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

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A thesis submitted in fulfillment  
of the requirements for the degree of  
Doctor of Philosophy  
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# ABSTRACT

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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

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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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# PART I INTRODUCTION AND RESEARCH PARAMETERS

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## 1 INTRODUCTION TO THIS RESEARCH PROJECT

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This thesis is concerned with a narrow topic: a part of the legal process used to resolve post-separation parenting disputes. These disputes represent a majority of litigation in the New Zealand Family Courts.<sup>1</sup> Current theory in the relevant social and psychological fields suggests it is in the best interests of children to remain in substantial relationships with both parents<sup>2</sup> after the parents' separation. This theory<sup>3</sup> has effectively been cast into legislation.<sup>4</sup> In a sense therefore, government policy asks separated parents to bridge their irreconcilable divides and to agree on arrangements to accommodate this objective. While most divorcing partners are capable of achieving this autonomously, some cases cannot be resolved without judicial intervention. At that point the legislated paramount welfare principle comes decisively to the foreground.

It seems generally accepted<sup>5</sup> that legal process, and particularly its adversarial variant, is unhelpful to create or enhance the accommodating mindset required to achieve, implement, and sustain the arrangements necessary for the desired model of collaborative post-separation parenting. This is the motivation behind legislative and judicial attempts to craft procedures that are less injurious to the legislated objectives. Adversarial litigation is also resource intensive and therefore expensive and time consuming. Reducing the costs and increasing the speed of procedures are therefore important

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<sup>1</sup> In 2005, almost 23,000 parenting applications were processed in the Family Courts, in some 12,000 cases. A typical case involves two applications. Recently the process was simplified and this is no longer always the case: see Wyatt R and Ong SW *Family Court Statistics in New Zealand in 2006 and 2007* (Wellington, Ministry of Justice, 2009), 24. Of these cases some 7,500 involved applicants (64%) that had not been previously involved with such applications, meaning that almost 40% represent cases that return to the court: Ong SW *Family Court Statistics* (Wellington, MoJ, 2007). The number of applications in 2007 was reported as 23,985, representing some 36% of the Family Court workload: Boshier PF "New Pathways in the Family Court" Paper presented at the Auckland District Law Society Family Law Conference, Auckland, September 2008. The number of cases for 2007 is reported as 13,134: Ministry of Justice *Statistical Bulletin: An Overview of Family Court Statistics in 2006 and 2007* (Wellington, MoJ, 2009). It is noted that the official statistical data from the Family Court is often ambiguous. This is caused by definition changes, inaccuracy of data capture and the influence of legislative changes: Wyatt and Ong supra n1, 15, 24-38 and appendix C. See also appendix 1.1 in Bartlett E *Family Court Statistics 2004* (Wellington, MoJ, 2006), about the limited quality of source data from the court's Case Management System.

<sup>2</sup> The relevant research and its restrictions will be discussed in chapter 5. At this point it suffices to say that the matter is less settled than may appear from the firmness with which the principle is applied. For a recent article discussing the research of the last two decades, see Gilmore S "Contact / Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision Making" *International Journal of Law, Policy and the Family* (2006) 20, 344-365. For a detailed critique of one of the leading articles on the need for contact with both parents see: Kates EJ *The Misrepresentations of Michael Lamb and Joan Kelly* <http://www.thelizlibrary.org/liz/lamb-kelly.html#top> Last accessed: 26/7/2009.

<sup>3</sup> Although there seems to have been little informed legal and political debate in which the merits of this concept have been argued extensively: Fineman M "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making" *Harv L Rev* (1988) 101, 727-774.

<sup>4</sup> By way of almost universally adopted "paramountcy for the welfare and best interest of the child" principles, see particularly United Nations *Convention on the Rights of the Child*, Resolution 44/25, 20 November 1989, art 3.1, 9.1, 9.3, and 18.1; Care of Children Act 2004 (NZ), sections 4 and 5, and the way in which these have been interpreted in New Zealand case law.

<sup>5</sup> This assumption will be discussed in detail in chapter 7, and has been investigated in the surveys that form part of this study, and which are discussed in Part V.

additional objectives. The Parenting Hearings Programme (PHP) is a procedural innovation<sup>6</sup> that addresses these concerns.

On 1 November 2006 Family Courts in Auckland, Tauranga, Rotorua, Palmerston North, Wellington and Dunedin started a two-year pilot testing the effectiveness of the PHP proposal. It promises a less adversarial, efficient, and child focused process, achieved by rigorous changes in evidential procedure and case management, and by moving the control of the process from the parties and their lawyers to the judges. It introduces inquisitorial elements as found in Civil Law jurisdictions, and it integrates ADR techniques in the court hearing. The PHP was declared a success early in the trial,<sup>7</sup> and it is continuing in the pilot courts.<sup>8</sup> The official evaluation<sup>9</sup> was published on 19 October 2009, after writing this thesis.<sup>10</sup> No official announcements have yet been made about the long term future of the PHP.

This thesis uses different perspectives to analyse and evaluate the PHP process and its pilot, including comparison with other jurisdictions, views based on alternative dispute resolution methodology, and conflict theory. These are theoretical approaches, based on literature review. In addition, I undertook an empirical evaluation, based on material obtained through court observation, interviews and two large scale surveys.

I need to make a few remarks about my use of terminology. Although legislation created a new vocabulary in this area of law,<sup>11</sup> it is doubtful whether this has succeeded in changing litigants' thinking. The revised language can also be confusing when using material from jurisdictions that have retained traditional terminology.<sup>12</sup> I resist the attempt at semantic brainwashing<sup>13</sup> and use the terms "custody" and "day to day care", and "access" and "contact", interchangeably. I also use the terms "divorce" and "separation" quite liberally, despite their different technical meaning. Increasingly parents have not had

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<sup>6</sup> It is based on an Australian experiment that was considered successful and legislated in July 2006. The PHP's origins will be discussed in Part III.

<sup>7</sup> Particularly in presentations by Family Court Judges: Boshier *supra* n1; Boshier PF "Challenges Facing the Family Court" Paper presented at a Public Law Seminar, Wellington, 22 April 2008; Smith E "Success of the Parenting Hearings Programme (PHP)" *The Family Advocate* (2009) Summer Issue, 6-7.

<sup>8</sup> See Family Law Section email bulletin by Paul Maskell, September 2008.

<sup>9</sup> Knaggs T and Harland A *The Parenting Hearings Programme Pilot: Evaluation Report* (Wellington, MoJ, 2009) and Knaggs T and Harland A *The Parenting Hearings Programme Pilot: Evaluation, Technical Report* (Wellington, MoJ, 2009).

<sup>10</sup> This thesis had been virtually completed at the time. References to the official evaluation were added to the text, rather than integrated into it. References to material in the official evaluation in the footnotes have been placed in square brackets.

<sup>11</sup> The most relevant legislation in respect of this thesis is the Care of Children Act 2004.

<sup>12</sup> In some jurisdictions the old terms remain in use, while in others similar attempts at behaviour adjustment through semantic conditioning have been made. In Australia for instance, the terms "guardianship", "custody" and "access" have been replaced by "parental responsibility", "residence" and "contact" (Family Law Reform Act 1995 (Cth)).

<sup>13</sup> The term "semantic brainwashing" is a reference to the argument that is advanced by those who see the shift from legal to therapeutic process as reflecting an underlying agenda of the social science lobby; see for instance Fineman, *supra* n3, a topic to which I will return in this thesis. As I will argue, the policy behind the shift in semantics is of more significance than it may appear. That the change in wording is a result of explicit underlying policy may be evident from the not too subtle suggestions in the discussion document that heralded changes to the predecessor of the Care of Children Act 2004: Wilson M and Maharey S *Responsibilities for Children: Especially When Parents Part. A Review of the Laws About Guardianship Custody and Access* (Wellington, Ministry of Justice and Ministry of Social Services and Employment, 2000), 8-10, and the way the submissions were summarised in the government response: Ministry of Justice *Summary Analysis of Submissions in Response to the Discussion Paper: Responsibilities for Children: Especially Where Parents Part* (Wellington, MoJ, 2001). See for a judicial discussion, Dadelszen von P "The Case for Change: "Parental Responsibility" Not "Custody" And "Access"" *BFLJ (NZFLJ)* (1995) 1, 263-270. The term "semantic brainwashing" is similar to "transformational grammar" or "linguistic conditioning", a technique used in political lobbying and policy development, ascribed to George Lakoff, a cognitive linguist, who developed a theory of the central place of metaphors in human thinking, thus reaching the conclusion that by modifying words one can influence thinking and "frame" a debate. See for instance: Lakoff G *Don't Think of an Elephant! Know Your Values and Frame the Debate* (Chelsea Green, White River Junction, 2004).

any formal or semi-formal relationship, or the disputing parties are not parents in the traditional sense.<sup>14</sup> In what follows I refer to “divorce” and “separation” for the sake of simplicity, acknowledging that that terminology may not always be strictly accurate.

## **2 THE BACKGROUND AND RELEVANCE OF THIS RESEARCH**

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This study arose from my interest in comparative legal procedure and alternative dispute resolution (ADR). From that perspective the PHP raises some fundamental issues, which appear not to have been considered to any level of detail when the PHP was introduced.

In many areas of law ADR is gradually replacing traditional court processes, or is in some way integrated or associated with it. There are many reasons for this development, ranging from economic and efficiency considerations to the observation that consensual dispute resolution is empowering, and therefore more likely to generate solutions with which the parties can identify, and which, consequently, are easier to sustain, while potentially being less disruptive of ongoing relationships. Given these perceived advantages, it is understandable that ADR methodologies are increasingly used in the Family Court, which mostly deals with disputes that are characterized by high emotions, few objectively determinable issues, and governed by legislative standards that pronounce ambiguous principles rather than concrete rules.

Despite the promotion and use of alternative processes, the fact that decisions can ultimately be made by an institution that is part of the justice system has the effect that family matters are dealt with “in the shadow of the law”.<sup>15</sup> That being the case, adjectival law remains relevant as well, and the question thus arises how the principles and methodologies of ADR intersect with the basic procedural premises of the Common Law system.<sup>16</sup> Similarly, the Family Court is said to increasingly use inquisitorial practices as found in Civil Law jurisdictions,<sup>17</sup> albeit that these are now placed in legal institutions with a Common Law heritage.

There are a large number of practical matters surrounding the introduction of a radically new court process, including whether the process is able to achieve its objectives, how it is trialed, what those involved think of it, the effects on case management, and whether the new practices fit within the existing rule system.

In addition to these essential questions of principle and practice, parenting disputes are the largest

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<sup>14</sup> In such situations the relationship between the antagonists typically also plays an important role in the parameters of the dispute, albeit that this relationship is fundamentally different from the post-marriage concept of the prototypical situation. Recent statistics show that in almost 30% of the cases in New Zealand, the application for childcare orders is made by such other parties. In 50% of those cases it involves grandparents: Wyatt and Ong *supra* n1, 34.

<sup>15</sup> A concept to which I will return throughout this thesis and that was in fact first framed in this way in the context of separation conflicts, and around the time of fundamental changes of divorce law: Mnookin RH and Kornhauser L “Bargaining in the Shadow of the Law: The Case of Divorce” Yale LJ (1979) 88, 950-997.

<sup>16</sup> This question seems to have attracted little attention or principled study.

<sup>17</sup> See for a detailed discussion chapter 15. In New Zealand this concept was first raised by the Royal Commission for the Courts: Beattie D, Kawharu I, King R, Murray J and Wallace J *Report of the Royal Commission on the Courts* (Wellington, Government printer, 1978); and later expanded on in the Boshier report: Boshier PF, Beatson L, Clark K, Henshall M, Priestley J and Seymour F *A Review of the Family Court - a Report for the Principal Family Court Judge* (Auckland, New Zealand Family Court, 1993).

source of civil litigation in New Zealand.<sup>18</sup> The PHP pilot therefore represents an experiment with a potentially large impact, worthy of detailed study and analysis.

### 3 METHODOLOGY AND RESEARCH QUESTIONS

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My research sought to achieve an understanding of the context and characteristics of parenting disputes, in order to analyse the dissatisfaction with the adversarial trial model, and the merits of procedural innovations, particularly the PHP process.

#### *METHODOLOGY*

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I used documentary sources<sup>19</sup> to understand parenting disputes and their place in family law from socio-psychological and legal perspectives. My literature review also included conflict theory, ADR methodology and comparative law. I obtained empirical information using both qualitative and quantitative methods. Qualitative research involves an inquiry using interpretive approaches to comprehend human behaviour and underlying motivations.<sup>20</sup> Originating in the social sciences, qualitative methods are increasingly used in other fields, from information technology to marketing and economics. They differ from quantitative methods by purposeful rather than random sampling; by giving researchers a central and subjective position that requires explicit reflection on their role; and by using data that is “coded” by the researcher in order to develop concepts and to generate hypotheses. A qualitative researcher engages with the object of study and examines how individuals make sense of events in their lives. Qualitative research uses unstructured –and semi-structured– information, obtained by participation, observation, interviewing, and analyzing documents and other material.<sup>21</sup> The researcher finds and constructs the stories and relevance behind and beyond that information, thus giving recognition to the socially constructed nature of reality and human experience. The internal validity of qualitative research is ascertained by accuracy of source materials, corroboration from using multiple sources or repetition, and by continuing data gathering until a point of “saturation” is achieved. Its external validity can be fortified by methods such as triangulation,<sup>22</sup> multi-method approaches or peer review.

By contrast, quantitative research has the objective to develop mathematical models to systematically investigate phenomena and their relationships. A central concept in quantitative study is therefore

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<sup>18</sup> See the statistics reported in n1. Combining statistics from different agencies gives insight in the high number of non-ex-marital parenting disputes. The Family Court statistics provide that there are some 7,500 new parenting cases annually. Statistics NZ records that there are 4,800 divorces involving children annually: StatisticsNZ *Marriages, Civil Unions and Divorces: Year Ended December 2005* (Wellington, Statistics New Zealand, 2006). Although there are some timing differences in these numbers, they seem to indicate that almost 40% of parenting disputes that involve the court are between parties without prior marital relationship.

<sup>19</sup> Such as legislation, academic texts, journal articles, court reports, material provided by government agencies and conference proceedings, i.e. the sources traditionally included in literature review.

<sup>20</sup> Denzin NK and Lincoln YS *The Sage Handbook of Qualitative Research* (3<sup>rd</sup> ed, Thousand Oaks, Sage publications, 2005), and for its application in family research: LaRossa R "Grounded Theory Methods and Qualitative Family Research" J Marriage & Fam (2005) 67, 837-857.

<sup>21</sup> “Materials” is interpreted widely, and may include images, art, movies, music, cultural phenomena, discourse and any other medium through which people express themselves and interact with each other.

<sup>22</sup> Triangulation is a method of confirmation by obtaining multiple perceptions of the same phenomenon.

measurement; the translation of observations of reality into parameters that can be mathematically (and therefore also statistically) manipulated. In the humanitarian sciences (including law) many phenomena exist that cannot be objectively determined, let alone satisfactorily and conclusively measured. It is well outside the purpose of this study to discuss the controversies and ideological debates between proponents of qualitative and quantitative methods. It suffices to note that I consider that the current subject matter warrants the combined use of both approaches.

#### *INFORMATION GATHERING*

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Early in my project<sup>23</sup> I interviewed eight experienced and senior legal practitioners specializing in family law. Two were clearly in favour of the PHP innovation; two strongly opposed it, while the others took a more or less neutral stance in anticipation of more experience. I spoke with three Family Court Judges including the Principal Judge. They were all strongly in favour of the PHP process. The interviews typically lasted between one and two hours, and they were recorded and transcribed. The interviews were unstructured but organized around central topics such as the benefits and disadvantages of the PHP process as compared with the traditional process, the changes in the roles of lawyers and judges, the different preparation requirements, the effects on natural justice, the characteristics of intractable disputes, the differences between the PHP process and its Australian counterpart, the impact of the new process on the role of specialist experts and other agencies, and the explicit and implicit policy objectives underlying the innovation.

