obligations include impartiality,⁹⁴ restricting evidence to their area of expertise,⁹⁵ giving reasons for their opinions, and referring to any literature or material relied upon to support their opinions.⁹⁶ Psychologists must also ensure that all the documents supplied to them are read and referred to if relevant and that any additional material is approved by the Court.⁹⁷ In *M v V* the Court held that psychologists should keep notes of all interviews and include details such as time, date and duration, as this will prove that a roughly equal time was spent with both parties and that all relevant people were interviewed.⁹⁸ In *Daly v Daly* it was stated that report writers should elaborate the base upon which their interpretations and conclusions are made.⁹⁹ Ensuring that the methodology is correct and transparent validates a report, which in turn means that the parties are likely to give more weight to the findings.

Finally, focus must also be paid to the overall tone of the report to ensure that it is written in a constructive rather than critical style. A constructive report can assist with settlement even when the findings favour the interests of one party over the other. However an overly critical report will hinder conciliation by appearing biased. Seymour

⁹³ Note that under Care of Children Act, s133 the report has to be 'on the child of the proceedings'. There is no power under the COCA for the judge to request a report on a parent's psychological wellbeing; see chapter five for a discussion on this point.

⁹⁴ Code of Conduct for Expert Witnesses, High Court Rules, schedule 4 r2.

⁹⁵ At r 3(c).

⁹⁶ At r3(f).

⁹⁷ The obligation to read all material provided is not strictly referred to in the Practice Note or the High Rules, however Catriona Doyle suggested that if the Report Writer has not read all relevant material then it would be a good point for lawyers to challenging the report on during cross-examination; Catriona Doyle "Addressing the psychological evidence" *NZLawyer extra* (online ed, New Zealand, 2 July 2010) <<http://www.nzlawyermagazine.co.nz/NZLawyerextraarchive/Bulletin5/extra5F2/tabid/2418/Default.aspx>>

⁹⁸ *M v V* FC Levin FAM-2005-031-103, 18 August 2006.

⁹⁹ *Daly v Daly* FC North Shore FP 536/87, 16 March 1989.

and McDowell explain that a constructive report can be achieved by focusing on the present and future rather than allegations and historical events.¹⁰⁰ A good example of how constructive advice can be given without alleging fault is illustrated by the report writer in *W v G*:¹⁰¹

The changeovers were difficult and damaging for A. [The report writer] considered that the changeovers, involving eight occasions each week, needed to be reduced to as few as possible...if the parents continued their open hostility towards each other it would be better for A to have an intermediary present so that the parents did not have any contact with each other.

It is important that report writers are aware of the primary conciliatory purpose of the report as it will help them take appropriate measures throughout the assessment and reporting process.

III. Ascertaining, explaining and commenting on the views of the child

When a child is subject to proceedings under the COCA, s6 requires that they be given reasonable opportunities to express their views and for any views conveyed to be taken into account.¹⁰² Section 6 recognises that “children should not be seen as passive individuals but fully fledged people with rights to express their own views on all matters affecting them.”¹⁰³ The obligations under s6 are not limited to courtroom proceedings and therefore any pre-trial settlement proceedings must also involve the views of the child.

¹⁰⁰ Seymour and McDowell above n 26, explained “the comment ‘John would benefit from more one-to-one interaction with his father when on access visits’, is likely to lead to a different outcome than, ‘Mr Smith is generally neglectful of John on access visits giving him very little quality one-to-one interaction’. An emphasis on the present and future is more likely to promote conciliation than a retelling of past history, complete with misdemeanours and the other parent's allegations, against which a party may then feel they must defend themselves.”

¹⁰¹ *W v G*, above n 79, at [31].

¹⁰² There is now an incontrovertible understanding that it is in the best interests of all involved to have children's views as part of the decision-making process. Articles 12 and 13 of the United Nations Convention on the Rights of a Child provide that in matters affecting a child, the child should be able to obtain information and make his or her ideas known. Where a child is capable of forming a view, the child should be assisted in expressing his or her views, and the Court should give any views due weight in the decision making process according to the age and maturity of the particular child.

¹⁰³ Jane Fortin *Children's Rights and the Developing Law* (3rd Ed, Cambridge University Press, Cambridge, 2009) at 235.

The primary benefit of having a psychologist interview the child is that they are specifically qualified to do so.¹⁰⁴ Psychologists have training in how children express themselves and as Principal Judge Boshier recognised, having a report written by someone trained in communicating with children “[Ensures] the child’s views are heard correctly. Children are not always forthcoming with their views... A child-psychologist will often be more skilled at discussing these matters with children than a judge or lawyer who has minimal training in the area.”¹⁰⁵

A psychologist is able to perform three important functions; they can understand the child’s views, explain the views, and comment on the views.¹⁰⁶ In *SCS v GMS* the report writer was able to note that although the children did not wish to move to England they portrayed:¹⁰⁷

No sense of time in terms of minutes, hours, days, weeks, months and years, no sense of often travelled distance, no ability to recite various modes of travel, no comprehension of relocation of choices and their various implications.

Being able to explain and comment on the views in this way provides a greater insight than repeating ‘the children have expressed a view of not wanting to go to England’.

A child has the right to express their views *and* have them taken into account, but for this to occur parents need to truly understand what a child is thinking. It therefore follows that the person charged with interviewing the child needs to really listen to them and not just take their utterances at face value.¹⁰⁸ This is especially difficult when

¹⁰⁴ Judge Jan Doogue and Suzanne Blackwell “How do we best serve children in proceedings in the Family Court?” (2000) 3 BFLJ 193.

¹⁰⁵ Principal Family Court Judge Peter Boshier “Involving Children in Decision Making: Lessons from New Zealand” (2006) 20 AJFL 145 at 5.

¹⁰⁶ Doogue and Blackwell above n 104.

¹⁰⁷ *SCS v GMS* FC Tauranga FAM-2003-070-0000473, 30 April 2010, at [195]; cited s 133 report, 30 November 2009 at [3.2.15].

¹⁰⁸ Melton, “Where are the Children?” (1982) 52 *American Journal of Orthopsychiatry* 530, at 538. See also Principle Family Court Judge Peter Boshier “Listening to Children’s Views in Disputed Custody and Access Cases” (Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, 29 May 2008) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference>> at 6, ((quoting Pauline Tapp “Examining Judicial Approaches to Interviewing Children” (paper given at LexisNexis Child Law Conference, March 2002, at 10)): “Listening to a child requires ‘being able to enter the child’s world; listening to very young children does not necessarily mean taking all their utterances at face value, but it

a child's true opinion differs from that which they articulate, or when the child is too young to express themselves verbally.¹⁰⁹ In such a case it is beneficial to have a psychologist conduct the interview, as they may be able to ascertain a child's opinion without discussing the subject directly with the child.¹¹⁰ A psychologist's training enables them to interpret attitudes through verbal and non-verbal interactions,¹¹¹ and give meaning to observed behavioural patterns.¹¹² An example of this can be seen in *TLW v LCB* where the psychologist noted that:¹¹³

J-L had...symptoms of somaticised anxiety; she experienced severe stomach pains at times. She was also observed to become highly anxious to the point of panic when encouraged to speak about the father and what she thought she had seen.

Sometimes it is necessary to have the psychologist give their opinion on how much weight to afford to the child's views. For example, if there are allegations of alienation the psychologist may be able to provide insight on whether a child's expressed views are the result of 'programming' by the alienating parent,¹¹⁴ or whether the alienation has been so severe that the child has internalised the views and honestly believes them.¹¹⁵ In the psychologist's brief in *SCS v GMS* Heath J stated:¹¹⁶

does mean observing the nuances of how they exhibit stress, or curiosity or anxiety in a manner which is congruent with their maturity."

¹⁰⁹ For example in *Tanner v Edghill* [2008] NZFLR 262, at [50], the report writer was able to confirm that "there was a total mismatch between the adverse comments made by B about Mrs E and his behaviour and affect when he was with her."

¹¹⁰ Boshier "Involving Children in Decision Making: Lessons from New Zealand", above n 105, at 5.

¹¹¹ Litwack, Gerber and Fenster, "The Proper Role of Psychology in Child Custody Disputes" (1980) 18 *Jo of Family Law*, at 282 – 294.

¹¹² Caldwell, above n 59.

¹¹³ *TLW v LCB*, above n 87, at [52]

¹¹⁴ Alienation occurs when one parent or caregiver exposes a child to information and attitudes about the other parent that influence the child's own views. When alienation occurs the child often expresses the view that he or she wants nothing to do with the other parent, and this rejection is often unreasonable. The term 'programming' can refer to the case in which the child does not actually believe the views but is repeating what they have heard one parent say about the other. See comment in *SFW v RAL* FC Lower Hutt FAM-2005-032-000695, 15 November 2006 at [5]: "I do not think I can place a great deal of weight on what the children said because without the input of the psychologist, it is difficult for me to know just what reliance I can place on their comments."

¹¹⁵ Higher rates of psychologists are appointed to ascertain children's views in alienation cases than in cases involving issues such as relocation, care and contact, and protection. See Antoinette Robinson "Children: Heard But Not Listened To? An Analysis of Children's Views in Decision Making Under s6 of the Care of Children Act 2004" (LLB (Hons) Dissertation, University of Otago, 2010) at 32, where a study of 120 cases heard under the COCA showed that in 86.7% of Alienation cases a psychologist was appointed

Even though John is unable to express views verbally and Craig demonstrates the effect of coaching, it may be possible for a child psychologist, indirectly from behavioural responses, to provide some reliable information to the Court of each child's view, through the use of her expertise.

After interviewing the children the psychologist in *TLW v LCB* was able to note that they "had actually succumbed to subtle pressure to conform their views to what they believe is congruent with their mother's views and needs"¹¹⁷ again this is an example of the unique educative ability of the psychologist.

IV. Recognising the limitations of the report

It is important at this stage to identify the limitations of the report, being the matters that the psychologist is unable to tell the parties and other weaknesses of the assessment and reporting process.

Despite the variety of opinions about what psychologists can and cannot do there is an unmistakable consensus that psychologists have no special ability to predict future behaviours or development patterns.¹¹⁸ According to a New Zealand consultant psychiatrist writing in the mid 1980's, a psychologist's area of expertise is limited to reporting on the psychological functioning of parents and child at the time of making the report.¹¹⁹ The assessment therefore concerns the past and the present rather than the future.¹²⁰ Furthermore, the Family Court operates on a multi-disciplinary account of child development that includes familial, societal, cultural and psychological factors.¹²¹

to ascertain children's views, compared with 55% of relocation cases, 43% of protection cases, and 42.9% of care and contact dispute cases.

¹¹⁶ *GMS v SCS*, above n 84, at [125].

¹¹⁷ *TLW v LCB* above n 87, at [53].

¹¹⁸ See for instance Gary Melton "Developmental Psychology and the Law: The State of the Art" (1983-4) 22 *Jo of Fam Law* 445 at 472. Melton argues that because psychologists cannot predict the future they should under no circumstances make recommendations on the ultimate issue as to who should have custody.

¹¹⁹ Bridge and Bridge, "Expert evidence in custody and access cases" (1986) 1 *B FLB* 53. See also the oft-cited article: Mnookin "Child-custody adjudication: judicial functions in the face of indeterminacy" (1975) 39 *Law and Contemporary Problems* 226 at 252-253, where he argues that the main problem is that parenting is being assessed in a family system that is likely to undergo drastic change and that future behaviour of parties will depend on their future interaction after the decision.

¹²⁰ Zelas, above n 27.

¹²¹ For an in-depth analysis of the multi-disciplinary account of child development see chapter one of Antoinette Robinson, above n 115; see also Allison James and Alan Prout "Introduction" in Alison James

The psychologist is only able to comment on psychological factors, as the other factors are outside their area of expertise.¹²² For these reasons the New Zealand Family Court errs on the side of caution by precluding experts from making recommendations on the ultimate issue.

As well as these two significant limitations, there are a number of other shortcomings to consider. Firstly, when psychologists are employed as specialist report writers for the Family Court they are being asked to work within an adversarial legal system that in a number of ways “speaks a different language” to that of their own.¹²³ Psychology operates in on a context-free paradigmatic model and relies on psychological hypothesis and theories; whereas in family law the narrative and context of each case is unique and sensitive.¹²⁴ Litwack, Gerber, and Fenster acknowledge that the use of empirical studies and theories in relation to child-custody cases “may befuddle rather than clarify the issues to be determined in courtroom settings” because none of hypotheses can ever be claimed as “certain”.¹²⁵ Secondly, although reports are received on the assumption that the findings and conclusions are objective, practising psychologists are the first to concede that judgements are “subject to bias and often are coloured by the values of the diagnostician”.¹²⁶ Finally, there is an inherent difficulty in assessing parenting skill,¹²⁷ a task that is only intensified by the short time frame and the strict fiscal constraints that a s133 report writer is required to work with.¹²⁸

and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, Basingstoke, Hampshire, 1990) 1, at 1-6.

