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PROCEDURAL INNOVATION IN THE NEW ZEALAND FAMILY COURTS: THE PARENTING HEARINGS PROGRAMME

Berry Zondag

A thesis submitted in fulfillment of the requirements for the degree of Doctor of Philosophy The University of Auckland 2009
Abstract

Parenting disputes are the main source of litigation in the New Zealand Family Courts. Although ninety five per cent of the 13,000 cases filed annually are resolved in the “conciliatory arm” of the Court, the remaining five per cent require judicial determination. Of those, a large number return to court, showing that the outcomes in these difficult cases are of poor quality, despite their disproportional use of resources. It is often suggested that the root cause of quality and resourcing problems lies in the characteristics of adversarial litigation. A procedural innovation that addressed these issues was recently trialed.

The “Parenting Hearings Programme” (PHP) promises a less adversarial and more child focused process, achieved by changing the judge’s role. The judge, not the parties, determines the relevant issues and the scope and nature of the evidential process. Judges apply mediative and adjudicative interventions in a “hybrid” process with “inquisitorial” characteristics.

This thesis discusses the social and legal context of parenting disputes and evaluates the PHP from different perspectives, including comparative law, conflict theory, alternative dispute resolution (ADR) methodology, natural justice, and compliance with court rules. The empirical component includes the results from a survey of family lawyers.

While my findings confirm the potential disadvantages of adversarial litigation, the principles and procedures that constitute the PHP are not endorsed. Conflict- and ADR theory unearth serious shortcomings in the PHP concept. Comparison with a truly inquisitorial system suggests that changing the nature of some aspects of the court process has little prospect of sustained success. The innovation is arguably outside the rules and rule making powers of the Family Court, and it is doubted whether the PHP complies with fundamental tenets of the New Zealand justice system.

The pilot process is found to have been lacking in methodology and execution, and the PHP innovation has not achieved the required level of endorsement and support from the legal profession.

This study suggests a focus on improving the operational efficiency and resourcing of the Family Courts, rather than continued engagement in innovative experiments that ultimately fail to improve accessibility and quality of justice.
ACKNOWLEDGMENTS

I would like to express my immense gratitude to my supervisor, Associate Professor Pauline Tapp, for her inspiration and guidance, her never faltering enthusiasm for this project and her preparedness to discuss and debate any and all aspect of this thesis and the literally dozens of hardly related issues that I encountered and investigated along the way.

Dr Nicola Taylor acted as my advisory board and I wish to express my deep appreciation for her constant emphasis on clarity and focus and her zealous advocacy for consistent use of method and structure.

I am grateful to the hundreds of family lawyers who took the time to participate in my surveys and the senior lawyers and psychologists who gave their time for interviews and conversations.

My thanks go to the judges who made themselves available for interviews, and particularly to His Honour Peter Boshier, the Principal Family Court Judge who I had the pleasure of talking with on several occasions, and who helpfully granted permission to observe PHP hearings and to study and analyse PHP court files.

I thank the parties who gave consent to my presence during their court hearings, and the registry staff at the Auckland Family Court who facilitated my court observations. I also thank the registry staff in the Family Courts where I undertook my research of court files.
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