During the initial stage I had informal conversations with several Family Court registry employees<sup>24</sup> and many specialized family lawyers. I spoke with several professional report writers<sup>25</sup> about their professional experiences. These were not formal interviews and I only made summary notes of these conversations.

The Court and the parties to twenty PHP cases granted me approval to be present during their hearings. I made extensive notes covering my observations of the process and the participants' response to it. The cases I observed were randomly selected.<sup>26</sup> There was never an objection to my presence, and parties and lawyers often sought to have a brief conversation with me during adjournments or following the hearing. Although these informal encounters were informative and helped to provide context to my observations, they were not part of the data gathering for my research.

All interview recordings, their transcripts and my observation notes were entered in NVIVO, a software application designed to support qualitative analysis.<sup>27</sup> This was used to code and categorize concepts and ideas. This software also assisted as a repository of research and reference material.

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<sup>23</sup> About four months after the introduction of the PHP pilot, by March-April 2007.

<sup>24</sup> The larger Family Courts have dedicated employees in functions such as case-managers, counselling coordinators and case-flow managers.

<sup>25</sup> These are typically professionals with a social science background, who provide the various reports required by the Family Court.

<sup>26</sup> I attended the Court on days that PHP hearings were scheduled, while the relevant case managers had contacted the parties or their lawyers prior to the hearing date to ask for their consent. As a result, I witnessed cases that happened to be scheduled on those days, and I was never aware of the parties or the case before my attendance.

<sup>27</sup> See <http://www.qsrinternational.com>. This software can handle material in text files, sound and video recordings and a range of other input formats.

For additional context I used the World Wide Web, which is increasingly developing as a source by itself as opposed to a mere technological means for accessing traditional information resources. This is because individuals and interest groups use the Web as a platform to disseminate information or to engage in discussion. Examples are interest groups offering assistance and information,<sup>28</sup> and the emergence of “public watchdogs” that focus on constitutional issues or on perceived shortcomings of the legal system. Individuals maintaining personal websites or “blogs” or who interact through public discussion panels are another example. Although these informal information sources do not have the academic rigour of traditional research material, they provide a vibrant and direct interface with the issues as experienced by those that are subjected to the legal system through their disputes.

In November-December 2007 and 2008 I undertook online questionnaire surveys of family law practitioners. I discuss these in Part V, where I use the resulting data to evaluate the PHP.

The Principal Family Court Judge and the Ministry of Justice granted permission for access to court files in the PHP pilot courts. The objective was to obtain detailed insight in the PHP process and to gather quantitative data, such as processing times, number and characteristics of documents filed, demographic data of the parties and number of court events. I eventually analysed 51 cases in two Family Courts, including 63 files.<sup>29</sup> The resulting information was placed in a database. It was my intention to analyse all PHP cases for the first 12 months of the pilot (then estimated to be 250 cases), but this had to be abandoned for logistic and financial reasons.<sup>30</sup> Given the limited size of this data set I have only used it for background-, anecdotal- and qualitative information.

I attempted to be involved in the official evaluation in some way, or to obtain access to its source data. However, the Ministry of Justice was not interested in either sharing information or in my participation in the official evaluation.<sup>31</sup>

#### *ETHICS APPROVAL AND CONSULTATION WITH THE FAMILY COURT*

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The empirical part of the research required several applications to the University of Auckland Human Participant Ethics Committee, all of which were granted, respectively on 15 November 2007, 10 December 2007, 11 April 2008, 9 October 2008, and 4 December 2008. The Principal Family Court Judge granted formal permission for access to Court files on 27 March 2008.

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<sup>28</sup> A good example is provided by one of the parties to the first case to enter into the PHP, who posted extensively about his experiences on the website of one of the men’s groups: Anonymous “Jail for Texting” Blogpost on <http://menz.org>, Last accessed July 2009.

<sup>29</sup> I use the term “case” to refer to one set of parties. There may be multiple files when the parties change, or when the court has assigned different file numbers for cases returning to the court.

<sup>30</sup> It turned out that analysing each file took on average at least four hours, while some older files occupied entire cardboard boxes of documents, taking even more time to properly analyse. My initial intention would have resulted in costs for travel and accommodation that were beyond my budget.

<sup>31</sup> The correspondence with the Ministry is available from the author.

The following questions guided my research:

*What is the social context of post-separation parenting? Has changed thinking about marriage and family affected their social relevance and has this influenced opinions about re-structuring families post-separation?*

*What is the relationship between social and legal developments in this area; does the legal system follow social developments or is the legal system the way by which social policy is implemented?*

*How can the emergence of “less adversarial” process be explained in this context?*

*What are the PHP characteristics and how are they different from the current procedure in the Family Courts?*

*What are the assumptions and premises on which the PHP is based?*

*How does the PHP process align with alternative dispute resolution (ADR) methodologies?*

*How can custody disputes be analysed using the psycho sociological theories that underpin the study of conflict?*

*Does this new process comply with current procedural legislation and rules, and what are the restrictions that a Common Law legal system imposes on “less adversarial” PHP proceedings?*

*How does the PHP compare with its Australian genesis, both in terms of the actual procedures and in terms of the surrounding legal, social and bureaucratic environment?*

*How does the PHP process compare with custody law procedure in a Civil Law jurisdiction?*

*What is the role of pilot projects in policy development? How should pilot projects such as the PHP be conducted and evaluated, and how does the PHP pilot comply with these criteria?*

*What are the objectives of the PHP process and its pilot and have these been achieved?*

## 4 ORGANISATION OF THE THESIS

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This thesis has six parts, each divided in continuously numbered chapters. Following this introduction, Part II reviews the context of post-separation parenting disputes. The approach in chapter 5 is from social and psychological perspectives and includes statistical information about marriage and divorce. Chapter 6 considers the legal environment in New Zealand. Chapter 7 addresses the perceived disadvantages of adversarial process, while chapter 8 discusses possible remedies for those problems. Chapter 9 focuses on the concept of “judicial leadership”, which appears to be the driving force behind the current procedural innovations in both New Zealand and Australia.

In Part III I take a closer look at these innovations. Chapter 10 focuses on the Australian Children’s Cases Programme (CCP), while chapter 11 considers the New Zealand PHP model. I compare and contrast them in chapter 12, not only in respect of their procedural characteristics, but also in the context of societal comparisons, fiscal parameters, and the wider structures in which these processes are placed.

Other perspectives that inform my analysis are addressed in Part IV. Chapter 13 introduces the socio-psychological field of conflict theory: the study of why and how people behave when in dispute. It canvasses what conflict theory may contribute to knowledge about the type of disputes that will be subjected to the PHP process. Chapter 14 is concerned with ADR theory and methodology. It provides a structured analytical framework to analyse conflict resolution processes and applies that framework to the interventions used in the New Zealand Family Courts. The way a truly inquisitorial, continental, Civil Law system deals with parenting disputes is considered in chapter 15. I use the Dutch Civil Code and legal process for this comparative purpose. The introductory materials for the PHP emphasize its compliance with the rules of natural justice. I examine the constitutional dimension of that claim in chapter 16. Chapter 17 considers the PHP in its manifestation as a rule system, where I investigate



whether the PHP process was promulgated in accordance with the rules about rule making, and whether the process fits within the existing procedural regulations.

Part V contains an analysis of the PHP pilot in practical and empirical terms. It includes the results and conclusions from the qualitative and quantitative evaluations I have undertaken. The survey methodology and the characteristics of the respondents are discussed in chapter 18. Chapter 19 considers the execution of the PHP pilot experiment, by establishing criteria for pilot projects and by applying these to the PHP trial. In chapter 20 I extract the objectives of the PHP process from the available information, discuss how these objectives might be evaluated, and consider whether these objectives have been achieved.

Part VI contains a brief summary of my conclusions.

# PART II

## CONTEXT

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### *Introduction*

No procedural innovation stands on its own or can be evaluated without taking its context into consideration. For the PHP that context is the incident of collaborative post separation parenting, a social concept unheard of a few decades ago. It is the result of social developments that radically changed the traditionally connected concepts of marriage and parenthood. Legal systems have struggled to keep pace. In this part, I consider these social developments and the family law response to them. I analyse the often heard complaints about adversarial process, and discuss the nature of proposed remedies.

## 5 POST-SEPARATION PARENTING

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Although “post-separation parenting” appears to be a contradiction in terms, the reality is that many parents discontinue their cohabiting relationship and thus terminate the traditional family unit. Phrases like “reorganisation of family structures” and “family transitions” are euphemisms<sup>32</sup> referring to the processes whereby the relationships and structures that are inherent in an intact family unit are replaced by a system of more or less formalized arrangements about childcare following separation. Not only the change in these structures, but also the manner in which that change is achieved, have an impact on all involved, particularly the children. Separated parents can make and maintain their own arrangements,<sup>33</sup> supported in that process by family and friends and perhaps with some professional assistance, for instance from their church or a social agency.<sup>34</sup> At the other end of the spectrum are those who are unable to resolve parenting issues and who require judicial intervention. The distinction between making private arrangements and relying on the justice system is blurred by the increasing development of institutionalized non-adjudicative interventions. It is also not uncommon that arrangements<sup>35</sup> disintegrate and (again) require judicial determination. This often occurs when the relationship between the parents deteriorates<sup>36</sup> or when a crisis involving the children occurs,<sup>37</sup> which requires more

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<sup>32</sup> “Families have become more fluid and family boundaries are becoming more ambiguous”: Statistics New Zealand *International Developments in Family Statistics* (Wellington, Statistics New Zealand, 2006), 1.

<sup>33</sup> In some cases one parent simply terminates all relationships with the children, either immediately following the separation, or gradually over time, and with or without conflict over parenting issues. Although this is seen as a cause for concern because of its social implications, it is mostly outside the scope of this study, as these parents will not normally seek the assistance of the courts. Nevertheless, there are cases where the parent that had (eventually) terminated all contact, again seeks to be involved in parenting, often after they have stabilised their lifestyle and re-partnered, or where they, for some other reason, develop an interest in their children’s wellbeing. Sometimes such attempts take place many years after all contact had been terminated, and cause extreme upheaval. My study of court files revealed anecdotally that such cases are particularly difficult where one party had simply absconded and no formal arrangements had ever been made.

<sup>34</sup> There is very little research about the support networks used for relationship difficulties. A very limited qualitative study (50 interviews) found that family and friends were the most important source of support, followed by an “unexpected” group including GP’s church ministers, community elders. (It is difficult to see how this could possibly be unexpected). Professional services were also relied on, albeit less frequently: Roguski M, Duckworth S and Chauvel F *Reaching out Who New Zealanders Turn to for Relationship Support* (Research Report No 5/08) (Wellington, Families Commission, 2008).

<sup>35</sup> Whether made privately or following a court process.

<sup>36</sup> For instance when one of them re-partners, or when some aspect of their conflict re-ignites.

<sup>37</sup> Such as truancy, criminal activity, school choice, teenage relationships, or severe health issues. For an example in a PHP situation, see *C v C (PPH Case)* Family Court Dunedin, 8 June 2007, Judge O’Dwyer, FAM-2007-012-145.

cooperation than the remaining fragile relationship between the parents can support.<sup>38</sup>

Parenting disputes –within the wider topic of the decline of the traditional nuclear family– are the subject of much attention from researchers in fields as diverse as sociology, psychology, economics and law. However, given its context of human emotional relationships and the ideological character of arguments about the proper role of the state and its agencies in such relationships, there is not much widely accepted science to this field. It is unlikely there ever will be enough empirical data –let alone agreement about a theoretical basis– to resolve the complexities of discontinued or re-constituted family life. This pervading uncertainty is the background of the dilemmas that ultimately drive the policies behind the part of family law that pertains to families that are in this transition process. This problem, a shortage of data and absence of an accepted theoretical basis for policy making, is not unique to New Zealand. The countries with which we tend to compare ourselves in respect of legal matters<sup>39</sup> all face similar issues. A committee for the Canadian Parliament complained of a lack of data for policymaking<sup>40</sup> and suggested that extensive and comprehensive research would be required to inform debate on issues including false allegations of abuse and neglect, parental alienation, patterns of domestic violence in custody disputes, parental abduction, the effects of continued contact with grandparents and the wider family, the effects of loss of contact with one parent, the long term effect of different parenting arrangements, and the effects of amicable settlement between parents. A recent large-scale Australian study states in its foreword: <sup>41</sup>

*In Australia, as elsewhere, not a great deal is known about the nuts and bolts of parent-child contact...Why do parents opt for certain patterns of care? What factors facilitate or impede contact, particularly contact between fathers and their children, and how might these factors interact to influence different patterns and levels of care?*

In New Zealand a Families Commission was established in 2004.<sup>42</sup> This agency's functions include research and policy advice relating to "families", a concept defined in the widest of terms.<sup>43</sup> As yet, this Commission has not published any significant empirical research addressing questions as posed in the Canadian and Australian examples. Despite similarities, there are timing differences between developments in different jurisdictions. The United States, for example, appears to have led the world in the social acceptance and occurrence of divorce,<sup>44</sup> and maintains a leading role in the development of non-adversarial procedures and private counselling and education programs,<sup>45</sup> while Canada and

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<sup>38</sup> Despite movies, TV series, books and magazines often showing idealized situations where the former spouses have become the best of friends in their joint parenting enterprise, in reality this is an elusive concept.

<sup>39</sup> These jurisdictions are the UK, the USA, Canada, and especially Australia.

<sup>40</sup> It did so following an extensive review of available information. As quoted in: Schepard AI *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families* (Cambridge University Press, Cambridge, 2004), 29.

<sup>41</sup> Smyth B *Parent-Child Contact and Post-Separation Parenting Arrangements* (AIFS research reports in print) (Melbourne, Australian Institute of Family Studies, 2004).

<sup>42</sup> By the Families Commission Act 2003.

<sup>43</sup> S10(2) of the Families Commission Act 2003 holds: "In this section, family includes a group of people related by marriage, civil union, blood, or adoption, an extended family, 2 or more persons living together as a family, and a whanau or other culturally recognised family group".

<sup>44</sup> Recent data demonstrate a change in the trend of ever increasing divorce rates, which in the US have levelled off since the mid 90's and which are currently slightly decreasing. In a number of US states, the legislation is even reversing no-fault divorce, albeit on a voluntary basis. These experiments, however, appear to have limited success: Zurcher K "I Do or I Don't - Covenant Marriage after Six Years" Notre Dame J L Ethics & Pub Pol'y (2004) 18, 273-302, and Flory H "I Promise to Love, Honour, Obey...And Not Divorce You': Covenant Marriage and the Backlash against No-Fault Divorce" Fam LQ (2000) 34, 133-147.

<sup>45</sup> See for instance [www.smartmarriages.com](http://www.smartmarriages.com), which provides a portal to literally hundreds of organisations that provide marriage-related education.

Australia appear ahead<sup>46</sup> in developing court structures and rule systems to deal with parenting disputes.<sup>47</sup>

The context of court-based programmes like the PHP is that although courts have retained the jurisdiction to determine disputes arising out of the dissolution of marriage, legislation restricts the scope of those disputes, typically to matters of property and childcare. Shared childcare after separation requires a level of interaction and can thus be a vehicle for continuation of conflict, or a source for new differences. The suggestion that traditional (Common Law adversarial) court process is not the best environment to stimulate cooperation between the estranged parents leads to attempts to adjust the process or to develop alternatives. The core objective of all such attempts is to support continued responsibility for, and involvement in, parental care for children by both parents. As a result, courts can become therapeutic social agencies, instead of rights-based dispute resolvers.