¹²² To obtain information on the cultural aspects of a child’s development the Court may request a cultural report; Care of Children Act, s133(2)(a)

¹²³ BT Glimmer, DA Louw, and T Verschoor “Law and Psychology: An exploration of the conceptual interface” (1997) 10 S Afr J Crim Just 19, at 32.

¹²⁴ At 27.

¹²⁵ Litwack, Gerber and Fenster, above n 111, at 273. At 278 Litwack and others explain the reason that child-custody theories or hypotheses can’t be proven is because “ethical considerations prevent researchers from carrying out well-designed, systematic “experiments” that might shed some light upon the possible benefits and harms of custody alternatives. To carry out such experiments, children would have to be placed in arrangements thought at the time to be contrary to the children’s best interests to see if such predictions were correct.”

¹²⁶ At 269.

¹²⁷ Caldwell, above n 59.

¹²⁸ Practice Note, above n 23, at [10]: the referral includes a date for completion and an upper limit of authorised hours to complete the report.

Report writers are under no false illusions about these limitations. Psychologists are required by their own code of ethics to recognise the boundaries of their competence,¹²⁹ and it is good practice for psychologists to highlight the limitations within the report.¹³⁰ Caldwell has suggested that report writers should go further than this by pointing out possible alternative explanations for their findings, explaining why particular data has been down-played, and stressing their inability to predict long-term outcomes for children.¹³¹

The final factor inhibiting the ability of report writers in promoting settlement is the type of cases that they are asked to assist with. The report is usually requested in situations of high conflict after a number of failed conciliation attempts. The psychologists are frequently asked to address intrinsically complicated issues such as relocation,¹³² alienation, mental health and drug abuse. With complex facts, mounting allegations, legal uncertainty and entrenched positions, some cases are never going to be settled regardless of how constructive the report may be.

¹²⁹ Code of Ethics for Psychologists Working in Aotearoa/New Zealand (2002), at [2.2.2]: “Psychologists recognise the limits of their own competence and provide only those services for which they are competent, based on their education, training, supervised experience, or appropriate professional experience.”

¹³⁰ Weithorn and Grisso, above n 78, at 162 – 165.

¹³¹ Caldwell, above n 59.

¹³² Relocation cases occur when the custodial parent wants to change his or her place of residence and take the child with them and the other guardian opposes the relocation. Relocation cases are some of the most difficult to resolve because they are not amenable to the traditional conciliation model as there is little room for compromise; see *R v S* [2004] NZFLR 207 at [75]; see also Judge Peter Boshier “Relocation Cases: An International View from the Bench” (Association of Family and Conciliation Courts, Seattle Washington, 20 May 2005).

CHAPTER FIVE

CURRENT HINDRANCES IN THE USE OF THE REPORT

Chapter four illustrated the capacity a psychological report has to educate parents about their child, their child's views and their child's relationship with the other parent. However as highlighted in chapters two and three of this paper the Family Court fails to accommodate for the report's educative function. This chapter will address the four main factors that are preventing the report from being utilised to its fullest advantage.

I. No forum to discuss the assessment process or the report's findings

It is concerning how few safeguards there are in place to ensure that lawyers and parents truly understand the s133 reports and the report writing process. The nature of high conflict cases is such that parents rarely approach the report with an open mind or take the time to come to terms with its findings. Parents usually read the report for the first time at their lawyer's office in an atmosphere of anxiety and anticipation and in a great majority of cases they never receive a copy for themselves.¹³³ This does not give parties much opportunity to digest the material within the report and often results in biased comprehension of the report's findings and poor subsequent recall.¹³⁴

A further issue is the lack of opportunity provided for parties to discuss the report with the report writer. With no forum for discussion and no outlet for debate, the psychologist is unable to explain the report and parents do not get a chance to ask questions. This is unlike most other domains of psychological report writing where the report is the first stage of an on-going relationship between the psychologist and client.¹³⁵ Failing to provide a forum for discussion leaves misunderstandings, emotional responses and important questions unaddressed and this is a major barrier for the report's educative function. The following case highlights the place that exists for discussion between parties and the report writer.

¹³³Pryor, above n 71, at 35.

¹³⁴ Seymour and McDowell, above n 26, at 35.

¹³⁵ At 35.

A case study – JLE v JAR-B [2012] NZFLR 122

In *JLE v JAR* a father sought contact with his child after the discharge of a protection order. The Court requested a s133 report to assess the child's psychological state. During the proceedings the mother made a number of complaints to the psychological board about the report writer Ms K in relation to both the findings of the report and the assessment process.¹³⁶ In the High Court case held to address the mother's complaints, the Court explained the objections as being the result of three factors:¹³⁷

- i. The mother's misunderstanding of the assessment task and expectation that she would be treated as a client of the psychologist;
- ii. The mother's rejection of the report's findings because they did not correspond with her own view;
- ii. A misunderstanding and misconstruing of the assessment process and substance of the report which led to "wayward conclusions" on the mother's behalf.

The Court concluded that "the complaint itself proceeds from a series of misunderstandings about the psychologist's role and responsibility".¹³⁸ The Court found no support for the allegations against the psychologist's code of ethics and the mother eventually withdrew the complaints.

Despite this outcome, *JLE v JAR* cannot be considered a complete success as the result came at the cost of an additional and unnecessary court hearing. Had the mother been given an opportunity to discuss the report with Ms K the issue could have been resolved in a faster, cheaper and less adversarial manner, for it appears that all that the mother wanted was "to hear [Ms K's] apology for the distress and pain the process had occasioned to [her]".¹³⁹

¹³⁶ Because the complaint was filed during the proceedings the court heard the complaint in full.

¹³⁷ *JLE v JAR-B* [Contact][2012] NZFLR 122 at [13].

¹³⁸ At [23], Because the mother disagreed with the outcome of the report and misunderstood the process she reported a number of matters incorrectly to the court, and later 're-wrote' the report to support a hypothesis she had developed; at [19], the mother said said Ms K took no notes, whereas Ms K said she did and produced a sheaf of notes. The mother said that Ms K did not talk to her daughter V, and Ms K said that she did and produced interview notes. Furthermore, the mother said that Ms K had clearly already concluded that the father was a good person, when Ms K had not by then met him during the assessment process; at [28] "the complaint itself proceeds from a series of misunderstandings about the psychologist's role and responsibility, I cannot conclude that there is within the evidence before the Court sufficient suspicion of any offence against the Code of Ethics, which would justify referring this matter to the Board."

¹³⁹ At [29].

The issues that arise through lack of discussion become even more acute when the s133 report lacks clarity. A psychologist interviewed by Pryor raised this issue and noted that it was a barrier to conciliation:¹⁴⁰

So I think if we had, you know, clearer reports then that could assist in people settling things, and transparent reports, you know, people are often trying to second guess what the psychologist means or what they you know, and they shouldn't have to do that, it should be really clear.

Ambiguity in reports may be the result of many factors: a poorly drafted brief, an inexperienced report writer or overly complicated issues; in the difficult relocation case of *GMS v SCS* the updated psychological assessment ran to some 40 pages.¹⁴¹ While educating report writers on how to write effective reports may help, allowing them to talk the report through with parties would be more effective. Things can often be said with more clarity in person than they can on paper.

The New Zealand Psychological Society holds the same view and succinctly stated so in their submission to the 2011 Review. In their opinion, if the Court really does want parents to “step up” and make decisions that are in the best interests of their children then “psychologists need to be able to reflect back to them the meaning of the data that is collected throughout the assessment process.”¹⁴² The Society unequivocally favoured that the psychologist be involved in dialogue rather than just collecting data and writing reports. They argued that the current forensic role the reports perform is “little different from Environmental Science and Research scientists in criminal matters” and that because of this the opportunity for the assessment process to be educative is being lost.¹⁴³

The provision of a forum for discussion would generate what the Psychological Society referred to as “applied conciliation.”¹⁴⁴ From a psychological perspective it would allow the parties to partake in ‘Double Loop’ learning which makes the most out of the information obtained in the report and allows parents to make truly informed choices

¹⁴⁰ Pryor, above n 71, at 30.

¹⁴¹ *GMS v SCS* above n 84, at [53].

¹⁴² The New Zealand Psychological Society *Submission to the Ministry of Justice: Review of the Family Court* (29 February 2012) at 5.

¹⁴³ At 5.

about the future.¹⁴⁵ The Society noted that the opposite (and current) type of learning that is occurring is ‘Single Loop’ learning in which “faulty inferences, assumptions, values, choices and predictions of outcome are not detected and corrected.”¹⁴⁶

There has never been a more appropriate time to implement a discussion forum between the psychologist and parents. Recent announcements made by the Ministry of Justice include plans to reduce the role of lawyers and focus on self-litigants.¹⁴⁷ The problem with this proposal is that lawyers perform a vital role in assisting with communication between parties, explaining processes, addressing emotions and acting as reality testers.¹⁴⁸ If the proposal is carried through then someone else is going to have to carry out these roles or the educative and conciliatory functions of the report risk being lost altogether. Allowing the psychologist to meet with parents in the post-assessment period to discuss the report would fulfil this task.

II. Adversarial responses to the report

As recently as 2011, Principal Judge Peter Boshier has expressed concern that the Family Court remains an inherently adversarial system; in discussing the conciliation/mediation model suggested by the 1978 Commission he argued that “probably the exact opposite has happened”.¹⁴⁹ A prime example of Boshier’s assertion can be seen in the way reports are received and responded to. The accepted way of

¹⁴⁴ At 6.

¹⁴⁵ At 6: described as ‘Model 2’ behaviour or ‘Double Loop’ learning in the pioneering work of Argyris and Schon, it has at its core a feedback loop in which all data is shared, this will help reduce the hostility and bitterness between the parents and allow both parents feel that they have been heard.

¹⁴⁶ At 6.

¹⁴⁷ See Ministry of Justice “Family Court Review” (2012) www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1: The government is proposing a ‘three track system’, and where an application is allocated to the Simple track, the parties will have to represent themselves and will not be allowed a lawyer. A lawyer for the child will not be appointed. Where an application is allocated to the Standard track, the parties will have to represent themselves until the hearing stage. If things are not resolved, the parties may have legal representation at the more formal hearings which will follow. A lawyer for the child may be appointed after a defence is filed if there are serious issues. This is undoubtedly a cost-cutting measure; it is no secret that the review was in response to growing costs. See Ministry of Justice *Family Court Review A public Consultation Paper* (20 September 2011) at 11: Costs of running the Court increased 70 per cent from \$84 million in 2004/05 to \$142 million in 2010/2011; see also Cabinet Domestic Policy Committee Minute of Decision “A Review of the Family Court” (13 April 2011) DOM Min (11) 6/2 at 2.

¹⁴⁸ Family Law Section, New Zealand Law Society “Retaining the right to legal representation in the Family Court” (2012) www.familylaw.org.nz/home.

¹⁴⁹ Boshier, above n 3, at 5.

countering an unfavourable report is to cross examine the psychologist,¹⁵⁰ or have a second expert critique the report.¹⁵¹ It was noted by a lawyer responding to the 2011 Review that “It is now not uncommon for there to be a trial within a trial as each party tries to discredit the views of one of the specialist report writers.”¹⁵²

A critique is not a second assessment of the child and it is not a second opinion; it is report carried out by a second psychologist critiquing the methodology, information, data and psychological principles used in the s133 assessment.¹⁵³ There have been warnings given by judges as to the adversarial nature of critiques: “because second opinions are usually called by one of the parties in order to challenge or critique a report already before the Court, the procedure is potentially adversarial and partisan.”¹⁵⁴ Psychologists understand that their opinions need to be tested and critiqued, and if there is an issue with the methodology or evidence of true bias then obviously assertive cross examination or critique is necessary. However if there are no obvious errors, methodological or otherwise, challenging the report rather than accepting its findings is unnecessarily adversarial and inconsistent with the conciliatory nature of the Family Court.¹⁵⁵

This is another issue that will become more prominent if the current proposal to promote self-litigants is carried through. Lawyers have a duty under the Family

¹⁵⁰Pryor, above n 71, at 30; Pryor’s survey found that a major problem was posed by the use of “non-specialist and inexperienced counsel, and adversarial lawyers” who cross-examine in unconstructive ways. See also Law Commission, above n 18, at [709] “When giving evidence, [report writers] feel they are increasingly subject to aggressive cross-examination that is often not properly controlled by the Court. They understand their opinions must be tested and critiqued, but object to belligerent and repetitious questioning that is rude and disrespectful.” See also Evidence Act 2006, s85 prohibits unacceptable questions in cross examination which includes at 85(1) ‘any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.’