## STATISTICS

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Over the last decade, the nominal number of marriage registrations in New Zealand has been stable but substantially lower than in the 1970's.<sup>48</sup> In relative terms, the marriage rate<sup>49</sup> has steadily declined to 13.7 in 2008 (see Figure 1).<sup>50</sup> This rate must be compared to one of 45.5 in the peak year of 1971. Many factors contribute to this, including the increase of de-facto relationships,<sup>51</sup> a general trend towards later marriage,<sup>52</sup> increasing numbers of people wishing to stay single, economic factors, the wider availability of contraceptives, and even the introduction of no-fault divorce.<sup>53</sup>

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<sup>46</sup> It remains difficult to determine this with any precision, given the differences in the developments and the tendency to describe and promote innovations as "world leading", without providing substance to such claims. For Australia see for instance: Family Court of Australia "Chief Justice's Column / Singapore Subordinate Court (Family Justice Division) Adopts Less Adversarial Trial" Family Court Bulletin (2008) July Issue, 1-2, 7; and for New Zealand: Boshier PF "Launch of the Family Court Website" Speech at the launch of the website, Wellington, 29 July 2004.

<sup>47</sup> The situation is not fundamentally different in the Civil Law world. Despite the conceptual differences in substantive and procedural law, social developments such as increasing divorce rates are the same as those in Common Law jurisdictions. Civil Law jurisdictions also experience the problems associated with the difficult disputes that can arise in post separation parenting situations. This aspect will be considered in more detail in chapter 15, where the approach to resolving parenting disputes in the Netherlands is discussed.

<sup>48</sup> Annually around 21,000 marriages are registered between New Zealand citizens. In 2008 the number was 21,900, for 2007 it was 21,500, and 20,500 in 2006. By comparison, the annual number of marriages in the 1970's was almost 5,000 higher. Source: the annual marriage statistics from Statistics NZ, available at [www.stats.govt.nz](http://www.stats.govt.nz), last accessed August 2009.

<sup>49</sup> The marriage rate is the number of marriages per thousand of the not-married population over 16 years of age.

<sup>50</sup> Source: Statistics New Zealand.

<sup>51</sup> In 2001, one in three New Zealand men and women aged 15-44 who were in partnerships were not legally married. In 1996 that ratio stood at one in four. For men and women under 25 years of age those living in a de facto relationship outnumber those legally married: Statistics New Zealand *supra* n32.

<sup>52</sup> Women's mean age at first marriage has risen from 20.8 years in 1971 to 28.1 years in 2004, for men these numbers are 29.9 and 23. A further contributing factor is that people tend to live longer at their parental home: *ibid*.

<sup>53</sup> It has been suggested that no-fault divorce itself "promotes" marriage dissolution and reduces the attractiveness of marriage. A European study, including statistics of 18 countries, found that 20% of the increase in divorce rates was accounted for by the law reforms that introduced no-fault divorce: Gonzalez L and Viitanen TK *The Effect of Divorce Laws on Divorce Rates in Europe* (IZA Discussion Paper No 2023) (Bonn, Institute for the Study of Labour IZA, 2006), and the sources quoted in that paper, 3. Similarly, an American study found that about 4% of the decrease in marriage rates could be related to the introduction of no-fault divorce: Rasul I "The Impact of Divorce Laws on Marriage" Available from <http://www.jourdan.ens.fr/piketty/fichiers/enseig/econeg/articl/Rasul2003.pdf> (2003). On the other hand, some authors maintain that causality is more likely to go in the reverse direction: Ellman I "Why Making Family Law Is Hard" *Ariz St LJ* (2003) 35, 699-714, 703, and Fella G, Manzini P and Mariotti M "Does Divorce Law Matter?" *J Eur Econ Assoc* (2004) 2, 607-633, and Ellman IM and Lohr SL "Dissolving the Relationship between Divorce Laws and Divorce Rates" *Int Rev Law Econ* (1998) 18, 341-359. Whatever the outcome of this debate about causality, there is a clear correlation between the increase of divorce and the introduction of no-fault divorce legislation, in New Zealand and elsewhere.

More than a third of marriages are re-marriages; and one in three remarriages involves a second or further marriage for both partners.<sup>54</sup> This waning popularity of marriage<sup>55</sup> is not restricted to declining numbers of new marriages. Existing marriages are under increasing pressure as well. Divorce increased after the passing of the Family Proceedings Act 1980, which introduced no fault divorce in New Zealand. A temporary high of 12,400 divorces in 1982 stabilized to an average of around 10,000 divorces annually (9,700 in 2008). The divorce rate in 2008 was 11.3,<sup>56</sup> which is comparable with the rates in Australia and England.<sup>57</sup> There is a continuing upward trend in the age of those divorcing, while divorce rates are markedly increasing for those of

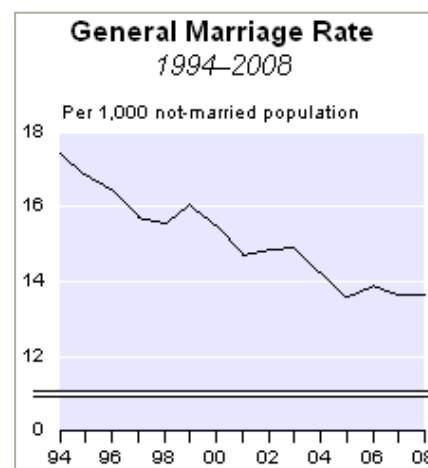


Figure 1 Marriage rates 1994–2008

lower ages. There is a gradual increase in the proportion of divorces in marriage of long duration.<sup>58</sup> These trends suggest that the social acceptance of divorce continues to increase, with about one third of all marriages eventually ending by divorce.<sup>59</sup> While the proportion of the population living in relationships is stable, marriage is a declining basis for those relationships, see Figure 2.

Less than half of all divorces involve children, and that proportion is declining, as is the total number of children involved. In 2008, 7,600 children were involved in divorce, of which some 3,570 (47%) were under the age of 10 years. On average, where children are involved, there are 1.8 children per divorce.<sup>60</sup> In the US even stronger trends can be observed with over half of marriages being remarriages.<sup>61</sup> By the early 1990's it was forecasted that one in six adults in the US would endure two or more divorces, and 40% of all children would experience parental divorce before reaching adulthood.<sup>62</sup> More than one million American children experience the divorce of their parents each year. When factoring in the

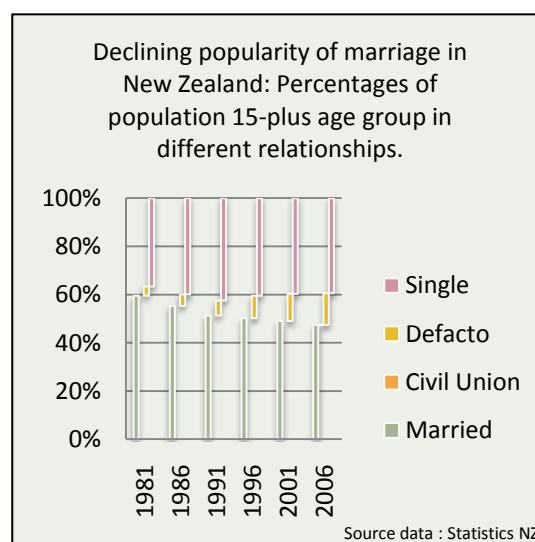


Figure 2 Declining popularity of marriage

<sup>54</sup> This rate of one in three was found in 2004; in 1971 that ratio was one in six. Ninety percent of those remarrying are divorcees, in 1971 that rate stood at 67%: Statistics New Zealand supra n32.

<sup>55</sup> Or as a recent newspaper headline stated: Collins S "I Do Becomes I Don't Think So for Kiwis" *The New Zealand Herald* 10 May 2008.

<sup>56</sup> The divorce rate has been declining since 2004, from almost 13 to under 11.5 for 2008.

<sup>57</sup> The divorce rate is the number of divorces per 1000 estimated existing marriages. Comparable rates for Australia and the UK are 12.1 and 11.9. See Statistics New Zealand *Marriages, Civil Unions and Divorces: Year Ended December 2008* (Wellington, Statistics New Zealand, 2009).

<sup>58</sup> In the 2008 divorce and marriage statistics about a quarter of dissolved marriages had been in existence for 5-9 years, 18% for 10-14 years, 15% for 15-19 years, and 12% shorter than 5 years.

<sup>59</sup> See also Dharmalingam A, Pool I, Sceats J and Mackay R *Patterns of Family Formation and Change in New Zealand* (Raising Children in New Zealand) (Wellington, Centre for Social Research and Evaluation, Ministry of Social Development, 2004).

<sup>60</sup> See Statistics New Zealand supra n57.

<sup>61</sup> It is helpful to compare data from the USA because social developments in New Zealand tend to be similar, albeit with a substantial time lag.

<sup>62</sup> US data shows an increase in divorce from less than 5% of all marriages near the middle of the 19<sup>th</sup> century to over 50% in the 1990's. One in six American adults will endure two or more divorces: Amato PR "The Consequences of Divorce for Adults and Children" *J Marriage & Fam* (2000) 62, 1269-1287.

differences in population size, this is more than twice as much as in New Zealand. Divorce and post-separation parenting is a larger social phenomenon in the US, and much of the research and academic material is of American origin. The other major common law jurisdictions (i.e. England, Canada and Australia) also provide a source of social and legal research materials, and are more comparable with New Zealand in respect of divorce statistics.

The statistics from (Western) Civil Law jurisdictions are also similar,<sup>63</sup> underlining that divorce and the associated disputes are a social, rather than a legal, phenomenon. It must be remembered that parenting disputes increasingly involve parents who were not married. In New Zealand, 45% of children are born outside of marital relationships.<sup>64</sup> There are no precise statistics, but it is clear that a substantial number of parenting disputes involves parents without previous marital relationship.<sup>65</sup> Presumably, the number of litigated disputes from non married couples is lower than that from separating married couples. But cohabiting relationships have a much higher rate of dissolution,<sup>66</sup> and would therefore be a relatively larger source for disputes.

Increasing numbers of children grow up in family constellations different from the traditional norm,<sup>67</sup> often without one of their parents, with varying partners of the custodial parent, or while experiencing ongoing conflict between parents. The new, and sometimes chaotic, family structures have aspects that impact on family functioning, which in turn affects the wellbeing of parents and children. Such aspects include (the lack of) family routines, poor quality of the parents' and parent-child relationships, care and supervision issues, household management problems (including financial), and conflict.

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<sup>63</sup> See Gonzalez and Viitanen, *supra* n53. (Note that the divorce rate in that report is expressed as divorces/1000 married people, and must therefore be multiplied by 2 to be comparable with the New Zealand statistic, resulting in 2002 divorce rates of 10 or higher in the 18 countries in the Gonzalez study).

<sup>64</sup> This number is based on 2004 data, a dramatic increase from 1962, when this percentage was 8%: Statistics New Zealand *supra* n32. This number is even higher in the US where more children are born ex-nuptial than from marriage. Comparative statistics for births outside marriage in various European countries can be found in Callen S *The Makeup of the Millennial Family: UK Relationships at the Start of the 21st Century* (Cardiff, Care for the Family, 2004), who also provides the interesting statistic that 70% of children born within marriage spend their childhood with their natural parents, a percentage that is only 36% for children born of cohabiting relationships.

<sup>65</sup> Although I have not found official statistics for this number it would appear to be some 40% of the parenting disputes that are filed in court. See also n18 above.

<sup>66</sup> No statistics for New Zealand are available (see Statistics NZ *supra* n32), but these are probably comparable with those in Canada, where a national longitudinal study involving 22,000 children, provides that the separation rate of cohabiting couples is more than four times as high as that for married couples: Stewart R *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review* (Canada, Department of Justice, 2001), and see Callen *supra* n64 for UK statistics.

<sup>67</sup> Although these "family transitions" are known to be critical for the children experiencing them, there is very little statistical data that identifies and quantifies different family structures and the movement between them. A recent review in New Zealand concluded that even the conceptual framework to undertake statistical sampling is lacking: Statistics New Zealand *Report of the Review of Official Family Law Statistics* (Wellington, Statistics New Zealand, 2007), 12. This study also concluded that there are no accepted standard methods to capture information about family functioning and that study into that topic is more suited for small-scale study, rather than official statistics (at 3). There is some statistical data about family wellbeing, reporting on indicators constructed from census data: Milligan S, Fabian A, Coope P and Errington C *Family Wellbeing Indicators from the 1981–2001 New Zealand Censuses* (Wellington, Statistics New Zealand, 2006).

## IS THE DECLINE OF FORMAL MARRIAGE A SOCIAL PATHOLOGY?

The social relevance of marriage has decreased dramatically, divorce has become a mainstream event, and non-married family life has increased sharply.

The traditional family household is rapidly losing its social relevance (Figure 3).<sup>68</sup> The social ramifications are obvious, and can be interpreted from different perspectives, varying from assumedly positive effects for the individuals involved<sup>69</sup> to allegedly negative effects on society as a whole:<sup>70</sup>

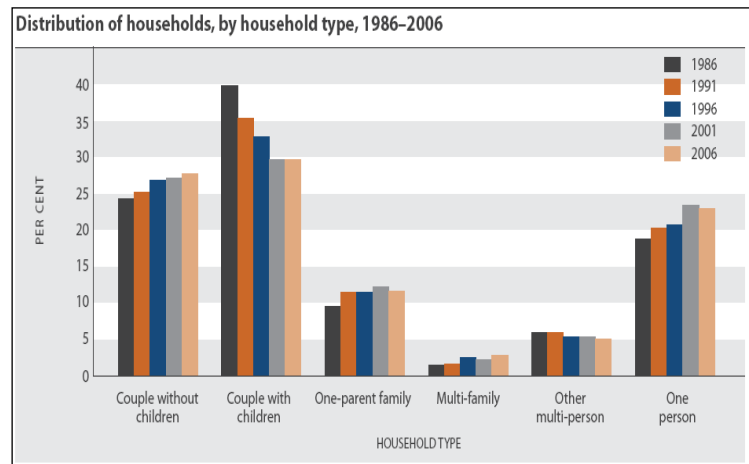


Figure 3 Household Type Distribution

*The family will be slowly ground into a random collection of individuals, haphazardly bound together in the common pursuit of selfish ends and in the common rejection of the structures and strictures of family, church, state and civil society.*

It is apposite to ask whether divorce, or rather the decline in popularity of marriage and the reduction of the relevance of the traditional family, must be seen as a social pathology.

### *The family as the “cornerstone of society”*

The essence of family is that it is an associational concept; its members take responsibility for one another under parental authority. The family provides a nurturing environment for individual development and acts as a platform for social interaction with the wider community. The family is a worthwhile collective enterprise for couples,<sup>71</sup> children and for society as a whole;<sup>72</sup> it acts to enforce social norms.<sup>73</sup> Clusters of families create larger (e.g. tribal or religious) groups, and further congregations can form larger and more complex structures. The family thus acts as a constituting element<sup>74</sup> for social structures and offers the environment in which individuals are prepared for their

<sup>68</sup> Noting that “couples with children” does include all forms of partnership. I have not been able to find statistics that separate married couple families from others. Source of the graph: Ministry of Social Development *2009 the Social Report* (Wellington, MSD, 2009), 15.

<sup>69</sup> I.e. divorce allows escape from dysfunctional relationships, thus enabling individual self-fulfilment.

<sup>70</sup> Friedrich Nietzsche, letter August 1886, as quoted in Witte J *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (John Knox, Westminster, 1998), 215.

<sup>71</sup> Studies demonstrate that married individuals rate higher on wellbeing scores in health, economic and emotional terms. A summary of such studies is provided in: Waite LJ and Gallagher M *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (Doubleday, New York, 2000).

<sup>72</sup> The preamble to the United Nations Convention on the Rights of the Child refers to family as “the fundamental group of society and the natural environment for the growth and wellbeing of all its members”: United Nations supra n4.

<sup>73</sup> Woodhouse BB “Towards a Revitalisation of Family Law (Book Review)” *Tex Law Rev* (1990) 69, 245-290, and 279.

<sup>74</sup> Particularly tribal societies often provide good examples of the way nuclear families form the building blocks for larger structures. In the New Zealand context the Maori culture is an exponent of this type of societal organisation with its hierarchic structure of whanau, hapu and iwi, although the nuclear family in that society has less strict demarcations in respect of parenting roles, which are often shared between nuclear families within the whanau.

future development and their engagement in social roles.<sup>75</sup> One important characteristic of the family as a distinct social entity is that it represents an environment with an internal and largely self-contained structure of authority. An important aspect of internal authority is that conflict between family members is resolved within the family itself.<sup>76</sup> Although serious conflicts, particularly between the parents, can tear the marriage and ultimately the family apart, most disagreements are resolved successfully<sup>77</sup> and eventually help to strengthen the bonds between family members.<sup>78</sup> Dealing with differences in a relatively protected and private environment also supports the development of the abilities of individual family members to function in society.<sup>79</sup> The concept of the family as a “cornerstone of society” thus relates to the family in its two most important functions: as building block for larger societal structures and as the environment to raise well-adjusted citizens.

The way a society deals with the construction and de-construction of marriage and the relationship between the concepts marriage and family is determined by the views that are prevalent in that society. They find their origins in more or less philosophical principles with parameters described in economical, legal, moral or religious terms (to name a few possible perspectives). These principles are subject to continuous change. Consequently, the social and legal relationships between marriage and family and the relevance of families in the fabric of society are also subject to change.<sup>80</sup> Procreation was once predominantly valued in the context of marriage, and marriage and family were therefore almost invariably connected.<sup>81</sup> The importance of these connections has diminished.<sup>82</sup> Marriage is no longer determinative of procreation,<sup>83</sup> and marriage itself is no longer universally understood within its original

<sup>75</sup> The Australian Family Law Act 1975 lists “principles” which include: *“the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children”* (s43). The Royal Commission that first suggested specialist family courts in New Zealand framed it thus: *“Some pessimists suggest that the family will cease to exist as an institution within a decade or so. We believe however, that the family is vitally important to the future of our society; we trust that it will evolve in ways best suited to the changing times. It is capable of providing its members with a place and an identity in the community, of fulfilling a major role in socialising the children, and of offering stability in the relationship between a man and a woman.”* Beattie et al supra n17, 146.

<sup>76</sup> *“Children that are emotionally secure about their parents’ relationship have confidence in the stability and predictability of marital interactions, and an expectation that conflicts will eventually ameliorate, hence providing confidence in the continuing psychological and physical availability of their parents. This then provides a capacity for emotional regulation in the face of stress”*: Davies PT and Cummings EM “Marital Conflict and Child Adjustment: An Emotional Security Hypothesis” *Psychol Bull* (1994) 116, 387-411, 389.

<sup>77</sup> This often involves apportioning and recognizing fault, followed by application of forgiveness, thus also teaching family members the value of remorse and of expressing and accepting it. For a small scale study of this type of family behaviour in New Zealand, see: Evans I, Yamaguchi T, Raskauskas J and Harvey S *Fairness, Forgiveness and Families* (Blue Skies Report No 17/07) (Wellington, Families Commission, 2007). For a description of a therapeutic approach that is based on an empathy-humility-commitment model, using this fault-remorse-forgiveness connection: Worthington EL “An Empathy-Humility-Commitment Model of Forgiveness Applied within Family Dyads” *J Fam Ther* (1998) 20, 59-76.

<sup>78</sup> Perhaps unsurprisingly, therefore, there is consistent evidence that there is a positive correlation between the quality of the marriage relationship and the quality of parenting: Erel O and Burman B “Interrelatedness of Marital Relations and Parent-Child Relations: A Meta-Analytic Review” *Psychol Bull* (1995) 118, 108-132; who found this relationship to be stronger and more consistent than anticipated in a meta-study that involved 68 pieces of previous research.

<sup>79</sup> Wallerstein JS and Kelly JB *Surviving the Breakup: How Children and Parents Cope with Divorce* (Basic Books, New York, 1980), 17.

<sup>80</sup> Very limited detailed data is available about the interaction between family, state, marketplace, and society: StatisticsNZ supra n32, 5. In that sense, it is surprising that governments are increasingly developing policy and programmes that directly interfere with the organisation and operation of families, because the effects of such interventions cannot be rationally predicted.

<sup>81</sup> Sweden is accepted as one of the more advanced countries in recognizing other relationships as a basis for the concept of “family”. Yet compelling research, investigating more than a million cases, found consistently that families based on marriage produced substantially better outcomes for all involved: see sources quoted in Garrison M “The Decline of Formal Marriage: Inevitable or Reversible?” *Fam LQ* (2007) 41, 489-518, 497.

<sup>82</sup> Catania, for instance, argues that the family consists of a variety of component relationships that continues to exist in re-constituted form after termination of the husband/wife marriage relationship. See Catania FJ “Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes” *Neb L Rev* (1992) 71, 1228-1271, 1229.

<sup>83</sup> The ex-nuptial birth-rate in New Zealand is around 40%; in the US that number is much higher at about 60%. See also n64, above.



concept of the holy matrimony between husband and wife.<sup>84</sup> Family has become a social, legal<sup>85</sup> and economic<sup>86</sup> construct, and the obligations and responsibilities that are implied within the originally closely related concepts of marriage and family have thus become subject to legislation and underlying policy objectives.<sup>87</sup>

The relatively autonomous character of families as structures with internal authority, mostly free from direct state intervention has also changed. Family and marriage can no longer be seen independent of the views that the state, in its assumed aggregate responsibility for social harmony, develops in relation to them.<sup>88</sup> Marriage and divorce thus attain an additional aspect because the legal frameworks by which they are regulated develop into mechanisms by which governments may seek to influence individual behaviour. Political ideologies and aspirations permeate the legal background against which dissolution of marriage must be placed. The legal, social science and even statistical<sup>89</sup> discourse surrounding the subject is steeped in terms of political objectives. This comes particularly to the foreground where the dissolving relationship has produced children and where issues arise about the responsibilities for those children. This situation is even more pertinent where the children are not the result of marital relationships. In those situations there are less socially understood and legally accepted default responsibilities and all legally relevant relationships must somehow arise through legislation or via the precedent effect of judicial decisions. In those cases the distinction between family-autonomy and state intervention effectively disappears. The situation is further confounded when observing the trends and developments in their socio-economic and ethnic perspectives. The decline of marriage and the increase of non-marital childbearing are typically concentrated in lower socio-economic and certain racial/ethnic minorities, while these trends are much less prominent (or even reversed) for better educated or more affluent socio-economic groups.<sup>90</sup> Regulation of family life and marriage therefore has very direct social,

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<sup>84</sup> Although the term "marriage" itself is almost everywhere reserved for the "traditional" formal and heterosexual construct. For example the Australian Family Law Act 1975 states in its principles: "*the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life*" (S43). This definition comes from English case law: *Hyde v Hyde and Woodman see (1865-69) 1 L.R.P. 130, 133*, a 19<sup>th</sup> century statement on the role of marriage as a social institution.

<sup>85</sup> See s10 of the Families Commission Act 2003, recognising the "diversity of New Zealand families", and the wide definition of "family group" in s2 of the Children Young Persons and Their Families Act 1989.

<sup>86</sup> Apart from the obvious economic parameters, such as the effects of marriage on home ownership and tax, a link between duration of marriage and the strength of the economy has been suggested: Collins S "Stronger Economy, Longer Marriages" *The New Zealand Herald* 5 April 2007, based on Ministry of Social Development *Work, Family and Parenting Study: Research Findings* (Wellington, MSD, 2006). A broad longitudinal study in the US demonstrated strong relationships between economic wellbeing and marriage conflict, divorce and impact on the wellbeing of children, see Sun Y and Li Y "Children's Wellbeing During Parents' Marital Disruption Process: A Pooled Time-Series Analysis" *J Marriage & Fam* (2002) 64, 472-488.

<sup>87</sup> By changing the character of marriage from a concept with dominant religious influences to a mostly secular arrangement, it could also be brought under secular power structures. This occurred as a consequence of the 16<sup>th</sup> century reformation. See for an account of this development: Witte supra n70 and Berman HJ *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press - Harvard University Press, Cambridge - London, 2003).

<sup>88</sup> A reasoning that is developed in depth in: Diduck A and Kaganas F *Family Law, Gender and the State: Text, Cases and Materials* (Hart Publishing, Oxford and Portland, 2006), and is exemplified in the manner in which the New Zealand Families Commission frames its thinking about the role of policy in supporting families to achieve "outcomes", see Stevens K, Dickson M, Poland M and Prasad R *Focus on Families, Reinforcing the Importance of Family* (Wellington, The Families Commission, 2005).

<sup>89</sup> The New Zealand department for statistics writes: "*Public policy about families is aimed at creating a social environment in which family life is supported, because high-quality family life is valued in society and reduces government expenditure. The role of government is often to assist families when the quality of family life and the support it offers falls short...Strong evidence is needed to develop programmes and services that stop problems becoming entrenched and change negative paths by dealing with matters early in life and early in the life of the problem.*" StatisticsNZ supra n32, 5.

<sup>90</sup> No statistics for New Zealand on this topic are available, but see for US statistics: Garrison M "Marriage: Essential or Expendable" Brooklyn Law School, Legal Studies Paper No 43, also published in *Journal of Law and Family Studies* (2008). Given that US social trends seem to be replicated in New Zealand after a time lag, similar developments may be expected. An interesting statistic mentioned in this article is that 68% of black children are born outside of marriage, while that percentage is 28% for non-Hispanic whites. Furthermore the majority of the white non-marital children are from cohabiting couples, while black non-marital births are

economic and political repercussions. The family as an autonomous institution and cornerstone of society is increasingly replaced by other social and legal structures, defined in legislative and regulatory terms, and directly subjected to the state's authority.

### *Fault based, liberal, and post-liberal views of divorce*

Historically<sup>91</sup> marriage was seen as an almost non-severable relationship between individuals of opposite sex with strong moral and religious notions about commitment.<sup>92</sup> Under Roman Catholic canon law, marriage was a sacrament<sup>93</sup> between husband and wife before God, representing the "marriage between Christ and the Church",<sup>94</sup> and it was well outside the reach of secular power structures.<sup>95</sup> In the post-medieval Western world, this principle was first challenged by the reformation.<sup>96</sup> The subsequent gradual re-definition of marriage as an inherently legal construct unavoidably necessitated legal provisions for its dissolution as well. Over time, and in keeping with social developments, these provisions have substantially changed. Divorce was initially virtually impossible and the prerogative of the very rich, almost exclusively male, part of society.<sup>97</sup> The increasing importance of the concepts of individual autonomy and self-realization, and no doubt the decreasing role of religion as a major organizing force in society,<sup>98</sup> changed the construct of marriage to one with a strong contractual flavour.<sup>99</sup>

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from "visiting" couples who do not share a residence. In fact, the chance that a black American child grows up with its parents was higher during the slavery era than it is today. For a discussion of the relationship between age and brain development and decision-making about parenthood, and how this enforces social inequalities, see Carbone J "Age Matters: Class, Formation and Inequality" Available from SSRN :<http://ssrn.com/abstract=1103603> (2008). For a study that touches on the subject in the New Zealand context, see Mitchell L *Maori and Welfare: A Study of Maori Economic and Social Progress* (Working Paper 5) (Wellington, Business Roundtable, 2009).

<sup>91</sup> Whereby "historically" must be interpreted as the post-medieval and pre-reformation period. In for instance the Roman period divorce was possible and relatively easy to obtain, although the issue of fault could play a role in the determination whether the dowry had to be returned: Antokolskaia MV "Nederlands Echtscheidingsrecht en 'the CEFL Principles on Divorce'; Welke is 'the Better Law'", inaugural speech, Vrije Universiteit Amsterdam, 2006. It is impossible to draw a sharp distinction between "historic times" where divorce was practically impossible and modern, liberal times.

<sup>92</sup> "Marriage is Sacred and Binding: Furthermore it has been said, 'Whoever divorces his wife let him give her a certificate of divorce.' But I say to you that whoever divorces his wife for any reason except sexual immorality[e] causes her to commit adultery; and whoever marries a woman who is divorced commits adultery.": Matthew 5:31-32.

<sup>93</sup> In an early illustration of this idea, St Augustine described marriage as *fides, proles at sacramentum*. *Fides* means faith, trust and love; *proles* refers to creating children to perpetuate life and fill the Church; and *sacramentum* indicates that marriage is a symbolic expression of God's love: Witte supra n70, as discussed in Zurcher supra n44.

<sup>94</sup> The liturgical prayers presently used in catholic wedding ceremonies still capture this doctrine: "Father, to reveal the plan of your love, you made the union of husband and wife an image of the covenant between you and your people. In the fulfilment of this sacrament, the marriage of Christian man and woman is a sign of the marriage between Christ and the Church."

<sup>95</sup> This does not mean that divorce was impossible; there were several grounds in Canon Law that allowed divorce, together with a range of possibilities to declare a marriage null and void if it had been entered into under for instance fault (from fraud to misrepresentation) or mistake.

<sup>96</sup> The Lutheran two Kingdoms doctrine relegates marriage as earthly: "subject to the Prince, not to the Pope". In Luther's words it is "a secular and outward thing". Luther argued that "an alien justification should not touch the mating act". In his view jurists, not clerics should adjudicate the difficulties associated with this construct. Interestingly, Luther (himself an excommunicated monk) married a former nun, Katherine von Bora, and the Wittenberg jurist Schurpf acted as his best man: Witte supra n70, and Berman supra n87. Despite these clear reformatory intentions, the developing new secular marriage laws remained initially very similar to the Catholic Canon Law. In terms of process in England, the equitable jurisdiction of the Chancery Courts eventually provided a forum and source of development, clearly from an ecclesiastical, rather than a secular foundation, but later assimilated into Common Law and legislature; for instance in England by way of the Marriage Act 1753 (GB).

<sup>97</sup> In England, under the 1753 and until 1857 Marriage Act, divorce was only possible by way of a private act of parliament. The procedure was extremely expensive; in the period between 1715 and 1852 only 184 divorces were granted, of which only 4 involved female petitioners. In New Zealand this remained the position until 1867: Carmichael GA "Aspects of Ex-Nuptiality in New Zealand" (Unpublished Doctoral Thesis)(Canberra, Australian National University, 1982).

<sup>98</sup> And the development from the Roman Catholic to reformatory strands of the dominant Christian belief systems.

<sup>99</sup> Although different societies and legal systems have developed very different ways of dealing with the process involved. "The choices made in each system, regarding such things as unilateral divorce, reconsideration periods and judicial review indicate fundamental differences of culture and ideology". Woodhouse supra n73. For the Anglo-American common law jurisdictions the views of John Milton, John Locke and John Stuart Mill are thought to underlie the predominantly secular and contractual view of marriage that forms the starting point and theoretical justification for the modern transformations of the institution of marriage: Witte, supra n93.