¹⁵¹ Critiques are far more common than second psychological reports as the court will only allow a second assessment by a second report writer in exceptional circumstances; see *G v G* DC North Shore, FP 217/86, 1 June 1995, where Judge Boshier noted that the commissioning of a report from a second expert must be undertaken rarely and carefully. Critiques are entered as evidence under s134(6) Care of Children Act where it provides that a ‘part may present evidence on any matter referred to in the report’.

¹⁵² *Summary of submissions in response to Reviewing the Family Court: A public consultation paper* (April 2012) < <http://www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1> > At 38.

¹⁵³ Doyle, above n 97.

¹⁵⁴ *M v J* FC Wanganui FP 083/315/00, 15 July 2003 at [30].

¹⁵⁵ The Ministry of Justice has recognised this issue and the new proposals for reform include the recommendation to ‘remove parties’ ability to obtain a critique of a specialist’s report so that parties may only question a specialist’s methodology or conclusions through cross examination’. See Family Court Review Cabinet Paper, above n 4, at [121.4].

Proceedings Act 1980 to promote conciliation,¹⁵⁶ and as Catriona Doyle noted in her advice on dealing with s133 reports:¹⁵⁷

Consideration should always be given to encouraging the client to work with the recommendations and findings in the report...if the client does not like or understand what is contained in the report, it is suggested that consideration needs to be given to exploring ways in which the client may be able to accept the report.

However if parents are self-represented then there will be no one available to encourage them to reconcile their views and accept the findings; it is likely that adversarial challenges to the report will become more frequent.

III. Making suggestions or giving opinions on the ‘ultimate issue’

The New Zealand judiciary has made it clear through a string of explicit statements that report writers cannot make recommendations on the ultimate issue:

“[It is] probably not ever appropriate for the writer of the report to make recommendations to the Court as to the orders it ought to make or ought not to make” – Mahoney J in *Davies v Davies*.¹⁵⁸

“Custody and access decisions are to be decided by the Judge, not the specialists” - Hardie Boys J in *M v Y*.¹⁵⁹

“Recommendations should not be made on the ultimate issue for the Court’s consideration.” - Heath J in *K v K*.¹⁶⁰

Reasons for not allowing recommendations on the ‘ultimate issue’ (the outcome that would be in the best interests of the child) include the subjectivity of the report writer’s opinion and their inability to make the necessary judgements on social, family, and cultural values.¹⁶¹ These concerns are valid and are acknowledged in chapter four as limitations of the report. Making the ultimate decision is a task reserved for parents and

¹⁵⁶ Family Proceedings Act, s8.

¹⁵⁷ Doyle, above n 97.

¹⁵⁸ *Davies v Davies* FC Nelson FP 042/203/86, 21 September 1988.

¹⁵⁹ At [11].

¹⁶⁰ At [92].

failing agreement, the judge. This paper does not submit that psychologists can or should be allowed to usurp that role.

On the other hand it is clear that having suggestions and options outlined in the psychologist's report is an incredibly valuable and constructive practice. A lawyer interviewed by Pryor acknowledged the benefit of having a psychologist, stating "this is the sort of thing that needs to happen so that orders you make will actually work".¹⁶² For example in *W v G* the possibility of reducing the children's contact with the mother was discussed and the report writer "suggested the possibility of alternate weekends from Friday afternoon to Sunday afternoon and during the day on Saturdays on the other weekends."¹⁶³ Practical suggestions such as this can lay the framework for discussions between lawyer and client or between parties themselves.

Suggestions from report writers have a unique value because the report writer is often the only person able to meet with all the parties.¹⁶⁴ Furthermore, unlike the lawyers for parties and even the lawyer for child the psychologist is under no obligation to advance the interests of one side. Any recommendations made by a lawyer will favour the interests of their client over the other and will not necessary represent the best outcome for the child.¹⁶⁵ By contrast, a psychologist's suggestion is independent and impartial and can be viewed as such.

With stark judicial warnings like those stated above there is a danger that the wrong message is being sent to report writers. When the judiciary uses the term 'recommendation' it is likely that they are referring to something directive like an authoritative instruction or specific order. Therefore a psychologist is unable to recommend that 'the only thing that would be in the child's best interests is if they were allowed to move to Auckland' or 'the child must be able to see the parent once a week'.

¹⁶¹ Caldwell, above n 59, at 5.

¹⁶² Pryor, above n 71, at 32.

¹⁶³ At [33].

¹⁶⁴ Seymour and McDowell, above n 26.

¹⁶⁵ Despite the s8 Family Proceedings Act's duty to promote conciliation lawyers have an overriding ethical duty to advance the interests of their client; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, schedule at 6: "In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties"; at 4: the lawyer "must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice."

The psychologist is not able to justifiably ever say ‘this is the only outcome that will work’.

However this should not prevent a psychologist from suggesting, like the psychologist in *F v L*, “that Mr F should seek to visit [the children] in a location close to their home for a weekend every month to six weeks, [and have] overnight contact for one or two nights.”¹⁶⁶ When a psychologist is able to state that “the child is developmentally ready for overnight contact with the father”¹⁶⁷ they should be encouraged to also suggest that “overnight contact occur from Friday afternoon till Saturday evening and gradually become more frequent.” This second component to their advice is an incredibly useful tool in settlement.

IV. Psychological evaluations of parents

At present there is no power under the COCA for a judge to order parental or psychological evaluations on parents, as s133(2)(a) states that the report is to be ‘on the child who is the subject of the application.’ Despite this clear statutory direction a number of psychologists are concerned that a report is often requested with the aim of indirectly analysing parents.¹⁶⁸ A mixed-message is being sent to report writers because although the legislation requires the report to be “on the child,” the High Court in *Brown v Brown* held that it is proper for the psychologist to report on any matters which may impact on the welfare of the child including the mental state of the parents.¹⁶⁹

In *GMS v SCS* Heath J asked the report writer to undertake a predictive assessment to identify developmental milestones for the children and to comment on which parent was more likely to meet the child’s psychological and emotional needs over that time.¹⁷⁰ However when the report came before the court, Somerville J was of the opinion that the report writer could not reliably provide such evidence as they were not able to carry out the necessary assessments.¹⁷¹ The report writer herself was uncomfortable in

¹⁶⁶ *F v L* Family Court, Hamilton FAM-2004-063-000676, Nov 9 2006 at [6].

¹⁶⁷ Garner, above n 83.

¹⁶⁸ Pryor, above n 71, at 31.

¹⁶⁹ *Brown v Brown* (1987) 2 FRNZ 355.

¹⁷⁰ *GMS v SCS*, above n 84, at [125].

¹⁷¹ *SCS v GMS*, above n 107, at [81].

making such comments without undertaking a psychological examination of the parents. Without being able to assess the parents she had to rely on the psychological adage that “past behaviour is the best predictor of future behaviour.”¹⁷²

Despite the wording of s133(2)(a) it appears that the type of instruction given to the report writer in *GMS v SCS* is not uncommon and that it is often necessary to target questions in the brief at the parents. Parenting capabilities are inextricably related to a child’s wellbeing and a psychologist is unable to address one without the other. If a parent is suffering from a mental illness or substance abuse then the Court and the parties need to know what likely effects this will have on the child’s wellbeing. Specialist report writer Kevin Garner noted that he has been instructed by courts in the past to ‘identify if there are any psychological issues for any of the parents which may impact on their ability to care for either of the children.’¹⁷³

Whilst it is evident that the report writer cannot be requested to produce a report on the psychological condition of an individual parent, it is not clear how much of the current assessment can focus on parent’s abilities or mental state. The only guideline provided in the Practice Note is at 8.4: “Report writers are thus to avoid making a parent or guardian the subject of the report”.¹⁷⁴ Clearly the report writer in *GMS v SCS* did not feel confident in commenting on the parent’s ability to meet the needs of the children without carrying out the necessary evaluations; however in *W v G* the psychologist felt comfortable in stating that she had “no doubt the mother provided good physical care for A, but concerns arose from the mother’s psychological traits which interfered in her parenting.”¹⁷⁵ It is questionable whether the report writer in *TRW v SWR* was reliably able to state that “Ms W suffers either a personality disorder or significant personality traits that are of concern” without carrying out the necessary assessments.¹⁷⁶

¹⁷² At [100] referring to s133 report, 30 Nov 2009, at 4.1.3.

¹⁷³ Garner, above n 83.

¹⁷⁴ See also Practice Note, above n 23, at [8.4] contains the obscure statement ‘If, in the opinion of the report writer, it would be valuable to provide the Court with further information on a parent or guardian, this should be drawn to the attention of the Court. The Court will then decide how to proceed. There is no provision for a report on a parent or guardian under the Care of Children Act 2004.’

¹⁷⁵ *W v G*, above n 79, at [37].

¹⁷⁶ *TRW v SWR* FC Rotorua FAM-2006-063-000406, May 31 2011 at [28].

Lawyers interviewed in Pryor's study noted that it would be useful to have psychologists assess parents as well as children,¹⁷⁷ and the Reference Group for the current review were of the same view in noting:¹⁷⁸

A report under s 133 is only an assessment of the child although contextual issues related to the parties' parenting can be part of the dispute. This restriction on undertaking an assessment of the parents is often disadvantageous to the child as evidence relevant to the welfare and best interests of the child can often only be referred to obliquely and not specifically addressed.

For psychologists to be able to conduct a more thorough assessment of parents they require a clarification from the Court as to the meaning of 'report on the child', or an amendment of s133 to allow for parental assessments as well.

¹⁷⁷ Pryor, above n 71, at 33.

¹⁷⁸ Reference Group "Report to the Ministry of Justice on Family Court Review" April 2012, at [7.11].

PART THREE
WHERE TO FROM HERE?

CHAPTER SIX

DEVELOPING A FRAMEWORK FOR THE USE OF s133 REPORTS

It is disconcerting when a current Family Court Judge expresses the opinion “we are not doing perfect, we are not doing happy, we’re doing ‘It will be all right’”.¹⁷⁹ Specialist assistance is requested in high conflict cases involving vulnerable children; if there are inefficiencies in the use of the report it is the children who ultimately suffer. Although the role of the report is narrow it does not justify an ‘it will be all right’ attitude and it is not a situation that can afford complacency.

There are many possible ways for psychologists to be involved in the Family Court. They could be employed as ‘gate-keepers’ in a tri-age process similar to Australia’s Family Relationship Centres,¹⁸⁰ or as ‘parenting co-ordinators’ similar to some jurisdictions in the United States.¹⁸¹ In Germany a number of family courts employ psychologists as full time in-house experts.¹⁸² However whilst recognising that these options exist, this paper has concentrated on the role of a psychologist as an expert report writer employed by the court in complicated and high conflict cases; this focus will be maintained throughout this chapter.

Keeping a narrow focus has two main advantages. Firstly, because the underlying system of s133 reports is already operative, improvements could transpire quickly; it would require slight amendments to legislation and procedure rather than reform. Large alterations are contingent on government resources, which can delay progress; an illustrative example is the currently enacted but unimplemented Family Court Matters Bill.¹⁸³ On the topic of slow progress in the Family Court former Justice Minister Simon

¹⁷⁹ Pryor, above n 71, at 1, quoting a Family Court Judge interviewed as part of the study.

¹⁸⁰ Psychologists can be employed at Family Relationship Centres which act as the gateway into the family court. Parents are able to access Family Relationship centres to receive advice, deal with relationship difficulties, or be aided in dispute resolution. For more information see: Australian Government “Family Relationship Service Description” < <http://australia.gov.au/service/family-relationship-centres>>.

¹⁸¹ ‘Parenting Co-ordinators’ are employed in some jurisdictions in the United States such as Colorado, Texas, New Hampshire, and North Carolina. The responsibility of the Parenting Coordinator is to assist high conflict parents to implement parenting plans, facilitate resolution of disputes, educate parents about children’s needs and co-parenting techniques, and with approval make recommendations within the scope of the court order; see *Guidelines for Parenting Coordination*, developed by The AFCC Task Force on Parenting Coordination, 2005, Association of Family and Conciliation Courts.

¹⁸² Ministry of Justice, 2011, *Family Justice Review Final Report*, at 122.

¹⁸³ Family Court Matters Bill 2008 (143-2).

Power expressed the view that it is the result of a lack in “any real overarching strategy.”¹⁸⁴ Simon Jefferson countered this statement by claiming that “it is not the lack of an overarching strategy but the lack of political will and financial wherewithal which has been the greatest impediment to addressing the (correctly) perceived inefficiencies”.¹⁸⁵ Whatever the cause may be: lack of political will, economic ability or overarching strategy, change takes time and the power of small developments with specific aims should not be underestimated.

Secondly, retaining a narrow scope on s133 reports will prevent unnecessary costs, delay and the over-analysing of simple issues. The majority of cases that enter the Family Court are resolved after counselling or through mediation and these cases do not require the skills of a psychologist.¹⁸⁶ Confining the use of the report to high conflict cases with complex issues will ensure that the skills of a psychologist are directed to the cases where they are needed most.¹⁸⁷

A framework for the future use of s133 reports

This paper will now turn to address the issues raised in chapter five that are preventing the ‘proper’ use of s133 reports. It is submitted that the following initiatives should be to be implemented to ensure that the reports are being utilised to their full potential.

I. Discussion forums and settlement meetings

Providing a forum for discussion of the report

A ‘discussion forum’ would involve the report writer meeting with the parties in the post-assessment but pre-hearing stage of proceedings. At the meeting the psychologist could discuss the report’s findings, explain the views of the child, and address parent’s misunderstandings. The aim of the forum would be educate parents and provide an

¹⁸⁴ Boshier, above n 3.

¹⁸⁵ Boshier, above n 3.

¹⁸⁶ In 2009/10, 24 percent of Care of Children Act applications finished at or immediately after judicially ordered counselling took place, while 11 percent did so at mediation; only 8 percent required a court-hearing.

¹⁸⁷ High conflict cases are characterised by Maccoby and Mnookin as having “high rates of litigation and re-litigation, high degrees of anger and distrust, incidents of verbal abuse, intermittent physical aggression and on-going difficulty in communicating about and cooperating in the care of their children.

opportunity for parents to question the report in a non-adversarial setting. Under the new Ministry of Justice proposals psychological reports and discussion forums would be most prevalent under the ‘standard track’, as the Ministry has described the standard track as dealing with cases involving “multiple or more serious issues”.¹⁸⁸

The format and style of discussion would have to be flexible to suit the needs of each case.¹⁸⁹ The psychologist could meet with parties individually or separately, with their lawyers or without, and the discussions could take place at the psychologist’s office, at a neutral location, or if circumstances require over the telephone or Skype. It is likely that the psychologist, having already met with the parties, will be in the best position to know what ‘type’ of forum would be most appropriate. However for the purpose of regulating the Family Court system there could be a standard model that could be used unless circumstances require otherwise.¹⁹⁰

The Ministry’s new proposals restrict the use of lawyers to courtroom hearings, leaving parties to be self-represented at the pre-hearing stages in both standard and simple track cases. As discussed in chapter five this will likely affect a parent’s ability to approach the report rationally and will increase the chance of an adversarial response.¹⁹¹ In light of this it is submitted that the discussion forum should be implemented as a prerequisite to a court hearing if a case involves a s133 report.¹⁹² In

Maccoby and Mnookin *Dividing the child: social and legal dilemmas of custody* (Harvard University Press, Cambridge, 1992).

¹⁸⁸ ‘multiple or serious issues’ include for example applications for day-to-day care and permission to take the children to live overseas, these are issues that commonly require a s133 report; see Family Court Review Cabinet Paper, above n 4, at 22. See also the diagram of the three track system attached in appendix.

¹⁸⁹ Literature in the area of high conflict disputes suggests that high conflict cases require individualised services to meet the specific needs of the parents and children involved; see S Finman and others “Innovations in Family Court Dispute Resolution” (paper presented at the Association of Family & Conciliation Courts 43rd Annual Conference, Tampa Florida, May 31 – June 3, 2006); see also J McIntosh, and H Deacon-Wood “Group Interventions for Separated Parents in Entrenched Conflict: An Exploration of Evidence-Based Frameworks” (2003) 9(2) *Journal of Family Studies* 187, at 187 – 189.

¹⁹⁰ One aim of the review was to simplify and clarify court processes; see Ministry of Justice “Family Court Review” (2012) www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1. One option for a ‘standard model’ could be for example, the two parties meeting separately without lawyers at the psychologist’s office for a half hour discussion.

¹⁹¹ As discussed in chapter five the lawyer currently performs an important role in explaining the report, discussing its findings, and acting as a reality-tester.

¹⁹² Currently the Ministry is proposing two pre-requisites that parties have to complete before making an application to the court: Parenting Through Separation Programme and Family Dispute Resolution. See diagram of proposed system in appendix.

such a case the psychologist should be the first person to read and discuss the report with the parties, as this would prevent snap judgements.

Although discussion forums should be a prerequisite to hearings they cannot be mandatory in all cases. Three exceptions would need to be recognised: firstly, a discussion forum should not take place if it would unduly prolong or delay a case as this is not in the best interests of the child;¹⁹³ secondly, discussions should not take place if they are likely to put the child or another party at risk of harm;¹⁹⁴ and finally, there will be instances when a discussion forum will be impractical or ineffective, such as when one party is overly aggressive, hostile, or is unlikely to be receptive to a discussion. In such cases there needs to be a way for the report writer to alert the court to these facts and have a judge determine how to proceed.

Furthermore, it is unlikely that the discussions could be afforded privilege as the psychologist is still the Court's expert and if the case proceeds to a hearing they will need to testify. It would be artificial to suggest that a psychologist could keep the information obtained from the assessment separate to the information obtained through discussion. Likewise, the forum would need to be restricted to a discussion of the report and its findings. The report writer could not attempt to facilitate agreement as it might compromise their perceived independence at the hearing. The 2003 Review acknowledged that psychologists have the experience and expertise to be employed as facilitators but that this would have to be "in a role quite separate from their report writing function."¹⁹⁵

¹⁹³ It is a consideration under s4 COCA that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time: see Care of Children Act, S4(5)(a).

¹⁹⁴ Care of Children Act, s134 provides the Court with the authority to restrict a self-represented party's access to a report if they are satisfied that the information contained within the report would, if provided to the party, place the child or another at risk.

¹⁹⁵ Law Commission, above n 18, at [758]. Note also the practice in Alberta Canadian where the psychologist can be employed as a parenting expert to facilitate agreement under a 'Parenting Conflict Intervention', or alternatively can be employed to conduct 'Bi-lateral Custody Assessments' for the court; note however Court of Queen's Bench of Alberta "Family Law Practice Note 7: Use of Independent Parenting Experts" (effective 31 March 2001, amended July 2006) at [10] where it provides 'this Practice Note expressly recognizes that Parenting Experts are not permitted by their colleges to engage in the dual roles of Assessment and Intervention with the same person or family.'

Implementing the discussion forums

The most effective way to establish a forum for discussion would be to provide for it in the COCA by amending s133 to include a 133(5) and (6) as follows:

(5) The court must allow for a forum for discussion of the report between the report writer and the parties to a proceeding

(6) Subsection (5) does not apply if –

(a) The court considers that the delay that would be caused by the provision of a forum would or might entail serious injury or undue hardship to the child;¹⁹⁶ or

(b) The provision of a forum would otherwise not be in the best interests of the child.¹⁹⁷

To discharge the s133(5) statutory duty a clause could be added to every report writer's brief that reads: 'the report writer is instructed to meet with the parties to discuss the report once it is distributed'.¹⁹⁸ The Ministry's proposals recommend the introduction of a 'standard specialists brief' to be used in all cases where a s133 report is requested.¹⁹⁹ It is submitted that a discussion clause should be included in any standard brief that is created.

The clause in the standard brief could be supplemented by supporting measures. To ensure that the discussions are driven by conciliatory goals the report writer could be given a duty to promote conciliation. Under s19 Family Proceedings Act 1980 the Court has a duty to promote reconciliation and conciliation and under ss8 and 12 legal advisors and counsellors have the same duty; it would take the slightest effort to extend this duty to report writers.²⁰⁰ Another auxiliary measure would be to extend the Practice Note for Specialist Report Writers to cover report discussions and provide

¹⁹⁶ This wording is similar to that already used by the legislator in Care of Children Act, s32(3).

¹⁹⁷ This statutory exception would cover the situation where the report writer does not believe that a discussion would be effective or practical.

¹⁹⁸ This would place the duty on the report writer, who having met with the parties is likely to be in the best position to fulfil the duty.

¹⁹⁹ Family Court Review Cabinet Paper, above n 4, at [191.81.1].

²⁰⁰ Note that this is in fact the opposite to what the Ministry is currently recommending; In the Family Court Review Cabinet Paper, above n 4, at [191.3] it is recommended that the committee 'agree to repeal the obligations in the Family Proceedings Act 1980 on the Court, lawyers and counsellors to promote reconciliation or conciliation'.

guidelines on the process. Section 8A could be inserted into the Practice Note and it could read:²⁰¹

8.A Discussion Forums

8.A.1 Report writers have a responsibility under s133(5) Care of Children Act 2004 to meet with the parties on distribution of the report to discuss the report's findings.

8.A.2 Discussion forums are usually expected to take place at the report writer's office, however the approach to the discussion is flexible.

8.A.3 The objectives of the discussion forum may include: explaining the report's findings and methodology, addressing parties' misunderstandings, and explaining the views of the child.

8.A.4 The report writer must refrain from stepping into a facilitating role and limit discussion to the report and the assessment process.

8.A.5 The communication at the discussion is not privileged.

8.A.6 If throughout the process of interviewing and writing the report the report writer is of the opinion that the parties will not benefit from a discussion of the report, the report writer is to inform the Court in writing.

Attending settlement meetings and mediation conferences

It is uncommon for report writers to attend mediation or settlement conferences even though the Practice Note allows for it with the judge's approval.²⁰² There are a number of reasons why it would be beneficial for this practice to become routine. Similar to points made above it would provide an opportunity for the report writer to explain the findings and discuss ambiguities, and it would allow the parties to challenge the report in a non-adversarial setting. Furthermore, having the report writer present at the meeting may increase the weight/prominence given to the report as parties would be

²⁰¹ Section 8A would follow the current s8 which outlines the guidelines on the report and assessment process.

²⁰² Practice Note, above n 23, at [7.5] "the report writer will not attend a mediation conference or a family group conference without the written approval of a Judge"; note also Law Commission, above n 18, at [756]: "Because the report writer has expertise as well as knowledge of the family, his or her input in discussions can be valuable in bringing about a settlement. To this end, report writers have sometimes been invited to a mediation conference with the judge, to give advice on arrangements that would be in

able to ask questions and pose ideas and have them answered immediately. It may also ensure that mediation is aimed at achieving an outcome that is in the best interests of the child rather than just aimed at settling, as the report is essentially written about what outcome is in the child's best interests.²⁰³

The main issue with report writers attending mediation is that it is a privileged setting; the communication that takes place is not able to be used at court. However this is not an insurmountable issue for the report writer could attend the mediation for just one session while the parties discuss the report and its findings, or the report writer could be present at the mediation but in a separate room and available to answer questions when needed.

The issue of costs

The 2011 Review openly concentrated on the issue of sustainability due to a 62% increase in court expenditure that has occurred in recent years.²⁰⁴ With this focus it is clear that any new initiatives would need to undergo a cost-benefit analysis before being implemented. Whilst such an analysis cannot be conducted in this paper, justifications for the new initiatives could include the following:

- i. The cost of specialist reports is already substantially less than the cost of other Court services; in 2004/05 specialist reports cost \$3,163 compared to \$13,362 for counsel for child and \$6,277 for counselling.²⁰⁵
- ii. The Reference Group's Report stated that: "Given the increasing complexity of cases it is the view of the Reference Group that the current annual cost of specialist

the child's best interests. Such input might also be valuable in a round-table meeting organised by, for instance, counsel for the child".

²⁰³ Note that the current proposals recommend removing Alternative Dispute Resolution such as mediation from the Family Court system and require parties to complete Family Dispute Resolution prior to attending court. If this recommendation is enacted then it would limit the possibility of report writers attending mediations as s133 reports are unlikely to have been requested at the mediation stage. See diagram of proposed system attached in appendix.

²⁰⁴ This figure takes account of direct Court operating expenditure such as staff salaries, professional services costs typically incurred by counsellors, lawyers and specialist report writers, family legal aid expenses, and judicial costs such as judge's salaries and allowances. See: Ministry of Justice "Family Court Review a Summary: sustainability and delay" (September 2011) www.justice.govt.nz/publications/global-publications/f/family-court-review-summary/sustainability-and-delay. However note also the comment from the Reference Group that it is uncertain as to what role the cost of specialist reports has had in this increase as there are no statistics on the average cost of reports prior to 2005 and it is difficult to make a comparison; Reference Group, above n 178, at [7.7].

reports is not excessive when taking into account the number of applications before the Court.”²⁰⁶

- iii. The major cost of the specialist report is in the assessment and reporting stages; it takes 6-8 weeks to prepare a report, around 30 hours.²⁰⁷ As the bulk of the cost is spent on this process it makes sense to spend a little more to ensure that the report is utilised properly.
- iv. Attempts to cut costs by reducing the number of lawyers, lawyers for child and specialist reports may produce impractical or unworkable parenting orders. This is likely to result in re-litigation which often involves an updated report; in 2008 a total of 1086 s133 reports were requested, of which 384 required updating.²⁰⁸ Evidently reducing costs the ‘first time’ may just lead to increased costs in the future.