Divorce came to be seen as almost a species of breach, albeit in a legal context that was largely equitable in nature. Consequently, the concept of fault attained an important role in determining the character of the break-up and the consequences of the associated breach.<sup>100</sup> This extended to division of assets and to custodial matters where the wrongdoer would be punished for their misbehavior. When the concept of individual autonomy and its liberal connotations became the dominant philosophy in the second part of the 20<sup>th</sup> century,<sup>101</sup> the fault element lost its importance<sup>102</sup> and divorce emerged as a matter of almost strictly individual choice.<sup>103</sup> There is much debate over the question whether the introduction of no-fault divorce caused the increase in divorce rates, or whether the social demand for more flexibility in divorce laws necessitated this almost universal<sup>104</sup> change.<sup>105</sup> It is, however, clear that the introduction of no-fault divorce has provided the opportunity to terminate unsuccessful relationships,<sup>106</sup> dramatically changed the bargaining positions within the marriage,<sup>107</sup> and affected outcomes for those involved.<sup>108</sup> The current position in most Western jurisdictions<sup>109</sup> is that the actual decision to dissolve a marriage –and the grounds for that decision– are outside the intervention of the law and that these grounds normally have no legal consequences between the parties. However, following the acceptance of the concept that individuals may choose not to be partners, but cannot alter the fact that they are parents, the emphasis has almost universally shifted to the welfare and best interests of children.<sup>110</sup> Given the much increased rates of divorce and the decreased acceptance of the traditional practice that children were integrated in

<sup>100</sup> And this was effectively legislated as well, see Matrimonial Causes Act 1857(UK). For the New Zealand developments see Henaghan M "Legally Rearranging Families: Parents and Children after Break-Up" In: Henaghan RM & Atkin B (eds) *Family Law Policy in New Zealand* (LexisNexis, Wellington, 2007), 356-360; and see: Carmichael supra n97.

<sup>101</sup> See for an in-depth analysis: Stone L *Road to Divorce: England 1530-1987* (Oxford University Press, Oxford, 1990), and Reece H *Divorcing Responsibly* (Hart Publishing, Oxford / Portland, 2003).

<sup>102</sup> And was in fact abused on a large scale in order to obtain a divorce, a practice sometimes referred to as the "big lie", where spouses colluded to manufacture evidence to obtain a divorce.

<sup>103</sup> This development took place in practically all Western societies. Two main themes of divorce grounds may be recognized, irreconcilable differences and mutual consent. In the first the marriage simply cannot be continued on what may be called semi-objective grounds. The role of the state in these cases is community oriented and paternalistic; it seeks to preserve marriage for its social value and prevents individuals from making too hasty decisions. In the second the state has no other role than an administrative one. Unsurprisingly, this latter divorce ground was introduced early in the Soviet Union (1917), although later revoked by Stalin in 1944. It was introduced in Sweden in 1973, and appears to be the template for progressive divorce law: Antokolskaia MV *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia* (Intersentia, Antwerpen, 2006). When looking at the actual scenario's that are accepted in the context of "irreconcilable differences" in for instance 18 European jurisdictions, it is apparent that this concept may include everything from fault based grounds through to "divorce on demand": Boele-Woelki K and Antokolskaia MV *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, Antwerpen, 2007).

<sup>104</sup> Almost all Western jurisdictions now have no-fault divorce provisions, although they can vary substantially in respect of the qualifying conditions. Late adopters of no-fault divorce were European countries with a strong Catholic background, including Italy, Spain and Ireland. A few American States retain fault based divorce, while a significant number have re-introduced stricter divorce laws as an alternative, available on a voluntary basis. For this covenant type marriage and its very limited success, see: Zurcher supra n44 and Shaw Spaht K "For the Sake of the Children: Recapturing the Meaning of Marriage" *Notre Dame L Rev* (1998) 73, 1547-1580.

<sup>105</sup> For studies that argue the first proposition see: Rasul supra n53, and Gonzalez and Viitanen supra n53. Questioning those arguments are for instance: Wolfers J "Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results" *Am Econ Rev* (2006) 96, 1802-1820, and Fella, Manzini and Mariotti supra n53. See also the text at n53, above.

<sup>106</sup> For example, the introduction of no-fault divorce correlates strongly with decreasing suicide and homicide rates for married individuals: Stevenson B and Wolfers J "Bargaining in the Shadow of the Law: Divorce Laws and Family Distress" *Q J Econ* (2006) 121, 267-288. Research also shows that divorced individuals tend to enjoy increased happiness: Gardner J and Oswald AJ "Do Divorcing Couples Become Happier by Breaking Up?" *J R Stat Soc* (2006) 169, 319-336.

<sup>107</sup> Brinig MF and Buckley FH "No-Fault Laws and at-Fault People" *Int Rev Law Econ* (1998) 18, 325-340.

<sup>108</sup> Using US census data, an empirical study found that the introduction of unilateral divorce increased numbers of mothers living below poverty levels, and reduced investment in children's education, see Caceres-Delpiano J and Giolito E *How Unilateral Divorce Affects Children* (IZA Discussion Paper No 3342 ), 2008).

<sup>109</sup> Several European jurisdictions were quite late with legalizing divorce. Divorce was not legally possible in Italy until 1971, in Spain until 1981, and in Ireland until 1997: Gonzalez and Viitanen supra n53, 26.

<sup>110</sup> The initial common law proprietary approach gave supremacy to the father. Later legislative developments gradually introduced and strengthened the interests of the children as the paramount principle: Taylor N "Care of Children: Families, Dispute Resolution and the Family Court" (unpublished PhD thesis)(Dunedin, University of Otago, 2005).

the families of the re-partnered custodial parent,<sup>111</sup> more fine-grained regulation was deemed necessary. This type of intervention in private life is consistent with notions of social liberalism or socialism: The state intervenes legislatively or bureaucratically into areas traditionally within the domain of other social institutions, after the importance of such institutions is diminished by the apparently liberating development of increased individual autonomy. The state is, in other words, through institutions of its own creation, to which individuals are strongly directed, attempting to bring about behaviour that is not legally required, and that may not even be consistent with widely accepted social norms.<sup>112</sup> The reasons to maintain judicial intervention in the process of marriage dissolution – particularly in the separation phase and especially where there are children involved – are supported by political, social and even psychological considerations, not by legal ones. The state withdraws from legally intervening in the divorce itself,<sup>113</sup> but seeks to set moral norms to deal with consequences, especially for those who may end up as victims in what is perceived or portrayed as the resulting “law of the jungle”, i.e. the children.<sup>114</sup> Where setting moral norms and standards fails, stop-gap regulation<sup>115</sup> is introduced to deal with the situations where the parents cannot agree. The resulting possibilities of bringing divorce disputes back into the courtroom are seized by those predisposed to escalating their conflict by all possible means,<sup>116</sup> or reluctantly accepted by those who are unable to unravel the complexities of their previous relationship. It has been argued that the removal of the legal relevance of fault or misconduct in the marriage can create problems because no forum for such grievances is available, leading to either emotional problems or an increase in disputes over other matters.<sup>117</sup>

At the start of the 21<sup>st</sup> century a contentious debate continues about family values generally, and divorce specifically, which is mirrored in an enormous amount of writing and opinion. Two strands of argument can be recognized. One seeks to protect the more traditional forms of marriage and family life; it considers that marriage as an institution is deserving of protection. That argument includes the notion that the increased occurrence of divorce and the decrease of the popularity of marriage and its associated relationships are important contributors to many social problems.<sup>118</sup> The other strand suggests that divorce is an individual choice that offers adults the opportunity to pursue another attempt at happiness, and provides children with an escape from dysfunctional and aversive home environments. Both views

<sup>111</sup> This was almost without exception the mother, especially for younger children.

<sup>112</sup> Eekelaar J "Family Law: Keeping Us 'on Message'" CFLQ (1999) 11, 395.

<sup>113</sup> Or rather, it legislatively excludes the use of its institutions by providing that certain conduct between citizens does not warrant intervention by those institutions.

<sup>114</sup> Henaghan supra n100, 359.

<sup>115</sup> "Family law reform always seems to have been a matter of patchwork. Many such reforms have had the effect of influencing public opinion and perceptions after the event, often producing a wider degree of social impact than possibly anticipated." Inglis DB New Zealand Family Law in the 21st Century (Brookers, Wellington, 2007), 8.

<sup>116</sup> In that context, legal assumptions based on accepting social science dogma can be a powerful source for continued conflict, as the cases show were very marginally involved parents insist on “creating useful relations” with their offspring. See for an example *KLP v RSF* (2009) 27 FRNZ 603.

<sup>117</sup> Inglis supra n115, 8. For an analysis of the sub-conscious effect of fault, see: Wilkinson-Ryan T and Baron J "The Effect of Marital Misconduct on No-Fault Divorce Bargaining" Available from SSRN :<http://ssrn.com/abstract=906610> (2006). For a comprehensive discussion of the role of emotions: Weinstein J and Weinstein R "I Know Better Than That": The Role of Emotions and the Brain in Family Law Disputes" J L Fam Stud (2005) 7, 351-404.

<sup>118</sup> And which argument is sometimes carried to extremes, for an example see Fagan PF *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community* (The Cultural Policy Studies Project) (Washington, The Heritage Foundation, 1995). More moderate authors nevertheless speak of “marital emergency”, “a culture of divorce” and “marriage in crisis”. See quotes in: Shaw Spaht supra n104, 1550 and Zurcher supra n44, 273.

represent one-sided<sup>119</sup> accentuations, while the truth –no doubt as always– will probably lie somewhere in between: *“Increased marital instability has not brought society to the brink of chaos, but neither has it led to a golden age of freedom and self-actualization”*.<sup>120</sup> If anything, research shows that the effects of divorce remain highly situation specific, and its consequences on society and individuals alike cannot be simply generalized. Individual experiences, beliefs, preferences, and even ideology will therefore determine the attractiveness of either side of this debate.

Resolving parenting disputes is complicated by the lack of an accepted social value system about parenting responsibilities, or rather: social value systems have not developed at the same pace as the change in the social value of marriage itself.<sup>121</sup> This argument proceeds from an observation of the development of assumptions underlying custody decisions. In the period where the wife was seen as an extension of the husband, the husband was the ultimate rights-holder. The default position was therefore that the father had custody, unless exceptional circumstances were present. This changed by the early 20<sup>th</sup> century, when another set of assumptions developed, maintaining that the mother, as the nurturer and caregiver, was most suitable to have custody rights over young children and older girls. The father’s role was seen more as that of the breadwinner and male role model, best suitable to raise older boys. These assumptions were based on socially accepted family and gender roles for men and women at that time. Today there is no consensus about such roles, and the laudable, but elusive, concept of children’s welfare and best interest has developed into the determinative factor. Legislatures and courts struggle to develop standards for its determination, thereby creating an uncertainty that may actually encourage conflict rather than reduce it. In this view divorce is not so much pathological in itself, but the lack of adequate social values and standards for dealing with its consequences, and the resulting legal uncertainties and subsequent legalized conflicts are. Divorce itself has become value-neutral; the moral divide is no longer between those who have divorced and those who have not, but between those who divorce “well” and those who divorce “badly”.<sup>122</sup> I.e. a “good divorce” is to be preferred over a “bad marriage”.<sup>123</sup> This conceptualization of marriage, divorce and the problems following dissolution, may lead policy developers to think that the government, law and legal process have a role to play by directing divorcing parties to settle matters themselves, rather than to navigate the rough seas of ordinary legal procedure. Although it may seem a paradox that the same ideology can increase individual autonomy – by removing fault principles and legal intervention from the divorce– with one hand, while reducing autonomy –by setting behavioral standards for conduct during and after the divorce– with the other, this

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<sup>119</sup> *“Across nations, the marriage question has typically been debated in value-laden terms. On one side, the pro-marriage group calls for ‘a re-stigmatization of illegitimacy and promiscuity’ and contends that virtually all social ills, including ‘the drug crisis, the education crisis, the problems of teen pregnancy and juvenile crime’ can be traced ‘to one source: broken families.’ On the other, the anti-marriage forces deplore efforts to revitalize marriage not only as ‘moralistic’ and ‘atavistic,’ but as signs of ‘denial, resistance, displacement, and bad faith’.* Although there is a large and growing body of social science research relevant to the marriage debate, advocates on both sides have tended to selectively seize on evidence that supports their point-of-view or simply to ignore the evidence altogether.”: Garrison supra n90,3 (original footnotes removed).

<sup>120</sup> Amato supra n62, 1282.

<sup>121</sup> Emery RE, Otto RK and O'Donohue WT "A Critical Assessment of Child Custody Evaluations" *Psychological Science in the Public Interest* (2005) 6, 1-29, 24.

<sup>122</sup> Whereby a “good divorce” progresses through the discourse of rationality at the expense of emotions, severing chaotic and destructive feelings from the manageable and rational parts of ourselves, sanitizing personal disappointments and inducing feelings of guilt and inadequacy into those who have problems managing the darker side of themselves: Sclater SD *Divorce: A Psychosocial Study* (Ashgate, Aldershot, 1999).

<sup>123</sup> Reece supra n101, 155.

approach can be reconciled with socialist (or collectivist) notions of tempering individual autonomy with behaviour modification.<sup>124</sup> This raises questions about the use of law and legal process to affect social change and this aspect must be considered first.

### *The role of the law and legal process*

Ultimately, the social role of law and legal process involves a philosophical, jurisprudential, or even cultural perspective, which is largely outside the scope of this thesis. For the purpose of this brief discussion the simplistic but convenient view will be used that law may be seen as a conflict culture by which we exercise power over ourselves. This view ultimately leads to the proposition that divorce and parenting disputes are about rights and obligations between citizens and thus (through the rule of law) ultimately within the prerogative of the state, through its adjudicative institutions: the courts. This can also be seen as a technological approach to conflict resolution: citizens unable to resolve disputes between them seek mechanisms to exercise power over the opponent, and the final (and only) source of legitimate force is government-mandated and only available through the legal process. Yet another way of framing this is to say that in a civilized society a mechanism needs to be available to resolve issues between parties with fundamentally opposing opinions, whether these are the result from interpretation of fact or differences in moral values. A way of accommodating resolution of differences between such parties is agreement about the way disputes are resolved, i.e. rules and (legal) process. These approaches are all expressions of the same idea: formal judicial process is the legitimate last resort to resolve disputes between citizens, it provides a forum to apply and enforce the formal rules by which society is organized, and thus represents a source of government mandated coercive force.

If the consequences of this proposition are accepted, it also follows that any private arrangement, any result from a consensual dispute resolution process, or any non-court determination, will remain subject to some form of challenge, review or appeal process that will in turn be bound by a formal rule system. The rules, standards and procedures of the legal process thus act as a prototype and benchmark for any other process, which consequently takes place “in the shadow of the law”.<sup>125</sup> Disputes that do not take place within the court are thereby nevertheless set within a quasi-legal domain using “legalized” roles and actors, discourse and especially methodology. Hard cases in family law rarely turn on objectively determinable facts and unambiguous rules and they do not provide clear-cut moral issues. A challenge to any outcome of a non-court process will therefore rarely focus on whether the outcome itself is “right” (which may mean anything from “correct” to “just” or even “equitable”), but whether it has been reached in compliance with the relevant process and by considering issues that are deemed legally relevant. Law and legal process thus loom large over any attempt the parties themselves may undertake to resolve differences, and outcomes are open to challenge by a party prepared and/or able to engage the formal legal process. Another way to reach the same conclusion is by using economic theory, which holds that in a negotiation situation with zero transaction costs, parties will normally reach a negotiation equilibrium

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<sup>124</sup> Dewar J "Family Law and Its Discontents" ILJPF (2000) 14, 59-85, and Reece supra n101.

<sup>125</sup> Mnookin and Kornhauser supra n15. The argument as developed here takes a mostly procedural perspective. Similar reasoning can be constructed in respect of substantive law, whereby knowledge of the law as applied in the formal court process sets a benchmark from which rights expectations or claims are derived that inform the parties' positions in non-court procedures. The concept can also be used as a psychological perspective, which was considered in the text associated with n15, supra.

that accords with their rights as defined in the relevant legal and formal system.<sup>126</sup> If respective rights change, parties will adjust their negotiation positions in the direction of that change, and negotiation outcomes will therefore move in that direction. Although family law, and especially legal processes in parenting issues, are certainly not an environment with zero transaction costs, the effect of substantive law on the negotiation process is undeniable.<sup>127</sup> Although it remains open to debate whether law and legal process are suitable instruments to affect behavioral and/or social change in this area of human interaction,<sup>128</sup> they undeniably have effect, although operating less directly and with less force than lawmakers would perhaps hope.<sup>129</sup>

Particularly problematic is social behavior that escapes the law and even its “shadow” because individuals are effectively out of reach of the law, for instance those who refuse to cooperate or abstain from their responsibilities altogether, or those who are simply too poor, suppressed or otherwise disadvantaged to take any advantage of what the legal process may have to offer. An additional problem is caused by the reality that any legislative intervention<sup>130</sup> in social behaviour must by its nature operate indirectly. The mere fact that legislation prescribes certain social behavior, for instance post separation collaborative parenting or consensual dispute resolution, does not mean that citizens will adjust their behaviour to conform to the ideas endorsed in that legislation.<sup>131</sup> The question thus remains by what means individuals can be persuaded, coaxed, coerced or forced to comply with the legislative prototypes, or by what means family law can effectively promote the desired objectives.<sup>132</sup> One way to do that is to make recourse to the law and its institutions subject to behavioural compliance with policy objectives. The PHP programme is one possible method to achieve this, and this thesis will consider whether it is a valid one.

In this area of law it is debatable whether the development of law follows the development of social norms and social conscience or vice versa, or whether perhaps a more complicated system of interaction exists.<sup>133</sup> Equally contested is whether, insofar as the law protects the family this is because family as an institution is useful to society or because the family serves individual fulfillment.<sup>134</sup> The current relative ease of obtaining a divorce and the stated objectives of the contemporary legal process surrounding

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<sup>126</sup> The so called Coase theorem, see also Allen DW and Brinig MF "Bargaining in the Shadow of Child Custody" U Iowa Legal Studies Research Paper No. 05-25. Available at SSRN: <http://ssrn.com/abstract=820104> (2005).

<sup>127</sup> And this may have unintended consequences, such as tradeoffs between property and custody issues, where it has been argued that women have obtained a poorer negotiation position as a result of the removal of maternal presumptions in custody assessment: Altman S "Lurking in the Shadow" S Cal L Rev (1995) 68, 493-543. See for an empirical analysis behind that argument Brinig MF "Unhappy Contracts: The Case of Divorce Settlements" Online Article, Berkeley Electronic Press (2005) and Allen and Brinig supra n126. No fault divorce legislation is thereby a good example of how changes in substantive law indirectly influence other means of dispute resolution.

<sup>128</sup> Law has very limited capacity to affect family life, because that is so “*intertwined with other social structures that it is not possible to transform it without reversing a multitude of other trends in modern social life*”. Law and policy therefore have only an effect at the margins: Goode WJ *World Changes in Divorce Patterns* (Yale University Press, New Haven, 1993); Maccoby EE "Divorce and Custody: The Rights Needs and Obligations of Mother Father and Child" In: Melton G (ed) *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change* (University of Nebraska Press, 1995).

<sup>129</sup> While the use of law to influence social behaviour often causes a multitude of unwanted and even unforeseen side effects.

<sup>130</sup> Or any other intervention based on authoritative directions, such as regulations, by-laws or procedural rule systems.

<sup>131</sup> See also the comparison with Swedish legislation provided by Ellman supra n53, 706.

<sup>132</sup> Garrison M "Promoting Cooperative Parenting" Available from SSRN: <http://ssrn.com/abstract=1086441> (2007).

<sup>133</sup> For instance one where the developing insights in social science research give direction to, or at least stimulate, the development of law and legal process. This is arguably the case in some jurisdictions, such as Australia: Altobelli T "Editorial" AJFL (2007) 21, Editorial. An even more intriguing concept includes the interactions between culture, law and legal process: Chase OG *Law, Culture and Ritual Disputing Systems in Cross Cultural Context* (New York University Press, New York/London, 2005).

<sup>134</sup> Woodhouse supra n73, 263.

divorce seem to support the second, individualistic, contention. Although custody disputes share characteristics with other civil disputes, they are very different. An ordinary civil court acts as an independent umpire determining facts and applying law to declare resulting liability. This process is focused on correcting a situation that had arisen in the past. Contemporary family courts have an entirely different objective: they establish the parties' capabilities in the future to provide parenting in the best interests of their children, who are, in a strict formal sense, not a party to the proceedings,<sup>135</sup> and who would ordinarily lack standing to put their own case before the court.<sup>136</sup> But the differences are not restricted to the objectives of the proceeding; the process itself is also fundamentally different. While courts dealing with civil matters (in a Common Law procedural system) are not normally interested in how the proceedings are conducted, family courts and the associated social service agencies actively seek to affect behaviour, as part of a therapeutic function, which is not primarily aimed at protecting, repairing, or properly dissolving the marriage, but at creating a mindset that is conducive to responsible individual behaviour and collaborative practices post-separation. One thus recognizes a "dejurification" of the law of marriage and a shift from attempts to promote ideas about (married) family life towards resolving practical (and individualized) conflicts about property and especially about parenting. The process moves from formal court hearings to more consensual procedures, but always with the prospect of the legal process as a "backstop".<sup>137</sup> The relevant question is therefore whether there should be a role for the state in providing direction for individual behaviour in the family context, what that role and its direction should be, and the way by which both role and direction ought to be achieved, if deemed desirable.<sup>138</sup> That question has a strong political and even constitutional dimension,<sup>139</sup> and can be argued in a number of ways.

### *The dimension of political ideology*

As Durkheim suggested,<sup>140</sup> the focus on individual responsibility and the resulting withering of the strength of family as a core component of social organisation can be seen as part of a process by which individuals are placed in a direct, unmediated, relationship with the state,<sup>141</sup> devoid of intermediate social

<sup>135</sup> Which is recognized in New Zealand and (at least partially) resolved by appointing a lawyer for the child, while there are other mechanisms in place to obtain direct input from the child's perspective, such as judicial interviews and psychological reports, i.e. the anomaly is resolved by additional legislative and regulatory directions.

<sup>136</sup> It could therefore be argued that the adjudicative function itself cannot be reconciled with the purpose of parenting hearings. As a stranger, the adjudicator is likely to invoke norms of past behaviour, rather than an analysis of personal characteristics and relationships: Catania *supra* n82, 1240.

<sup>137</sup> A phrase coined by the New Zealand Law Commission in its 2004 review of the court system: New Zealand Law Commission *Delivering Justice for All, a Vision for New Zealand Courts and Tribunals* (Report 85) (Wellington, NZLC, 2004), 3-6 and 230.

<sup>138</sup> Ellman *supra* n53. Who argues that family law is often a futile tool to achieve social change, which should be used with caution, because it "operates in a sphere rich with non legal obligations that people take seriously". The same conclusion can be reached from an ethno methodological approach that questions whether law reaches sufficiently deep into everyday life to be actually used as a vector to affect change in social order and behaviour: Dingwall R "Language, Law and Power: Ethnomethodology, Conversation Analysis, and the Politics of Law and Society Studies" *Law Social Inquiry* (2000) 25, 885-911.

<sup>139</sup> Bartlett KT "Re-Expressing Parenthood" *Yale LJ* (1988) 98, 293-340, 303.

<sup>140</sup> Durkheim E and Thompson K *Readings from Emile Durkheim* (Routledge, London ; New York, 2004).

<sup>141</sup> This represents an ideal originating from Plato (see "The Republic") then applied in the French Revolution, and later enthusiastically adopted by socialist (collectivist) movements on either side of the political spectrum. Rousseau frames the concept as: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole." In: Rousseau JJ *The Social Contract or Principles of Political Right* (Translation by G.D.H. Cole, Public Domain at [www.constitution.org](http://www.constitution.org), 1762). The consequent place of children as "property of the common" (and thereby as instruments to control their parents) is also exemplified by the following quote: "The state must declare the child to be the most precious treasure of the people. As long as the government is perceived as working for the benefit of the children, the people will happily endure almost any curtailment of liberty and almost any deprivation.": Hitler A *Mein Kampf* (Houghton Mifflin, Boston, 1999). This type of ideological parallels between for instance the



structures and other mechanisms for the development of moral value systems.<sup>142</sup> Those intermediate social and moral structures normally serve to protect the individual from an overpowering state, and they thereby enhance individual liberty and democracy. On that note, one might conclude that divorce –or rather its legal context– indeed signifies a social pathology, albeit with a dimension that far supersedes the individual conflicts between former spouses.

The positive notions surrounding partnering<sup>143</sup> and entering into marriage,<sup>144</sup> and the impact on emotional wellbeing and the socio-economic and social ramifications that accompany marriage break-up, prove that the family remains an efficient and valued psychological, social and economic institution.<sup>145</sup> In addition, children from successful marriages have proven advantages over children raised in other structures, and hence one would expect strong government support for the formal institution of marriage, consisting of policies designed to reverse the decline of marriage and to provide more incentives to keep existing marriages intact.

A tension can be perceived between maintaining the individual and social advantages of traditional marriage and concepts of family on the one hand and ideology driven government objectives along the lines proposed by Durkheim on the other.<sup>146</sup> The legal environment in which divorce takes place is thus a salient example of how divorce and subsequent parenting disputes become events that allow the state to intervene in private life. Besides explicit government policy, the way law and legal process assign priorities while dealing with marriage conflict and continued parental responsibilities post-separation are a direct indicator of the scope and depth of the role of the state and they shine light on the state's objectives for social intervention. In that sense, state assistance to achieve negotiated rather than adjudicated parenting outcomes can be interpreted as the pinnacle of recognition of family- and individual- autonomy over legal and hence state-controlled processes. Subsidized or even compulsory, conciliation, re-conciliation, mediation and other programmes providing information and assistance all appear to fit in the view that the state is retracting from involvement with the way individuals organize

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ideologies of the Swedish welfare state and Nazi Germany are highlighted by family activists, and they are indeed also compatible with Marxist doctrine, which clearly denounces family as a bourgeois instrument of oppression: Marx K and Engels F *Manifesto of the Communist Party* (London, 1848). For a discussion of the constitutional position in the US, see: Cooper Davis P "Contested Images of Family Values: The Role of the State" *Harv L Rev* (1994) 107, 1348-1373. At the dystopian end of the scale, George Orwell writes: "*The family could not actually be abolished, and, indeed, people were encouraged to be fond of their children, in almost the old-fashioned way. The children, on the other hand, were systematically turned against their parents and taught to spy on them and report their deviations. The family had become in effect an extension of the Thought Police.*": Orwell G 1984 (Penguin, London, 1949), Part 2, chapter 3.

<sup>142</sup> Such as for instance religious value systems, which have (at least in the Western world) lost much of their direct relevance and fail to excite the majority of the population. Papal decrees that would have once caused major upheaval, now barely draw attention, for instance: Fisher I and Rother L "The Pope Denounces Capitalism and Marxism" *The New York Times* 14 May 2007.

<sup>143</sup> People that report to be satisfied with life tend to be satisfied with personal relationships, especially with the relationship with a partner, see Robertson J *New Zealanders' Satisfaction with Family Relationships and Parenting* (Blue Skies Report No 10/06) (Wellington, Families Commission, 2006). This research also found that relationship with children were rated as slightly more important than that with the partner, while the satisfaction about the relationship with children was slightly higher as well, although there are differences between men and women.

<sup>144</sup> For an example of English research indicating that marriage remains a family form that is preferred by most and remains socially endorsed and regulated, see Mansfield P, Reynolds J and Arai L "What Policy Developments Would Be Most Likely to Secure an Improvement in Marital Stability" In: Simons J (ed) *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department, London, 1999). This (limited) review of literature about the relationship between government policy and marriage and family concludes that more research is necessary, but assumes that there is a role for policy development.

<sup>145</sup> Married individuals typically live longer are healthier, use fewer drugs, engage less in risky behaviour, do better economically and accrue greater wealth. See Garrison supra n81, 493-495, for a selection of research on this topic. For New Zealand data, see Ministry of Social Development supra n86, 45, concluding that sole parents are significantly less happy than other parents.

<sup>146</sup> And which can be conceived also as a dichotomy between marriage as an institution and marriage as an individualised choice. See also Amato PR "Tension between Institutional and Individual Views of Marriage" *J Marriage & Fam* (2004) 66, 843-1071.

their private relationships.

However, and more cynically, it can equally be argued that an increasingly normative and interventionist approach, purportedly supported by notions of therapeutic justice, and the concomitant moves from disruptive adversarial to judge controlled inquisitorial process or state directed attempts at “consensual” alternative dispute resolution, are attempts to justify and implement increased, socialistic, state paternalism.<sup>147</sup> One can envisage the ultimate therapeutic state, a “Brave New World” in which Platonic guardians use law and legal process to achieve their conceptions of good health and social adjustment.<sup>148</sup> In such a Utopia no legal process is started without attempting conciliation, mediation and, if necessary, re-education by which eventually the most litigious individual may come to understand the errors in his/her behaviour and the shortcomings in his/her social adaptation. Under such a state of affairs legal and even pre-legal process is used to advance policy objectives beyond and besides the confines of the parties’ narrow and pathetic dispute. The parties’ issues are reduced, changed, added to, or enhanced by the state’s (pre) judicial process.<sup>149</sup> This will also occur where the parties “fail to recognize” victimization or social injustice. The issues are modified or embellished by applying (social) scientific research to explain their “real background” or neglected altogether where considered irrelevant to the (policy determined) “real issues” at stake. The therapeutic and social goals to be achieved determine the scope and extent of this regulatory, legislative and judicial meddling in citizens’ affairs. Any resistance against such interventions is considered a misguided misunderstanding, to be resolved by more and better “explanation”. As a result, government resorts to politics of persuasion.<sup>150</sup> The inherent drawbacks of adversarial litigation are exacerbated by burgeoning costs and delays, and rather than addressing those problems, “better alternative processes” are created and promoted.<sup>151</sup> Where promotion and subsidy of such processes does not achieve sufficient participation, they are made compulsory.<sup>152</sup> These alternative processes typically involve additional bureaucracy and the involvement of semi-officials governed by direct and detailed government guidelines. The bureaucratic apparatus and the members of the necessary “helping professions” that become involved are typically composed of those who are inclined to conforming social ideologies as a result of their training and background. Alternative and consensual conflict resolution processes become tools of social engineering; they use the discourse of healthcare, social work and mediation and thus extend the powerbase and influence of the “helping professions”.<sup>153</sup> By offsetting the horror stories of adversarial litigation with the rhetoric of fairy tale consensual endings

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<sup>147</sup> See for instance Reece supra n101, Roberts S "Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship" MLR (1993) 56, 452-470; Ingleby R "Court Sponsored Mediation: The Case against Mandatory Participation" MLR (1993) 56, 441-451; Davis G "Reflections in the Aftermath of the Family Mediation Pilot" CFLQ (2001) 13, 371-381; and Dewar supra n124.

<sup>148</sup> Winick BJ "The Jurisprudence of Therapeutic Jurisprudence" Psychology, Public Policy and Law (1997) 3, 184-206, 191 and Damaska MR *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, New Haven, 1986). This development would conceivably also be used to pre-empt conflict or problems by using legislated powers for executive agencies to intervene, inspect and correct. See for instance: Parton N "The 'Change for Children' Programme in England: Towards the 'Preventive-Surveillance State'" J Law Soc (2008) 35, 166-187.

<sup>149</sup> The pre-judicial process is of course increasingly dominated by modern social guardians such as social workers, state employed mediators and conciliators and state funded psychologist experts and counsellors. The PHP provides an example where the judicial process itself is directly used to perform that function of issue adjustment.

<sup>150</sup> Eekelaar supra n112.

<sup>151</sup> I.e. problems are treated not as problems in the implementation or administration of existing processes, but as symptoms of systemic failure that require adjustment of the fundamental tenets of the existing system.

<sup>152</sup> A good example is provided in both England and Australia. Kaspiew R "Advent of Compulsory Family Dispute Resolution: Implications for Practitioners" Family Relationships Quarterly (2007), Issue 6. In the course of completing this thesis the New Zealand Parliament enacted amendments to family law that have a similar effect. This will be discussed later.