II. Conducting assessments on parents or re-framing s133

An issue raised in chapter five was the mixed-message being given to psychologists about reporting on the mental state of parents.²⁰⁹ Although the legislation requires the report to be “on the child,” the Court has held that it is proper for the psychologist to report on any matters that may impact on the welfare of the child including the mental state of the parents.²¹⁰ There are two ways that this issue could be clarified:

- a. Allow the judge to request a ‘report on the parent’ under the COCA; or
- b. Re-frame the s133 report as ‘a report on the family’.

Allowing separate evaluations of parents under the COCA

The Reference Group for the review recommended that a new section be enacted under the COCA to allow for reports to be requested on parents.²¹¹ Similar to the courts ability under s178 CYPF Act the new section could provide:

²⁰⁵ Family Court Statistics, see above n 17, at [3.1].

²⁰⁶ Reference Group, above n 178, at [7.8]. See also Ministry of Justice, above n 204: In 2009/2010 the Family Court dealt with approximately 66,976 applications to the court.

²⁰⁷ See Practice Note, above n 23, at [8.1]; and Garner, above n 83.

²⁰⁸ Von Dadelszen, above n 21.

²⁰⁹ See chapter five.

²¹⁰ *Brown v Brown*, above n 169.

²¹¹ Reference Group, above n 178, at [7.12].

If, at any stage of any proceedings it appears to the court to be expedient that a medical, psychiatric, or psychological report should be available to the court in respect of any parent, the court may if it thinks fit, order the parent to attend for a medical, psychiatric, or psychological examination.

The new provision would need to be subject to the same qualification as s133: that reports are only to be requested when ‘necessary’. This would limit psychological assessments on parents to circumstances in which the mental health of the parent is impacting the child’s wellbeing. Furthermore, the assessment and report would have to be conditional on the parent’s consent.²¹²

However an intervening issue is that requesting a psychological assessment of a parent is relatively invasive and parents may feel coerced to undergo an examination if it is requested by a judge. Furthermore a full psychological assessment of a parent will usually provide a great deal of information that is superfluous to a case under the COCA. The only kind of information that is relevant is that which may help parents in answering the question ‘what outcome is in the best interests of the child?’ While a full psychological assessment on a parent may contain a diagnosis of a psychiatric illness or personality disorder, such information is unhelpful if it does not explain how the disorder affects the person’s interaction or relationship with their child. Therefore an assessment ‘on a parent’, whilst detailed, is unlikely to help answer this ultimate question.²¹³

Re-framing the s133 report as ‘report on the family’

Given the above conclusion a more useful alternative would be to clarify the s133 report as being a report ‘on the family’ rather than ‘on the child’. No detailed explanation is required as to what producing a ‘report on the family’ would entail as it is essentially what psychologists are already asked to do. Psychologists meet with all members of the family as well as third parties; they observe interactions between parents and children and comment on these relationships; they ascertain both the parents’ and children’s

²¹² This is the same condition as in Children Young Persons and their Families Act, s178.

²¹³ Note however that in a case where a parent has already been diagnosed with a psychiatric illness or personality disorder a report may already exist in the Department of Corrections, Department of Health, or the Department of Child Youth and Family. A lawyer interviewed by Pryor suggested that money could be saved by information sharing between the departments; see Pryor above n 71, at 33.

views; and they take account of any relevant family history.²¹⁴ Psychologists answer questions such as: how does a parent bond with a child? How do they relate to the child and interact with them? What are the child's needs and what is the ability of parents to meet those needs?²¹⁵ The s133 report is clearly already an assessment of the family focused around the wellbeing and needs of the children.

In light of this it is submitted that New Zealand should adopt the terminology of 'Family Report' used by Australia in the Family Law Rules 2004 and Family Law Act 1975.²¹⁶ Section 62G(2) Family Law Act 1975 provides that the court "may direct a family consultant to give the court a report on such matters relevant to the proceedings as the court thinks desirable." There is no limitation to report on the 'child' or the 'parent'.²¹⁷ This is significant because no s133 report can ever focus solely on a child or on a parent; as discussed above it is the *interactions* and *relationships* between parents and children that are important.

Clarifying the report in this way would validate a report writer's focus on parenting capabilities and other matters that may have an impact on the child. When implementing the change emphasis could be placed on s4(3) COCA as an overriding guide for both the brief and the report, with "a parent's conduct [being] considered only to the extent (if any) that it is relevant to the child's welfare and best interests." This would mean that psychological disorders and unconventional parenting styles could only be discussed in a report if they affect a child's wellbeing;²¹⁸ a person may well be an effective parent despite having psychological issues or an alternative lifestyle.

Framing the report in this way would also justify a report writer focusing on third parties such as step parents, aunts and uncles, or grandparents. For example in *Tanner v Edghill* the child 'B' had relationships with his mother, his biological father, and 'Mr E'

²¹⁴ See discussion in chapter five.

²¹⁵ See chapter five for cases where the report writers were asked to comment on such questions.

²¹⁶ Family Law Rules, reg 15.04; Family Law Act 1975, s62G(2).

²¹⁷ Note however that there are some differences between the Australian Family Report and s133 reports: the Australian Family Report is conducted by the Family Consultant which could be a psychologist or a social worker, and the Australian report is also not as thorough as the s133 report as it only involves interviews, whereas the s133 report conducts a wider variety of assessments.

²¹⁸ This already occurs. See for example *TLW v LCB*, above n 87, at [61], where the report writer noted that while there was evidence of drug and alcohol use by the father, "Lifestyle issues did not stand out as problematic for the children unless there were risk factors established by the court process."

who at an earlier period was thought to be the child's father.²¹⁹ The psychologist stated that:²²⁰

B's best interests require continuation of co-parenting by the three adults to whom he is attached...it is not in B's interests for Mr E to be removed from his life...Mr E had shown a consistent capacity to focus on B's best interests and welfare.

In order to reach this conclusion it was necessary for the psychologist to assess the relationship between B and Mr E.

III. Encouraging psychologists to make suggestions and provide an opinion on the ultimate issue

Chapter five highlighted how a report writer's suggestions can provide a framework for discussions at settlement.²²¹ However because the New Zealand judiciary has emphatically prohibited any 'recommendations on the ultimate issue' it is currently unclear as to what opinions psychologists can give in relation to the child's residency and contact arrangements.

This uncertainty is complicated by the fact that other jurisdictions have used the term recommendation interchangeably with 'opinion' or 'suggestion'.²²² The Australian Family Court has widely accepted and recognised that Family Consultants are to make 'recommendations' in Family Reports.²²³ In *Akston & Boyle* the Family Report included

²¹⁹ *Tanner v Edghill* above n 109, at [44] "Ms Trenberth [the report writer] was clear from her observations of B that he enjoyed an openly affectionate relationship with all three adults (he referred to Ms T, Mr M, and Mr E respectively as "my mum", "my dad", and "my daddy")"

²²⁰ At [11].

²²¹ See chapter five, at 47.

²²² In a fact sheet on 'Family Reports' provided by Queensland Legal Aid it is stated that 'a family report may include recommendations to the court about: parental responsibilities and where the child should live and who the child should time with', Legal Aid Queensland "is a family report being prepared for your family law matter" (July 2011) www.legalaid.qld.gov.au/PUBLICATIONS/FACTSHEETS-AND-GUIDES/FACTSHEETS/Pages/Family-report.aspx . See also Alberta, Canada Queen's Bench Family Practice Note 7 at [21] where it states that the intervention can include recommendations to the court.

²²³ Recommendations from the Family Consultant often provide a foundation for parenting plans; see Federal Magistrates Court of Australia "Family Reports" (November 2008) <www.fmc.gov.au/pubs/html/family_reports.html> where it states that "It is possible (and not uncommon) for matters to settle based on what is contained in the Report.

the recommendations such as “the father and mother should have shared parental responsibility” and “the child should remain living with his mother” but that “the court may consider increasing contact with the father to one night in the second week.”²²⁴ The Judge in *Akston & Boyle* was criticised for not taking these recommendations into account.²²⁵

It is suggested that New Zealand adopt a similar attitude to that held by the Australian Family Court. This should start with a clarification from the judiciary that ‘recommendation on the ultimate issue’ denotes an ‘instruction or direction to the Court’ and does not prevent a psychologist from offering their expert opinion on the ultimate issue.²²⁶ In order to encourage psychologists to make suggestions that could assist in settlement, a specific clause could be added to the proposed ‘standard brief’ that reads:

The psychologist is to use the conclusions in the report to provide an expert opinion on what residency and contact arrangements would be in the best interest of the child. Reasons for the opinion are to be highlighted within the report itself.

This would encourage psychologists to give their suggestion on care and contact arrangements when it is within their area of expertise to do so.²²⁷

It is not submitted that psychologists could reliably offer accurate suggestions in all cases. For example in international relocation cases such as *GMS v SCS* a psychologist could not tell the court that ‘the child should be allowed to move to England,’ as there are too many other factors that would impact this decision and it is not the role of the

²²⁴ *Akston & Boyle* [2010] FamCAFC 56, at [83].

²²⁵ Failure to give appropriate consideration to the Family Consultant’s recommendations may provide grounds for appeal as was the case in *Akston & Boyle* at [262] O’Ryan J stated “In my view, the Federal Magistrate failed to give any or any adequate reasons as to why this important evidence of the Family Consultant was ignored... the Federal Magistrate failed to explain why, in the circumstances of this case, no weight would be given to what the Family Consultant said.”

²²⁶ See discussion in chapter five.

²²⁷ Psychologists would need to support their suggestions both with observational material and empirical data; see for example Joan Kelly and Robert Emery, above n 85, at 352-362, where they note that there are psychological studies “that delineate situations in which joint custody and care is problematic or contraindicated”; they go on to give examples i.e. “Shared parenting time schedules and joint custody are not suitable for volatile, hostile, and antagonistic parents. Children are harmed by repeated exposure to parental enmity, that occurs often in shared custody arrangements with chronically discordant parents.

psychologist to weigh up the competing considerations.²²⁸ However it is within a psychologist's expertise to give opinions such as that given in *F v L* "that Mr F should seek to visit [the children] in a location close to their home for a weekend every month to six weeks, and for overnight contact of one or two nights for about three months."²²⁹ Practical suggestions such as this are going to be the most helpful to parties at settlement.²³⁰

Children under age ten are particularly vulnerable because they have not yet developed the internal coping skills or external support systems that would help them navigate family conflict."

²²⁸ In *GMS v SCS*, above n 84, the mother wanted to relocate to England with two boys. The case came before the court five times; initially the Family Court granted day-to-day care to the mother enabling her to leave, but a subsequent High Court case declined the application to relocate.

²²⁹ *F v L* above n 166, at [6].

²³⁰ Practical suggestions from psychologists can be relied upon to create parenting agreements and parenting plans so long as they are supported by observational findings and empirical data. An example of such empirical evidence is "To maintain high-quality relationships with their children, parents need to have sufficiently extensive and regular interaction with them, but the amount of time involved is usually less important than the quality of the interaction that it fosters. Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines-including bedtime and waking rituals, transitions to and from school, extra-curricular and recreational activities-are likely to keep non-residential parents playing psychologically important and central roles in the lives of their children;" M E Lamb, K I Stemberg, and R A Thompson, "The effects of divorce and custody arrangements on children's behaviour, development, and adjustment" (1997) 35 *Conciliation Courts Review* 393, at 400. See also Michael E Lamb and Joan B Kelly, "Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children, a Rejoinder to Solomon and Biringen" (2001) 39 *Family Court Review* 365, at 365, where psychologists are encouraged to refer to findings across multiple studies and integrative scholarly reviews rather than individual studies.

CONCLUSION

In 1901 Judge Learned Hand posited the notion that “no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how to do it best.”²³¹ Today, 110 years since it was first advanced by Judge Hand, the question of ‘how to do it best’ has been the motivation behind this paper’s examination of psychological reports in the Family Court. Two assertions have formed the foundation of this paper: that the principal role of the s133 report is as an educative tool for parents, and that currently the report is not being utilised for this purpose.²³²

Section 133 COCA was legislated as a mechanism to help parents resolve disputes out of court, and the psychological report can assist this goal in a number of ways: by educating parents about their child’s developmental and psychological needs, explaining the child’s views, commenting on parenting abilities and acting as a reality-check for untenable positions.²³³ Unfortunately the judiciary’s treatment of the report as expert evidence for court and the structure of the Family Court are obstructing this educative function.²³⁴

The principal hindrance of the report is the frequent misunderstanding or rejection of the report’s findings. This issue stems from the lack of discussion between report writers and parties in the post-assessment period, as it leaves parents’ questions and misunderstandings unaddressed. This gives rise to the second hindrance to the reports educative function: adversarial reactions. These two issues are likely to be exacerbated by the removal of lawyers from the pre-hearing stages of trial.²³⁵

A third issue lies in the inability of psychologists to conduct assessments ‘on parents’, as this prevents them from being able to comprehensively report on the interactions and relationships between parents and children. Finally, the ambiguity surrounding

²³¹ Learned Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harv L Rev 40, at 40.

²³² See chapters two and three.

²³³ See chapter one for legislative interpretation of s133 COCA, and see chapter four for discussion of what information and assistance the report can give to parties.

²³⁴ See chapters two and three.

²³⁵ See chapter five.

'recommendations' creates an uncertainty as to whether psychologists can say "this is the sort of thing that needs to happen so that orders you make will actually work."²³⁶

After recognising these limitations, this paper concluded with a model for the future use of s133 reports. A number of initiatives were recommended: the introduction of discussion forums; having psychologists attend settlement meetings; reframing the s133 report as 'a report on the family'; and encouraging psychologists to make suggestions on care and contact arrangements. It is submitted that with these measures s133 reports can be utilised as they were originally intended: to help cases settle in the 'proper' way.²³⁷

With the array of familial, social and cultural issues present in care and contact cases today, no one, not the psychologist, not even the judge, can purport to have the Wisdom of Solomon. However this does not negate the educative value of the s133 report, or its ability to help parties reach an agreement in the best interests of the child.²³⁸ With the Ministry of Justice's Family Court reforms fast approaching, there has never been a more appropriate time to re-examine our use of s133 reports, answer the question 'how to do it best,' and ensure that parents are being assisted in every way possible when making these 'solomonic decisions'.

²³⁶Pryor, above n 71, at 32. See chapter five at, for more detail.

²³⁷ See chapter six.

²³⁸ See Mallon, above n 40, at 357.

Appendix One

Selected Legislation

Selected New Zealand Legislation

Care of Children Act 2004

133 Reports from other persons

(1) This section applies to the following applications:

- (a) an application for guardianship;
- (b) an application for a parenting order (other than an application for an interim order about the role of providing day-to-day care for a child);
- (c) an application under section 105(1).

(2) If satisfied that it is necessary for the proper disposition of an application, the court may –

- (a) request a person whom the court considers qualified for the purpose to prepare a written cultural, medical, psychiatric, or psychological report on the child who is the subject of the application; or
- (b) direct the Registrar of the court to request a person whom the Registrar considers qualified for the purpose to prepare a written cultural, medical, psychiatric, or psychological report on the child who is the subject of the application.

(3) A cultural report on the child who is the subject of the application may address any aspect or aspects of that child's cultural background (for example, that child's religious denomination and practice).

(4) In deciding whether to request a report or to direct the Registrar of the court to request a report, the court must, if the wishes of the parties are known to the court or can be speedily ascertained, have regard to those wishes.

134 Distribution, etc, of reports under sections 132 and 133

(1) The Registrar of the court must copy a report under section 132 or section 133 (the *report*)

- (a) to the lawyer acting for each party to the proceedings or, subject to subsection (3), if a party has no lawyer acting for that party, to that party; and
- (b) to a lawyer appointed to act for a child who is the subject of the proceedings.

- (2) If the court orders a lawyer referred to in subsection (1)(a) not to give or show the report to the person for whom the lawyer is acting, the lawyer must comply with the order.
- (3) If a party has no lawyer acting for that party and the court is satisfied that information in the report would, if provided directly to that party, place the child concerned or another person at risk of physical abuse, sexual abuse, or psychological abuse, the court may—
 - (a) order that the report not be copied to that party under subsection (1)(a); and
 - (b) appoint counsel to assist the court under section 130(1) for the purpose of explaining the contents of the report to that party.
- (4) Before the report is copied to a lawyer under subsection (1)(b), the court must consider whether the report may be given or shown to the child for whom the lawyer is acting.
- (5) A lawyer referred to in subsection (1)(b) may give or show the report to the child for whom the lawyer is acting only if the court so orders, but in every case the lawyer must explain to the child the purpose and contents of the report, unless the lawyer considers that to do so would be contrary to the welfare and best interests of the child.
- (6) A party to the proceedings, or a lawyer appointed to act for a child who is the subject of the proceedings, may present evidence on any matter referred to in the report.
- (7) The court may, if it thinks fit, call as a witness the person who made or prepared the report.

135 Costs of reports under section 133

- (1) Fees for reports prepared under a request under section 133(2), and reasonable expenses incurred, -
 - (a) may be determined in accordance with regulations made under section 147(2)(d); and
 - (b) are payable by any party or parties to the proceedings the court orders or, if the court so decides, are payable out of public money appropriated by Parliament for the purpose.
- (2) An amount of any fees and expenses ordered to be paid by a party under subsection (1)(b) is, if paid by the Crown, a debt due to the Crown by that party and, in default of payment of the amount, payment of the amount may be enforced, by order of a District Court or the High Court as the case may require, in the same manner as a judgment of that court.

Guardianship Act 1986 (repealed)

29A Reports from other persons

- (1) On any application for guardianship or custody (other than interim custody) or access, the Court may, if it is satisfied that it is necessary for the proper disposition of the application, request any person whom it considers qualified to do so to prepare a medical, psychiatric, or psychological report on the child who is the subject of the application.

- (2) In deciding whether or not to request a report under subsection (1) of this section, the Court shall, if the wishes of the parties are known to the Court or can be speedily ascertained, have regard to those wishes.
- (3) A copy of the report shall be given by the Registrar of the Court -
 - (a) To the barrister or solicitor appearing for each party to the proceedings or, if any party is not represented by a barrister or solicitor, to that party; and
 - (b) To any barrister or solicitor appointed to represent a child who is the subject of the proceedings.
- (4) A report given to a barrister or solicitor under subsection (3)(a) of this section shall not be given or shown to the person for whom the barrister or solicitor is acting if the Court so orders.
- (5) A report given to a barrister or solicitor under subsection (3)(b) of this section shall be given or shown to the child for whom the barrister or solicitor is acting only if the Court so orders.
- (6) Where any person prepares a report pursuant to a request under subsection (1) of this section, the fees and expenses of that person shall be paid by such party or parties to the proceedings as the Court shall order or, if the Court so decides, shall be paid out of money appropriated by Parliament for the purpose.
- (7) Any party to the proceedings or any barrister or solicitor appointed to represent a child who is the subject of the proceedings may tender evidence on any matter referred to in any such report.
- (8) The Court may if it thinks fit call the person making the report as a witness.

Children Young Persons and Their Families Act 1989

178 Medical, psychiatric, and psychological reports

- (1) If, at any stage of any proceedings under Part 2 or Part 3A, it appears to the court to be expedient that a medical, psychiatric, or psychological report should be available to the court in respect of any child or young person to whom the proceedings relate, the court may, on application by any party to the proceedings or the barrister or solicitor representing the child or young person, or of its own motion, if it thinks fit,
 - (a) order the child or young person to attend for a medical, psychiatric, or psychological examination; or
 - (b) where the child or young person is, or is to be, held in the custody of the chief executive or detained in any residence, order that the child or young person undergo a medical, psychiatric, or psychological examination at the place at which the child or young person is, or is to be, detained.

- (2) Subject to subsection (3) if, at any stage of any proceedings under Part 2 or Part 3A, it appears to the court to be expedient that a medical, psychiatric, or psychological report should be available to the court in respect of any parent or guardian or other person having the care of any child or young person to whom the proceedings relate or any person who it is proposed should have the care of the child or young person, the court may, on application by any party to the proceedings, or of its own motion, if it thinks fit, order the parent or guardian or other person having the care of the child or young person, or other person, to attend for a medical, psychiatric, or psychological examination.
- (3) The court shall not make an order under subsection (2) requiring any person to undergo any medical, psychiatric, or psychological examination unless that person consents to the making of that order.
- (4) Subject to the right of the person who refuses to consent to the order to explain the reasons for that person's refusal, and to cross-examine witnesses and call evidence, the court may draw such inferences (if any) from the fact of the refusal as appear to it to be proper in the circumstances.

Selected Australian legislation

Family Law Rules 2004

REG 15.45 Order for single expert witness

- (1) The court may, on application or on its own initiative, order that expert evidence be given by a single expert witness.
- (2) When considering whether to make an order under subrule (1), the court may take into account factors relevant to making the order, including:
 - (a) the main purpose of these Rules (see rule 1.04) and the purpose of this Part (see rule 15.42);
 - (b) whether expert evidence on a particular issue is necessary;
 - (c) the nature of the issue in dispute;
 - (d) whether the issue falls within a substantially established area of knowledge; and
 - (e) whether it is necessary for the court to have a range of opinion. \
- (3) The court may appoint a person as a single expert witness only if the person consents to the appointment.
- (4) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

REG 15.46 Orders the court may make

The court may, in relation to the appointment of, instruction of, or conduct of a case involving, a single expert witness make an order, including an order:

- (a) requiring the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness;
- (b) that, if the parties cannot agree on who should be the single expert witness, the parties give the court a list stating:
 - (i) the names of people who are experts on the relevant issue and have consented to being appointed as an expert witness; and
 - (ii) the fee each expert will accept for preparing a report and attending court to give evidence;
- (c) appointing a single expert witness from the list prepared by the parties or in some other way;
- (d) determining any issue in dispute between the parties to ensure that clear instructions are given to the expert;
- (e) that the parties:
 - (i) confer for the purpose of preparing an agreed letter of instructions to the expert; and
 - (ii) submit a draft letter of instructions for settling by the court;
- (f) settling the instructions to be given to the expert;
- (g) authorising and giving instructions about any inspection, test or experiment to be carried out for the purposes of the report; or
- (h) that a report not be released to a person or that access to the report be restricted.

Family Law Act 1975

62G Reports by family consultants

- (1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.
- (2) The court may direct a family consultant to give the court a report on such matters relevant to the proceedings as the court thinks desirable.
- (3) If the court makes a direction under subsection (2), it may, if it thinks it necessary, adjourn the proceedings until the report has been given to the court.

(3A) A family consultant who is directed to give the court a report on a matter under subsection (2) must:

- (a) ascertain the views of the child in relation to that matter; and
- (b) include the views of the child on that matter in the report.

Note: A person cannot require a child to express his or her views in relation to any matter (see section 60CE).

(3B) Subsection (3A) does not apply if complying with that subsection would be inappropriate because of

- (a) the child's age or maturity; or
- (b) some other special circumstance.

(4) The family consultant may include in the report, in addition to the matters required to be included in it, any other matters that relate to the care, welfare or development of the child.

(5) For the purposes of the preparation of the report, the court may make any other orders, or give any other directions, that the court considers appropriate (including orders or directions that one or more parties to the proceedings attend, or arrange for the child to attend, an appointment or a series of appointments with a family consultant).

Note: Before making orders under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).

(6) If:

- (a) a person fails to comply with an order or direction under subsection (5); or
- (b) a child fails to attend an appointment with a family consultant as arranged in compliance with an order or direction under subsection (5);

the family consultant must report the failure to the court.

(7) On receiving a report under subsection (6), the court may give such further directions in relation to the preparation of the report as it considers appropriate.

(8) A report given to the court pursuant to a direction under subsection (2) may be received in evidence in any proceedings under this Act.

Appendix Two

Practice Note for Specialist Report Writers

1. BACKGROUND

- 1.1 The terms of this Practice Note have been settled in consultation with the Ministry of Justice, the Family Law Section of the New Zealand Law Society, the New Zealand Psychologists Board (“the Board”), the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists. It sets out the requirements and recommended procedures agreed for the appointment of specialist report writers to the Family Court.

2. CONTENTS

This Practice Note covers the following matters:

- legislative provisions;
- process for appointment;
- case management;
- reports;
- access to notes;
- content of referral;
- process for selection;
- criteria for selection;
- review of the list;
- administration of the list;
- complaints; and
- removal from the list.

3. INTRODUCTION

- 3.1 This Practice Note replaces all previous Practice Notes pertaining to specialist report writers.

- 3.2 The Practice Note will take effect from 1 June 2006.

4. TERMS AND DEFINITIONS

- 4.1 In this Practice Note:

- the term “specialist report writer” means any person (other than a cultural report writer) from whom a psychological report has been requested under section 133 of the Care of Children Act 2004 or under section 178 of the Children, Young Persons and Their Families Act 1989 (CYPF Act).
- references to “report writers”, unless otherwise stated, refer to specialist report writers. “Report” has a corresponding meaning.
- references to “(the) lawyer” unless otherwise stated mean a barrister and/or solicitor appointed by the Court for any child/young person.
- references to “counsel to assist”, unless otherwise stated, mean a barrister and/or solicitor appointed to assist the Court.