<sup>153</sup> Diduck and Kaganas supra n88.

an increasing relevance on, and even dominance for, these helping professions is achieved. The “old-fashioned” litigation and custody model, characterized by potentially harsh but unambiguous determinations of undiluted rights and responsibilities over children at the termination of the family structure, is set aside. It is replaced by a therapeutic and interventionist model that seeks to maintain relationships between individuals who have shown no interest in pursuing this for themselves, and that thus creates an ongoing dependency on state provided assistance to monitor and resolve disputes within the now re-constituted family where partner relationships have been replaced by parenting agreements or judicial decisions. State and social work involvement continues until the children reach maturity.<sup>154</sup> Hence, there is a large vested interest at stake for those professionally involved, which aligns perfectly with the interests of governments bent on social engineering.

The shift from parent’s rights to children’s rights can also be placed in this interventionist paradigm. Traditional common law legal process determines the rights between the litigants. Inevitably this frames authority over, and responsibility for, children in proprietary terms, hence the previous use of custody and access terminology, which reflects that approach. By introducing third party rights (those of the children) and by introducing the state as the guardian of those rights through legal, legislative, and procedural directions, the state now exerts proprietary entitlements over children. The parents’ role is reduced, their authority defined in legislative code, their active parenting role re-defined and described as providing day to day care, or being able to have contact.<sup>155</sup> The introduction of this new terminology can be seen as a semantic and rhetorical way of transforming and reorganizing the discourse about parental responsibility and authority.<sup>156</sup> By focusing on and elevating the welfare and best interest principle, a benchmark is introduced that assumes some objective knowledge of what constitutes this principle. A range of experts, again educated in, and operating from ideological principles, enter into the fray and provide “scientific” evidence to support decision making about parenting questions. The helping profession (social science and healthcare) discourse thus eventually encompasses and absorbs the traditional legal (rights based) dialogue, a definitive step in a process whereby eventually the decision making will shift to, or be effectively delegated to, social workers, counsellors and mediators. Although couched in terms of support, information, or education, the purpose of such developments is compliance with models of behavior or even with sets of norms that are derived from often theoretical ideologies about desirable social interaction or parenthood. In the end family law is being “hijacked” by doctrinaire rhetoric, enshrining an ideal of familial or divorcing behavior.<sup>157</sup>

As an alternative to this interventionist model, prominence could be given to maintaining the Common Law ideal of a disinterested and minimalist state that provides an impartial and neutral court which

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<sup>154</sup> Fineman supra n3, 763-764.

<sup>155</sup> Or for instance in the Australian context, under the recently introduced Family Law Amendment (Shared Parental Responsibility) Act 2006 s64B: “orders with whom the child is to live spend time and communicate”.

<sup>156</sup> And this was in fact blatantly introduced in that way, albeit from the perspective that the change of language will somehow change the mindset of the disputing parents. See also n13, supra, and associated text.

<sup>157</sup> A good example of an attempt to affect behaviour by way of “information and education” was the failed introduction of Part II of the Family Law Act in the UK, where in itself successful information sessions failed to achieve the desired result. Instead of saving marriages and increasing consensual dispute resolution and a focus on collaborative post separation parenting, the participants tended to engage lawyers to finalize their divorce plans, and to be better informed of their legal rights in anticipation of the promoted consensual processes: Lord Chancellors Department “Divorce Law Reform - Family Law Act 1996 - Part II Repeal” <http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=25847&NewsAreaID=2> Last accessed: 1 February 2008 , and the comments in Davis supra n147.

applies and develops law by adjudicating justly<sup>158</sup> in ever changing circumstances. Disadvantages of that system could be addressed without changing its basic premises. Litigation costs could be reduced by use of modern information technology, waiting times and delays could be resolved by increasing the capacity and efficiency of the judicial system. A legal aid system could be devised that gives wider access to proper legal advice, while retaining a connection with individual choice and responsibility. Court rules could be made that facilitate and enforce earlier exchange of vital information and punish excessive posturing, unnecessary evidence, unjustified allegations and other procedural tactics that are now being addressed by increased and early attempts at changing the mindset of the conflicting ex-partners. The objective could be to reduce the role, impact and importance of the state in family matters, instead of continuously increasing it.

I have not found independent and unbiased substantial empirical research that evaluates and compares the economic and societal effects of these alternative options. It must be noted that under the first (interventionist) alternative, the social power of the political and specialist elite is enhanced and embedded, while under the second notions of self determination and reduced involvement of the state in social and economic affairs are promulgated. The choice between them is therefore political and not legal.

Consequently, whether the current state of affairs surrounding the resolution of divorce disputes should be characterized in terms of social pathology, structural deficiencies in the judicial apparatus or as a lack of individual education or social adaptation of parents will be a strongly individual and predominantly political or ideological assessment. It must be noted that the (rather scarce) empirical data that informs this debate is not devoid from bias. Research into the social effects of divorce and the psychological effect on parents and children is often coloured by pre-conceptions of family life and levels of desirable state intervention.<sup>159</sup> The academic developments in this field thus also reflect a political or ideological agenda. To that must be added that virtually all research in this area, especially in New Zealand, is in some way government funded. As a result, there is too much symbiosis between policy-makers, departmental strategists and those who provide the reports, data and concepts on which government intervention is ultimately based.<sup>160</sup>

This paper argues that the debate between proponents of the opposing views on the spectrum between private- and family autonomy on one side and state paternalism on the other, ultimately involves a constitutional issue.<sup>161</sup> It appears that this dimension is not yet actively pursued in academic writing in New Zealand. This aspect will be considered below, together with the discussion of the substantive effects of procedural changes. Although outside the primary scope of this thesis, in my conclusion it

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<sup>158</sup> I.e. based on a limited set of fundamental moral principles and the "rule of law".

<sup>159</sup> For an interesting insight see Wallerstein and Kelly supra n79 and: Kelly JB "Changing Perspectives on Children's Adjustment Following Divorce: A View from the United States" *Childhood* (2003) 10, 237-254, 249, where Kelly remarks: "the media preference for reporting dramatic pathological outcomes was again evident, as was their impatience with social scientists' explanations ..."

<sup>160</sup> Australian material provides an interesting insight in this cross-pollination between academics and the judiciary, which is the driving force of the developments in that jurisdiction. See for example: Bryant D "The Role of the Family Court in Promoting Child-Centered Practice" *AJFL* (2006) 3, 30-47 and: McIntosh JE and Long C *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow up Study of Parent and Child Outcomes* (A report to the Family Court of Australia) (Carlton North, Family Transitions, 2007).

<sup>161</sup> For a comparable argument in the US context, see: Cooper Davis supra n141.

appears that New Zealand follows the path of increased state intervention and normative control of family life.<sup>162</sup> Whether the PHP is an example of such a trend, and whether the features of the PHP process provide sufficient due process safeguards to counterbalance any unwarranted state intrusion, is within my topic, and will be considered below.

### *The relevance of economic factors*

In addition to the questions that juxtapose different views about the role of the state in regulating matters that arise out of arguably the most intimate of individual affairs, it is necessary to briefly consider whether these questions actually address the most relevant issue. Apart from the question whether legislative and institutional intervention can effectively achieve social change, it may be that the developments underlying the decline of the traditional family are not signaling any trend in social attitudes, but are of a different nature. As a result, the interventions that are being applied may operate in the wrong domain, and will therefore not lead to the intended results. A recent paper discussing the situation in Arizona<sup>163</sup> found that divorce rates had been declining for two decades.<sup>164</sup> For about half of the children living with a single parent in that study, the cause of that domestic circumstance was not divorce, but the simple fact that the parents had never had a stable relationship in the first place.<sup>165</sup> If the perceived problem is that of single parent families or insufficient involvement of both parents in the upbringing of their children, then a decreasing marriage rate is as much cause for concern as divorce, particularly when noting that problems are concentrated in lower socio-economic groups. The Bush government in 2003 pledged billions to programs to promote marriage among the poor, in the belief that increased marriage would cure poverty.<sup>166</sup> It is arguable whether that causal connection is not in fact of a reverse polarity. Research in the US showed that the percentage of Americans with a positive view of marriage increased from 72% in 1991 to 86% in 1996, which appears to contrast starkly with declining marriage rates.<sup>167</sup> It can be argued that the poor simply cannot afford marriage, or that women have problems finding suitors that are economically viable, or otherwise suitable.<sup>168</sup> Added to that observation, real income levels<sup>169</sup> had continuously decreased during the past few decades for most of the

<sup>162</sup> A good indication of which can be found in the ever increasing numbers of brochures, leaflets, programmes and courses aimed at explaining and educating autonomous individuals, and the growing number of government employees dedicated to investigation, reporting and intervening into family situations.

<sup>163</sup> Ellman supra n53. Apparently this trend can be recognized on a wider scale in the US as well: Rasul supra n53.

<sup>164</sup> Which is apparently a trend for the US, where recent data indicates a stabilization or slight reduction in divorce rates: see the sources quoted in Parkinson P "Family Law and the Indissolubility of Parenthood" Fam LQ (2006) 40, 237-280, 238. It must be noted that US statistics record divorce rates as a percentage of population and not as a percentage of marriages, and this statistic can therefore not be directly compared with New Zealand data. Nevertheless in New Zealand divorce rates have been declining as well since 2004, see n56, supra.

<sup>165</sup> A situation not incomparable with New Zealand, where in 2004 almost half (45%) of children was born ex-nuptial. In 1962 this fraction was only 8%. StatisticsNZ supra n32.

<sup>166</sup> Amato supra n146, 959. See for instance 42 USC 601, which includes under a purpose clause the following: (2) *end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage*; (3) *prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies*; and (4) *encourage the formation and maintenance of two-parent families*.

<sup>167</sup> See for various sources that show that marriage is seen as an important life goal (at least in the US): Garrison supra n81. This research also shows that this objective was shared throughout the population, and was not different between socio-economic, racial or ethnic groups. Given the differences in actual married status and non-marital childbearing, there is strong support for the conclusion that economic factors are important to explain the decline of the importance of marriage and the family.

<sup>168</sup> Low-income mothers report that they have not married their children's fathers because of serious relationship problems such as violence, addiction, criminal misbehaviour and chronic conflict; problems strongly associated with relationship failure and poor outcomes for children. See also Garrison, ibid and sources quoted there.

<sup>169</sup> I.e. as compared with what can be purchased for a nominal income.

population. The suggestion is therefore that the underlying causes for single parent families are of an economic nature, rather than a sign of less appetite for marriage as an institution.<sup>170</sup> A similar economical perspective may be applied to marital failure and familial problems, which are often preceded or compounded by financial stressors.

In New Zealand, an economic viewpoint cannot avoid to consider the state's impact through the operation of the welfare system. The availability of specific social benefits for single parents (mainly women)<sup>171</sup> influences micro-economic aspects of decision making about parenting.<sup>172</sup> In economic terms, "being a solo mother" provides a not unattractive alternative to an economically sustainable relationship or single working parent situation (Figure

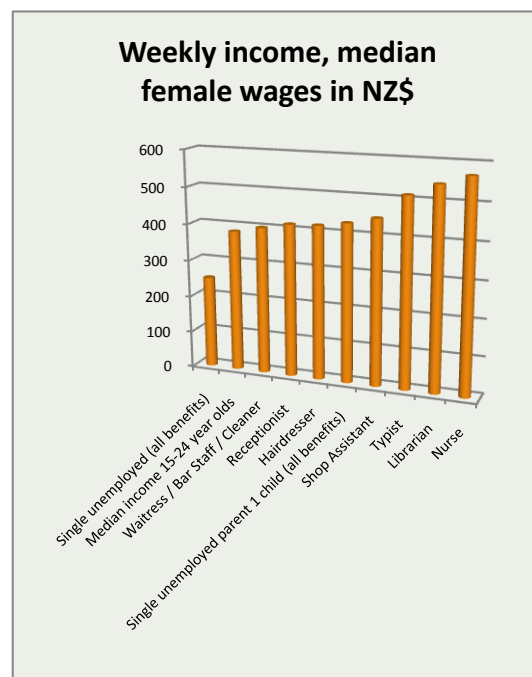


Figure 4 Median female wages/work area

4).<sup>173</sup> Statistical data shows a strong correlation between the introduction of the Domestic Purposes Benefit (DPB) and declining involvement of solo mothers in the work force.<sup>174</sup> By June 2009, more than 104,000 recipients of a DPB benefit were registered,<sup>175</sup> of which almost 90% were women. While DPB is only available for those older than 18 years, about 1000 girls of 16-17 years were receiving emergency benefits for the same purpose. DPB recipients are disproportionately found in Maori and Pacific minorities (41.4% and 10.0% of recipients). About 68% of recipients are younger than 40 years, and just over 50% care for one child. Some 16% of recipients declare another (small) income source, meaning that 84% are completely reliant on the welfare system.

Expressed as a percentage of the working age population, the number of DPB recipients was declining during the last decade, but has been rising with the worsening economic climate, from just over 3.5% in 2008 to almost 4% by 2009.<sup>176</sup> There are no conclusive and detailed statistics on the number of children who are, through the DPB, directly dependent on a welfare benefit as the only income source for their (custodial) parent, but it can be approximated at some 200,000 children.<sup>177</sup> The high numbers of those relying on the DPB indicate that a large number of children are likely to have very limited contact with the non-custodial parent, given that the child support had to be arranged through the benefit/compulsory

<sup>170</sup> It has also been argued that marriage may increasingly be seen as a marker of economic, rather than personal or social achievement: See Cherlin, Kefalas, Becker, Moffitt and Smock as quoted in Garrison *supra* n81, 503-504. If that argument is correct, than logic dictates that having children would act as an even stronger economic marker, unless disturbed by other micro-economic stimuli, such as welfare programmes.

<sup>171</sup> The 2006 census in New Zealand found that 28% of families were headed by a single parent, 80% women: census data available at <http://www.stats.govt.nz>.

<sup>172</sup> That can relate to a separation decision or ex-nuptial or solo-parenting generally. For an example where welfare entitlements dominate the parenting dispute, see *IU v OE* Family Court non-disclosed, 9 October 2006, Judge R Murfitt, FAM-2006-522.

<sup>173</sup> Income data based on <http://lindsaymitchell.blogspot.com>, 26 September 2009.

<sup>174</sup> Centre for Social Research and Evaluation *Receipt of the Working for Families Package: 2007 Update* (Wellington, MSD & IRD, 2007), 39.

<sup>175</sup> That being a decline from almost 109,000 in 2004. For data source information see n176.

<sup>176</sup> All data sourced from the Ministry of Social Development website: [www.msd.govt.nz](http://www.msd.govt.nz), last accessed August 2009.

<sup>177</sup> According to the NZ Christian Council for Social Services the number of children substantially relying on benefits as at June 2009 was 219,627. See [http://www.nzccss.org.nz/site/page.php?page\\_id=118](http://www.nzccss.org.nz/site/page.php?page_id=118) last visited September 2009.

payment child support regime. That suggestion is supported by the level of child support debt, which reached a staggering \$1.3 billion in June 2008.<sup>178</sup> To put this in perspective, by June 2006, there were 172,000 parents supposedly paying child support, of which 123,000 (72%) owed debts on their child support liabilities.<sup>179</sup> Non-payment of child support correlates with loss of contact, particularly where support levels are low,<sup>180</sup> or where the liable parent has absconded abroad.<sup>181</sup> By creating a welfare benefit intended to resolve (temporary) financial hardship for solo parents following separation or death of the partner, effectively an economic stimulus has been created for single parenthood as a life style choice supported by the taxpayer. This represents an area where economic variables at micro-level and ideologically driven interventions at macro-level substantially overlap. The resulting imbalances can be seen as either the intended result of ideological policy objectives, pursued in a roundabout way,<sup>182</sup> or as unwanted side effects caused by individual economic or social optimization being out of sync with the policy objectives. Particularly where the biological relationship is not necessarily determinative for the primary care arrangement (as is often the case in the Maori population)<sup>183</sup>, the child with the associated DPB and other welfare entitlements may in some cases become an economical, rather than an emotional asset.<sup>184</sup> This could have serious repercussions for the child's wellbeing.<sup>185</sup> Sadly, this economic principle can apply to solo mothers with their children, and it can be argued that those women thereby attract casual non-committed partners and the associated problems with domestic violence and child abuse. The end result of a policy, with a very substantial economic effect, aimed to improve children's wellbeing, ends up achieving precisely the opposite.