- the term “child” includes both “child” and “young person” as defined in the CYPF Act.

5. LEGISLATIVE PROVISIONS

- 5.1 Section 133 of the Care of Children Act provides for the Court to appoint a person to prepare a cultural, medical, psychiatric, or psychological report on a child who is the subject of any of the following applications: guardianship, parenting order (other than an application for an interim order), return of a child abducted to New Zealand.
- 5.2 Section 178 of the CYPF Act provides for the Court to appoint a person to prepare a medical, psychiatric or psychological report on a child who is the subject of care and protection proceedings and in respect of any parent, guardian or caregiver to which the proceedings relate. An order for a report on a parent, guardian or caregiver must be with their consent.
- 5.3 Any psychologist accepting an appointment under section 178 of the CYPF Act is bound by provisions of the Act. Particular reference is made to the requirements of section 179(4) as follows:

(4) Every child or young person who is examined under section 178(1) of Act is, where practicable, entitled to have present during that examination one adult –

- (a) Who is nominated for that purpose by that child or young person or, if the age or level of maturity of the child makes it impracticable for him or her to make such a nomination, by a Social Worker; and*
- (b) Who consents to be present.*

PROCESS FOR APPOINTMENT

- 5.4 Appointments must be made by the Court. The Judge is responsible for settling the brief for the report writer. This will usually be done in consultation with the lawyer for the child and the parties’ solicitors. The lawyer for the child will consult with any party to the proceedings who is unrepresented.
- 5.5 In allocating the brief to a report writer, the Court will consider the following factors:
- the match of skills to the case requirements;
 - the availability of the report writer;
 - the current workload of the report writer; and
 - the equitable distribution of work among report writers on the list of report writers referred to in paragraph 11 below.
- 5.6 Once the Court has settled the brief for the report writer, the Registrar will negotiate and approve the hourly rate of payment and an estimate of time and cost for undertaking the brief with the report writer. This will include any payment of any disbursements.
- 5.7 Extensions to the initial allocation of hours:

Where, during the course of the work, it becomes clear that the initial allocation of hours is insufficient for the report writer to meet the requirements of the brief satisfactorily, the report writer must seek an extension to the initial allocation of hours from the Registrar before commencing the additional work.

5.8 Extensions to the brief:

Where, during the course of the work, the report writer considers that an extension or variation to the content of the brief is required, the matter must be referred to the Court in writing for approval by the Judge before the extension or variation is commenced.

5.9 A bill of costs should be rendered with the report and should be calculated in accordance with the agreed hourly rate of remuneration.

5.10 Where a case is to proceed to a hearing, the Registrar and the report writer will settle a basis for payment for preparation and appearance at hearings. Prior to the hearing, the report writer will be advised of the time when he/she is required to be present at Court in anticipation of being called to give evidence.

CASE MANAGEMENT

5.11 In most cases, an appointment under section 133 of the Care of Children Act will be made following counselling and a mediation conference, or following the filing of an urgent application resulting from a perceived serious welfare issue.

5.12 An appointment under section 178 of the CYPF Act will usually be made after the family group conference has been held. Reports that are required for family group conferences are the responsibility of the Department of Child, Youth and Family Services. Section 178 reports are reports to the Court and will require the Courts permission for release and use for any purpose, including at a Family Group Conference.

5.13 On receipt of the engagement letter, the report writer will forward written acceptance of the referral to the Family Court Co-ordinator.

5.14 A letter advising of the appointment of the report writer under section 133 or section 178 will be sent to the parties, the parties' lawyers and, where such have been appointed, to lawyer for the child and/or counsel to assist.

5.15 The report writer will not attend a mediation conference or a family group conference without the written approval of a Judge.

5.16 In the interests of efficiency and effective cost control:

- the brief for the report writer should be concise and specific; and
- timetabling directions should follow the filing of a report to avoid lengthy delays between completion of the report and the hearing, and to avoid the need for updated reports.

5.17 The appointment will terminate on the date the report is filed, unless the report writer is requested by the Court to give evidence.

5.18 Where a report is commissioned under the Care of Children Act or under the CYPF Act, a party to the proceedings or lawyer for the child may present evidence on any matter referred to in the report.

- 5.19 Section 134(7) of the Care of Children Act and section 194 of the CYPF Act provide for the Court if it thinks fit, to call the report writer as a witness. Report writers, who are asked by a lawyer to give evidence at a hearing should, before doing so request advice from the lawyer as to whether the Court requires them to be called as a witness.
- 5.20 In cases that go to a defended hearing, the Registrar will release a copy of the judgment to the report writer for his/her confidential information.

REPORTS

- 8.1 Reports are usually expected to take six to eight weeks to prepare. The Court will allocate a date in the Registrar's list, within ten weeks of the direction appointing the report writer, to develop a timetable for further steps to be taken.
- 8.2 For matters relating to the preparation, presentation, and content of reports, report writers should refer to the most recent guidelines published by the Profession in New Zealand.
- 8.3 Report writers also have a responsibility to comply with the relevant obligations of the Code of Conduct for expert witnesses contained in Schedule 4 to the High Court Rules. The relevant obligations are:
- (a) an expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise;
 - (b) an expert is not an advocate for any party;
 - (c) an expert must state his or her qualifications in a report;
 - (d) if an expert witness believes that his or her evidence might be incomplete or inaccurate without some qualification, that qualification must be stated;
 - (e) the facts, matters and assumptions on which opinions are expressed must be stated explicitly;
 - (f) the reasons for opinions given must be stated explicitly;
 - (g) any literature or other material used or relied upon to support opinions must be referred to by the expert; and
 - (h) the expert must not give opinion evidence outside the witness's area of expertise.
- 8.4 The Court can only commission a report on the child (s133(2) Care of Children Act, and s178(1) the CYPF Act). A report on a parent or guardian can only be requested by the Court under s178(2) of the CYPF Act, and only with the consent of the proposed subject person. Report writers are thus to avoid making a parent or guardian the subject of the report. If, in the opinion of the report writer, it would be valuable to provide the Court with further information on a parent or guardian, this should be drawn to the attention of the Court. The Court will then decide how to proceed. There is no provision for a report on a parent or guardian under the Care of Children Act.
- 8.5 When a report commissioned under the Care of Children Act is received, the Registrar will release a copy of the report to:
- the lawyer acting for each party, on the basis that the report is not given or shown to the parties if the Court so orders;
 - the lawyer for the child, who may give or show the report to the child only if the Court so orders. However, in every case the lawyer for the child will explain to the child the purpose and contents of the report unless the lawyer considers that to do so would be contrary to the welfare and best interests of the child;
 - counsel to assist; and

- any party who is a litigant in person unless the Court is satisfied that the information in the report would, if provided directly to that party place the child concerned or another person at risk of physical, sexual, or psychological abuse. The Court may appoint a lawyer to assist the Court to explain the contents of the report to the litigant in person.

(see Care of Children Act s134)

8.6 When a report commissioned under the CYPF Act is received, the Registrar will release a copy of the report to:

- every person entitled to appear and be heard on the proceedings to which the report relates;
- any barrister or solicitor appearing for that person;
- the lawyer for the child, or any other person representing the child or young person;
- counsel to assist;
- a parent or guardian, or any other person having the care of the child or young person;
- the Chief Executive of Child, Youth and Family; and
- to any other person whom the Court considers has a proper interest in receiving a copy of the report.

(see s191 CYPF Act)

The Court may order that the whole or any part of the report not be disclosed to the above persons where the Court is satisfied that disclosure would be detrimental to the physical or mental health or emotional wellbeing of the child, young person or other person to whom the report relates (see s192 CYPF Act).

8.7 The report writer shall state in a separate paragraph, whether, in the opinion of the report writer, the report should be given or shown to the child by the lawyer acting for the child. If the report writer believes to do so would be contrary to the welfare and best interests of the child, that should be stated.

8.8 If the Registrar has concerns about the release of any report, the issue will be referred to a Judge for directions.

ACCESS TO NOTES

5.21 All applications for access to psychologist's notes and other materials relied upon for the production of a report under s133 of the Care of Children Act or s178 of the CYPF Act shall be made to the Family Court.

5.22 The Privacy Act 1993 does not apply to information held or created by the Court in its judicial function. This includes the report, and any notes or materials relied upon by a report writer in preparing their report.

5.23 Generally notes and materials will be made available to a suitable expert engaged by a party to the proceedings, on application to the Family Court, in order for that expert to be able to give a second opinion on the report requested by the Court.

5.24 A copy of the second opinion will be given to the report writer appointed by the Court. The Court appointed report writer will also be given an opportunity to respond to the second opinion.

- 5.25 Disclosure of notes and materials to counsel in order to aid them prepare their case will generally not be permitted. However, on application to the Family Court, counsel may be granted access to notes and materials relating to their own clients, but not any other person.
- 5.26 The Court may release notes and materials after proceedings have been concluded, or where no proceedings are pending. Any such release is at the discretion of the Court and, in the exercise of its discretion, the Court will take account of the fact that the most appropriate time to test the report is during the hearing before the Family Court.
- 5.27 In deciding whether or not to release the notes and materials, while the Court will consider the interests of justice, the welfare and best interests of the child shall be the paramount consideration.
- 5.28 The Court may attach any conditions it sees fit to the release of notes and materials.

CONTENT OF REFERRAL

- 5.29 Under section 133 of the Care of Children Act, the referral from the Court should comprise:
- the standard engagement letter;
 - the brief;
 - the current information sheet G7;
 - a copy of the original application, including any without notice application;
 - a copy of the notice of defence;
 - a copy of any affidavits of the parties;
 - a copy of the Judge's directions if applicable.
 - interim reporting requirements (if any);
 - the date for filing of the report (reports are usually expected to take six to eight weeks to prepare),
 - an upper limit of authorised hours to complete the brief; and

A list of documents supplied by the Court will be attached to the engagement letter.

- 5.30 Under section 178 of the CYPF Act, the referral from the Court should comprise:
- the standard engagement letter;
 - the brief;
 - the current information sheet CYPF 4
 - a copy of the original application, including any without notice application;
 - copies of any applications filed by the children's parents or caregivers;
 - a copy of any affidavits of the parties;
 - a copy of the Judge's directions if applicable.
 - interim reporting requirements (if any);
 - the date for filing of the report (reports are usually expected to take six to eight weeks to prepare),
 - an upper limit of authorised hours to complete the brief; and

A list of documents supplied by the Court will be attached to the engagement letter.

- 5.31 Affidavits provide background and perspective of the parties. Affidavits relevant to the issues outlined in the brief should be sent to the report writer. Such affidavits will contain

untested material and they should be treated with caution, particularly in relation to contentious issues and where, as in most cases, the affidavit evidence is incomplete.

- 5.32 Should additional affidavits be filed after the appointment of the report writer, the Court will forward copies of these affidavits to the report writer.
- 5.33 If additional information is required, the report writer must make the request, in writing, to the Family Court Co-ordinator.
- 5.34 The referral will also include:
- the agreed hourly rate of payment;
 - an agreed allocation of hours for interviews and writing the report;
 - standard disbursements payable; and
 - provision for application for extensions to authorised hours or changes to the brief.
- 5.35 Additional expenditure incurred, except for unforeseen additional attendances where there was no opportunity to seek prior approval, will not be reimbursed.
- 5.36 Judicial approval is required for:
- requests for access to, or copies of, additional file material;
 - access to the Court file/s
 - access to Child, Youth and Family Services diagnostic videos; or
 - access to Police videos (access is governed by sections 11(b) and 11(c) of the Evidence (Videotaping of Child Complainants) Regulations 1990)

PROCESS FOR SELECTION

- 11.1 In each Court there will be a list of report writers who are available to accept appointments from the Court as a report writer and from which the report writer may be appointed in individual cases.
- 11.2 The Registrar or Family Court Co-ordinator will convene a panel to consider applications for inclusion in the list of report writers available to undertake Family Court appointments. The panel will consist of a Caseflow Manager or Family Court Co-ordinator as chair, two experienced report writers appointed by the Court, and a Family Court Judge nominated by the Principal Family Court Judge.
- 11.3 The panel should normally sit with four people, but a panel of three may be convened in some circumstances (for example, when an interview would be unable to be arranged in a reasonable timeframe). Any panel of three must comprise a Family Court Judge, an experienced report writer and a Caseflow Manager or a Family Court Co-ordinator.
- 11.4 Panels will be convened as required but no less than twice a year, if there are applications waiting to be considered and a need for a report writer to be appointed.
- 11.5 The following appointment process should be followed:
- (a) The applicant will submit an application in form SRW1a to the Registrar in the Court region in which they wish to practise, nominating their area of specific expertise and the particular Court or Courts where they wish to be on the list.
 - (b) The application will be referred to a panel convened by a Registrar or a Family Court Co-ordinator.

- (c) The Registrar shall give copies of the application and any supporting documentation to the Regional Administrative Family Court Judge who shall be given seven days to make any comment in writing in relation to the application.
- (d) Panel members may make such enquiries as may be needed for them to be informed about the applicant's ability to meet the criteria including inquiries of the applicant's supervisor and two referees.
- (e) The panel will interview each applicant. If the panel has any concerns about the applicant's ability to meet the criteria, these concerns will be put to the applicant who will have the opportunity to reply.
- (f) An unsuccessful applicant shall be provided with reasons for not being included in the list. It is expected that, if an applicant is not selected, the panel will have discussed its concerns with the applicant during the selection process.
- (g) It is expected that the panel's approval will be by way of a consensus decision.
- (h) The Registrar will advise the applicant and the Court/s, of the decision, in writing.
- (i) On request, the national office of the Ministry of Justice will make a list of approved report writers available to the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists.
- (j) Report writers will be able to transfer their approval from one Court to another. Where such a transfer is sought, the Registrar of the original Court shall confirm with the Court to which transfer is sought, that approval has been given, and the date of that approval.

CRITERIA FOR SELECTION

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

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

12.2 Psychologists will provide evidence of competency in the following areas:

- (a) assessment/diagnostic skills:
 - child-parent attachment, bonding;
 - child development; and
 - physical, psychological and sexual abuse.
- (b) demonstrated knowledge and understanding of the following:
 - family systems;
 - family separation and impact on children and adults;
 - parenting skills;
 - family violence and impact on children and adults;
 - child abuse and neglect;

- alcohol and drug misuse and abuse;
- psychopathology;
- local community resources for children and their families; and
- the responsibilities of the report writer in relation to the Family Court.

(c) cultural awareness including an understanding of the following:

- the need and ability to refer to/make use of specialist cultural advice for families of different cultures;
- the significance of cultural prohibitions, customs and language of other cultural groups; and
- alternative child and human development perspectives.

12.3 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.

12.4 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 no complaints, past and/or present, have been made;

(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.

REVIEW OF THE LIST

5.37 The Registrar in each Court will ensure that the list of currently approved report writers is reviewed at intervals of not more than three years. Where several Courts use one pool of report writers, the Registrars in those Courts may choose to review the list of approved report writers together.

5.38 The Registrar will request all report writers who are currently on the list to indicate on a SRW4a, within 28 days:

(a) whether they wish to remain on the list and continue to receive report writer appointments; or

(b) whether they wish to withdraw from the list.

5.39 If they wish to remain on the list, report writers will provide the Court with a copy of their current practising certificate and professional membership, a report from their supervisor and a copy of their supervision contract, and a statement regarding any complaints.

5.40 The panel shall meet as soon as practicable and reconstitute the report writer list.

5.41 The panel will consider all the information provided by the report writers as well as any other matters raised that relate to the administration of the list, and may choose to meet with the individual report writers.

5.42 The name of a report writer may only be deleted from the list at the report writer's request or as a result of the report writer's failure to respond within the stipulated time. The Registrar will notify all report writers of the revised list and whether their names

have been retained or deleted from the list, as the case may be, as well as specify any reasons for any deletion.

ADMINISTRATION OF THE LIST

- 5.43 Each Court will maintain a register (CMS report) listing, case by case, each report writer's appointment, the date of the appointment, the type of case and the date on which the appointment terminates.
- 5.44 The report is to be available for the regular monthly management meeting of each Family Court.
- 5.45 In areas such as Auckland and Wellington, where several Courts use one pool of report writers, there should be inter-Court communication to ensure that, as far as possible, there is a spread of assignments to all listed report writers.

COMPLAINTS

- 5.46 This Practice Note applies to complaints made where proceedings are pending, in progress, or have been concluded.
- 15.2 The Family Court should deal with most complaints involving psychologists as part of its jurisdiction to regulate its own process, and exercise the powers and functions conferred upon the Court by statute. The Board should deal with complaints that raise questions about professional conduct or ethics. The Health and Disability Commissioner should deal with complaints about the examination of the child, who in this context is defined as the consumer of the health service provided. The parents and other parties are not deemed to be health consumers in this context.
- 15.3 Many complaints about Court process will be those that raise questions about the quality of the evidence before the Court. Matters that will generally be dealt with by the Family Court may include:
- allegations of perceived bias;
 - that the report writer has a sexist, racist or otherwise discriminatory approach;
 - the methodology used;
 - that one parent was treated differently from the other parent;
 - that the conclusions of the report do not correspond with the views of the child's parents; and
 - any matter relating to the content of the report, such as failure to deal with any fact or issue, the length of the report, or the style of the report.
- 15.4 The Board will typically deal with matters that go beyond the process of the Court and raise questions about professional conduct or ethics. This may include matters such as inappropriate relationships between the report writer and the parties, breaches of privacy, and incompetence.
- 15.5 Complaints made to the Family Court about the examination of the child may be directed to the Health and Disability Commissioner, or an Advocate under the Health and Disability Commissioner Act. The child may choose to lay such a complaint with any appropriate party, including the Court.

- 15.6 Complaints to be dealt with by the Court where proceedings are pending or in progress should be referred to the presiding Judge. Complaints after proceedings have concluded should be referred to the Regional Administrative Family Court Judge.
- 15.7 Where a complaint to the Family Court relates to proceedings that are pending or in progress, the presiding Judge will deal with the complaint, where possible, either before the hearing or in the course of the hearing, for example, through cross-examination, submission, or evidence called on behalf of the complainant.
- 15.8 Where a complaint to the Family Court relates to proceedings that have concluded, the Regional Administrative Family Court Judge will consider the complaint and produce a minute containing the view of the Court regarding the complaint. The complaint and minute need not be referred to the Board unless it appears to the Judge there are issues of competence, or other issues best dealt with by the Board in accordance with paragraph 15.4.
- 15.9 The Family Court will generally consider all complaints at first instance. Complaints made directly to the Board should be referred to the Registrar of the Family Court at which the report was requested. The Registrar will refer the complaint to the presiding Judge, or Regional Administrative Family Court Judge, to consider. Where the Board has referred a complaint to the Court, the Judge considering it shall provide a written minute to the Board within 14 days of receipt of the complaint, detailing any opinion on the merits of the complaint, and any action that will be taken by the Court. The Court will advise whether:
- (a) The complaint relates to a matter within the Court process, and will be dealt with by the Court; and/or
 - (b) The complaint appears to be of sufficient seriousness to require referral to the Board in accordance with paragraph 15.4.
- 15.10 The Board will deal with complaints according to its own procedure and the requirements of the Health Practitioners Competence Assurance Act 2003.
- 15.11 Where a complaint is dealt with by the Board and relates to a report under s133 of the Care of Children Act, or s178 of the CYPF Act, the Board may make written request for a copy of the report. The Family Court will release a copy of the report to the Board for the sole purpose of dealing with the complaint. If the Board appoints a Professional Conduct Committee to assess the complaint, the above protocol applies to the Committee.

15.12 Complaints must be in writing.

16 REMOVAL FROM THE LIST

16.1 The report writer may be removed from the list and this shall occur by the like process for selection of the report writer in paragraph 11 with all necessary modifications.

16.2 Grounds upon which report writers can be removed shall be as follows:

- (a) professional misconduct in carrying out their duties; or
- (b) demonstrated failure to abide by this Practice Note or other failure to carry out duties responsibly and competently.

16.3 The panel shall advise the report writer in writing that it is considering removing his or her name from the list.

16.4 The notice from the panel to the report writer shall:

- (a) specify the reasons why the panel is considering the removal of the report writer from the list;
- (b) state the right of the report writer to make submissions or representations within 21 days from the date of service of the notice; and
- (c) set out the intention of the panel to consider removing the report writer from the list at the expiration of 21 days unless the report writer indicates, in writing that he or she opposes removal.

16.5 Upon the expiration of the 21-day time period the panel shall convene to consider whether or not the report writer should remain on the list. In the event that the report writer has made submissions or representations opposing the removal, the Registrar shall convene a hearing.

16.6 At any hearing, the report writer shall be entitled to be represented and shall be entitled to call witnesses in support.

16.7 The Registrar shall advise the report writer, the Regional Administrative Family Court Judge, the relevant Court/s and the report writer's professional body, in writing, of the decision.

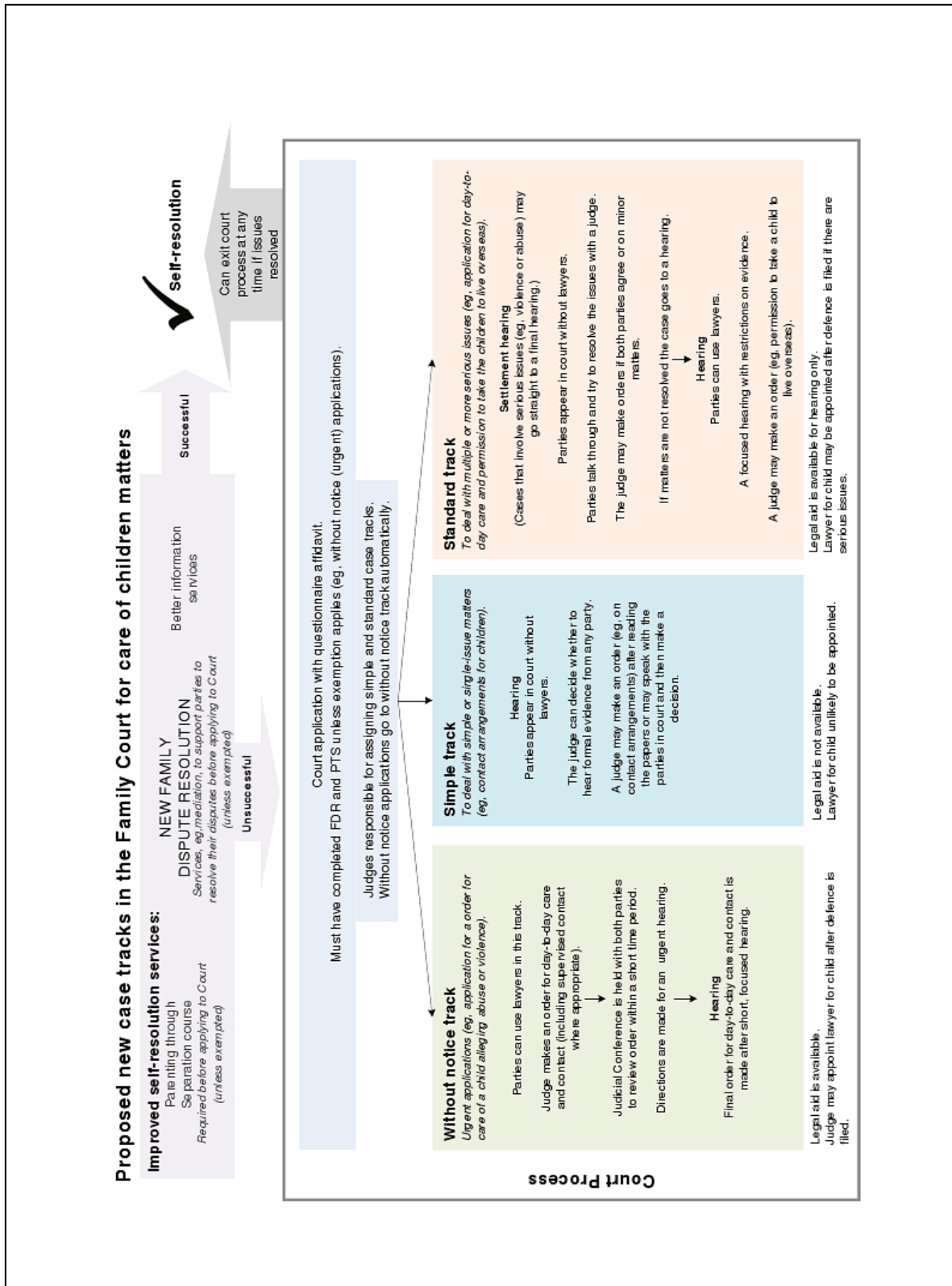
COMMENCEMENT DATE:

THIS PRACTICE NOTE IS ISSUED AS AT 24 MAY 2006 AND COMES INTO OPERATION ON 1 JUNE 2006.

Judge P F Boshier
PRINCIPAL FAMILY COURT JUDGE

Appendix Three

Proposed new case tracks in the Family Court for care of children matters



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