It has been remarked above that there is evidence of a correlation between economic prosperity and the duration of marriages.<sup>186</sup> An American study found that the rate of marriage of already cohabiting couples correlates with a rise in income.<sup>187</sup> Research has shown that economic factors have a higher

<sup>178</sup> Refusal to pay child support is correlated to loss of contact with the liable parent (typically the father). As child support is collected through the IRD, directly from the liable party's income or benefit, absconding from payment is typically achieved by the liable parent moving overseas, thus also effectively cutting off all contact. Source: Office of the Auditor General, <http://www.oag.govt.nz/>, last accessed August 2009.

<sup>179</sup> By 2008, the number of payers had reduced to some 130,000, of whom 45% had annual incomes below \$20,000, and thus paid the minimum child support. Overall, the annual costs of DPB is about \$1.5 billion, of which only 6.8% is effectively received through child support deductions, see <http://lindsaymitchell.blogspot.com>, 12 October 2009.

<sup>180</sup> Questions in parliament indicate that about a third of those liable are assessed to pay the minimum amount (then \$730/yr), of which more than 60% was in debt. See questions for written answer No 11827 (2006); available from [www.parliament.govt.nz](http://www.parliament.govt.nz) (last accessed August 2009).

<sup>181</sup> In June 2006, it was estimated that 15% of the liable parents with child support debt had moved overseas to avoid payment: Collins S "Government Crackdown on Debt Dodgers Who Skip Country" *The New Zealand Herald* 27 January 2007. It has been argued that a government enforced system of child support effectively pits the interest of the child against the fiscal interest of the state: Hatcher DL "Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State" *Wake Forest L Rev* (2007) 42, 1029-1086, also available at SSRN: <http://ssrn.com/abstract=1113165>.

<sup>182</sup> For instance an ideological objective for stronger and unmitigated links between children and the state will be advanced through benefits that effectively reduce the importance of traditional family structures, whilst also creating redistributive welfare dependency of the parents involved.

<sup>183</sup> It must be noted that within a population, strong differences may exist. In New Zealand, the ex-nuptial birth rates for Maori are far higher than for the rest of the population, while more than 40% of DPB recipients are Maori, representing almost 40,000 recipients of that benefit. Welfare issues therefore impact very differently on parts of the population, particularly Maori, see generally: Mitchell supra n90.

<sup>184</sup> And this is sometimes reflected in parenting disputes, where the relative level of day to day care is determinative for welfare apportioning.

<sup>185</sup> As pointed out in a recent OECD report: *"The indirect evidence from United States welfare-to-work experiments suggest that eligibility for such benefits until late in the child life cycle does not have positive effects on child well-being."* OECD Doing Better for Children, OECD, available from [www.oecd.org](http://www.oecd.org), 2009).

<sup>186</sup> See supra, n86.

<sup>187</sup> Ellman supra n53.

predictability for child welfare after divorce than any other.<sup>188</sup> Finally, the increase of divorce and decrease of marriage leads to economic strain on the simple basis that single parent families tend to have less freely disposable income, place pressure on available housing stock, rely more on welfare and other social services, and generate less tax revenue. These are all direct macroeconomic components of the changing perceptions of marriage and parenthood.

The effects of the changing relevance of the traditional family thus have significant macro- and microeconomic dimensions. Surprisingly, economic arguments figure only marginally in the research and the approaches used in judicial decision making. I suggest that the current emphasis on social and legal parameters may be of disservice to a complete understanding of the social and legal phenomena under investigation.

### *Conclusion, is the decline of marriage a social pathology?*

It is difficult to conclude that the decline of marriage is a social pathology in itself; it rather seems to be an aspect or consequence of wider social developments. Nevertheless, the consequences of the dramatic reduction of the importance of the traditional family as a place of nurture and an autonomous constituting element of society results in social and economic challenges for which no answers have yet been found. These challenges not only arise at the macro level, but are also particularly relevant for the individuals involved, to whom we must now turn.

## **THE EFFECTS OF DIVORCE**

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*Every divorce is a unique tragedy because every divorce brings an end to a unique civilization – one built on thousands of shared memories, hopes, and dreams....-only the people who shared those moments know what it means to lose them forever. So divorce takes a uniquely personal toll on the divorced. But the experience of divorce also has many commonalities. The end of a marriage always -or almost always- produces heartache, fear, self-doubt, confusion, and of course many anxious questions.*<sup>189</sup>

Divorce changes behaviour, feelings, friendships, health, work, and sex life. These changes are different for each individual, but have common patterns depending on factors including the role in the marriage and in the divorce, family history, gender, age, work and social circumstances. Despite these commonalities, the sheer number of variables prevents simple generalizations, especially where children are involved. Marital failure cannot be seen as a single event but involves a series of interconnected transitions or life experiences that influence wellbeing and social interaction. The effects vary over time, and different phases of coping with the effects of divorce can be recognized. Views about the effects of divorce are therefore highly dependent on when observations take place. Long term studies indicate that many of the common beliefs about the effects of divorce are incorrect, such as the idea that divorce only has win- or a loose- outcomes, the idea that children always suffer (especially in the absence of a father and subsequent loss of income), the idea that death and divorce produce similar psychological outcomes, or that divorce is followed by “standard or normal” emotional pathways.

Typically, and although conflict may have been going on for some time, one of the parties initiates the

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<sup>188</sup> For instance: Hetherington EM and Kelly J *For Better or for Worse: Divorce Reconsidered* (W W Norton & Company Ltd, New York, 2002).

<sup>189</sup> *Ibid*, 2.



actual divorce process,<sup>190</sup> thereby surprising the other to some extent. The surprise element can cause a “phase difference”<sup>191</sup> in coping with the divorce between the parties. One has made up his or her mind and has thus already distanced emotionally from the marriage. The other party is forced to catch up with this emotional state, while outward manifestations of the divorce are taking place. This is often offered as an explanation for reactions that may seem overly distressed or even exaggerated. These effects may coincide with unbalanced power relationships that existed within the marriage, and that are extended into the divorce process, in which they may increase in severity. Fault assignment is another aspect of the emotional cocktail. Fault is ingrained in people’s thinking, they assign fault in emotional or traumatic periods and may eventually want to expose or even punish the person who they perceive as perpetrator. They may be so aggrieved that they expect that the law simply must be on their side, despite the explicit no fault provisions that are at the core of most contemporary divorce law.<sup>192</sup> Gender plays a role in the different ways individuals cope with separation, especially where children are involved. Gender-associated role patterns<sup>193</sup> will be relevant in these differences, as will be deeper, and as of yet incompletely understood, biological, physiological, neurological and genetic influences.<sup>194</sup> Given these extremely strong and influential emotional parameters, most marriage break ups will have conflict elements; varying from minor discord over small issues to drawn out battles over each and every issue that lends itself for the purpose. Some conflicts escalate beyond civil boundaries and come to involve psychological and physical violence or even homicide, infanticide or suicide. Extreme disputes will be dominated by non-rational and emotional parameters that are extremely difficult to understand, let alone resolve. Regardless of the actual level of conflict, divorce will have effects on the individuals involved, and on their behavior in a wider sense. It is relevant to briefly look at the effects of separation on parents and children, and especially on parenting behavior.

### *Children and parents*

Before the liberal movement that changed divorce from an exceptional to a mainstream social phenomenon, the effect of divorce on children was conceptualized as resulting from disruption of the family structure. As a result, the concept of “children from broken families” initially permeated the research.<sup>195</sup> When divorce became more common, the effects of the divorce process itself and the marital discord surrounding it came to be included in the research focus, which developed into a divorce-stress-adjustment-moderator discourse. The most important variable researched continued to be the presence

<sup>190</sup> In two-thirds of divorces the woman initiates the divorce, with the husband often being unaware that divorce was contemplated. This then leads to being unprepared for the separation process, in turn leading to negative outcomes. Mitchell D and Chapman P *Pathways through Parental Separation: The Experience of a Group of Non-Resident Fathers* (Innovative Practice Fund No 5/09) (Wellington, Families Commission, 2009).

<sup>191</sup> The idea of “phases” is also a part of conflict theory, which will be discussed in chapter 13.

<sup>192</sup> Empirical research indicates that divorcees are deeply concerned about issues of blame, which colour their perceptions of fairness and their ideas about justice. Divorcees struggle to make sense of what went wrong in their marriage and this making sense of the past is a necessary part of negotiating a new reality to replace the shared history of the marriage: Reece supra n101, 193. See also the small NZ study in Mitchell and Chapman supra n190.

<sup>193</sup> Woodhouse supra n73.

<sup>194</sup> This involves an entirely new field, that of neuro-jurisprudence, which investigates the relationship between emotion driven conflict behaviour and neurological processes. The foundation for this approach may be found in neuro-biological research, see for instance: Damasio A *The Feeling of What Happens Body and Emotion in the Making of Consciousness* (Harcourt, New York, 1999); Damasio A *Descartes' Error: Emotion, Reason, and the Human Brain* (Putnam, New York, 1994); LeDoux J *Synaptic Self: How Our Brains Become Who We Are* (Putnam, New York, 2002). For an overview of this field in relation to family law disputes, see Weinstein and Weinstein supra n117.

<sup>195</sup> Schepard supra n40.

of a continued marital relationship. It was found that children from divorce were negatively affected in physical health and psychological and socio economic wellbeing; they scored lower on academic achievement, social conduct, social adaptation, self-concept, psychological adjustment and the quality of mother- and father relationships.<sup>196</sup> Adults who experienced divorce as a child scored lower in psychological wellbeing, socio-economic attainment, had poorer marital relationships and were themselves more likely to divorce.<sup>197</sup> Although the effects were consistent, effect sizes were generally modest. Further studies also considered the effect of marital conflict as an additional variable. These suggested that conflict between parents affects children's wellbeing, independent of the divorce itself.<sup>198</sup> In fact, some studies suggested that a divorce may prompt better outcomes for the children where it was preceded by a high-conflict marital situation: the divorce allows children to escape from exposure to the conflict between parents.<sup>199</sup> This was enforced by findings that compared divorced and non-divorced high conflict marriages.<sup>200</sup> It is often commented that it is difficult to control for the multitude of effects that may impact on children's development and wellbeing that also have an effect on marital discord, and the cross-over effects between these.<sup>201</sup> The matter is further complicated by the child's own response to conflict, which may impact on his or her wellbeing or development, and thus confound the research results. As examples: young children are ego-centric and can develop a sense of guilt, leading to anxiety, where they perceive to be somehow responsible for marital discord.<sup>202</sup> Teenagers may seek to escape from the conflict situation and curtail education plans, or enter into badly considered relationships, thereby perpetuating the cycle of problems.

Divorce must be seen as a process rather than an event,<sup>203</sup> but the often suggested gradual adjustment following divorce is not universally applicable. For a number of affected children the ongoing effects of divorce point to a "chronic strain model", which posits that the effects are long-lasting, and may remain dormant, to be triggered by events in later life.<sup>204</sup> This is again confounded by other variables such as socio-economic status, which inter-operate with the re-emergence of effects from parental conflict and divorce. Some authors suggest that the quality of the relationship with the custodial parent is the most critical factor determining a child's capacity to deal with the parents' divorce.<sup>205</sup>

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<sup>196</sup> Amato PR and Keith B "Parental Divorce and the Wellbeing of Children: A Meta-Analysis" Psychol Bull (1991a) 110, 26-46, a study analysing 92 previous studies and finding limited effect sizes that declined in methodological advanced and more recent studies. In contrast to these generalised findings, see also for instance Morrison DR and Cherlin AJ "The Divorce Process and Young Children's Well-Being: A Prospective Analysis" J Marriage & Fam (1995) 57, 800-812, who found substantial gender differences in coping with the effects of divorce.

<sup>197</sup> Amato PR and Keith B "Parental Divorce and Adult Wellbeing: A Meta-Analysis" J Marriage & Fam (1991b) 53, 43-58, conducting a meta analysis of 37 studies, involving a total of 15 different outcome variables.

<sup>198</sup> Following a study that examined the evidence supporting 5 different popular hypotheses at the time (1993), and finding only substantial support for the conflict perspective: Amato PR "Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support" J Marriage & Fam (1993) 55, 23-28.

<sup>199</sup> See for instance the first study in Booth A and Amato PR "Parental Pre-Divorce Relations and Offspring Post-Divorce Well-Being" J Marriage & Fam (2001) 63, 197-212, who conclude that this phenomenon is related to the levels of stress to which the child is exposed.

<sup>200</sup> Morrison DR and Coiro MJ "Parental Conflict and Marital Disruption: Do Children Benefit When High Conflict Marriages Are Dissolved?" Ibid (1999) 61, 626-637.

<sup>201</sup> Ibid.

<sup>202</sup> Wallerstein and Kelly supra n79.

<sup>203</sup> Hetherington and Kelly supra n188. Amato PR and Booth A *A Generation at Risk: Growing up in an Era of Family Upheaval* (Harvard University Press, Cambridge, 1997).

<sup>204</sup> Amato supra n62, 1279.

<sup>205</sup> Maccoby supra n128, 164-165.

The question whether the divorce<sup>206</sup> and its consequences<sup>207</sup> or the exposure to conflict is most determinative for children's wellbeing (or the lack of it), has not been decisively answered. Attempts at using a meta-analytical review of research from 1970-1994 to construct and evaluate models of young children's post-separation adjustment<sup>208</sup> demonstrate the multitude of variables that come into play, and the complexity of their inter-relationships. Such attempts also show the limitations of using models created within one scientific discipline to evaluate issues in a different domain,<sup>209</sup> and the lack of insight in other variables that may be relevant.

In summary, the research into children's wellbeing as a result of the interaction between conflict and divorce appears to demonstrate a noticeable, but limited, negative effect of divorce- and pre-divorce conflict in all circumstances. Subsequent divorce leads to an improvement in child wellbeing only if the conflict was at the extreme end of the scale. Continuation of the marriage and conflict further deteriorates the child's wellbeing where that conflict is relatively high.<sup>210</sup> All these effects are moderated substantially by other factors, especially socio-economic circumstances. It is impossible to generalize from the research, as what emerges is a diversity of outcomes, rather than any inevitability.<sup>211</sup>

The post divorce stress for the child can include an abrupt transition from a predictable, orderly and financially secure life to its opposite: poverty, disorder, dealing with an altered and less competent parent, chaotic school attendance, being given inappropriate chores, being involved in adult disputes, regular moving, and coping with serial live-in lovers or new partners of a parent. An important aspect is the breach of trust the child had with its parents in the family situation and the dependency on less-functional and individual parents that replaces it.<sup>212</sup> Typically, the child will have to cope with a custodial and a non-custodial parent, and contact arrangements will start to have an effect on the child's wellbeing. A meta-analysis of 63 different studies into the effect of different dimensions of the relationship between a child and his or her non-residential father and the child's wellbeing, found that the amount of contact with the father was a very poor predictor for the child's wellbeing.<sup>213</sup> In fact, the payment of child support was found to have a larger effect size and statistical significance.

A variable that will confound any research is the parenting arrangement following divorce. Much of the older research impliedly assumes differentiation into custodial and non-custodial roles. That may be too

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<sup>206</sup> For instance, a four-point pooled time study attempted to trace the impact and dynamics of marriage disruption prior to divorce, compared with effects in marriages that remained intact. It found that children from divorced marriages scored lower on wellbeing scores than children of continued marriages at all four time points (two before divorce, two after). The effects on (objective) education related scores over time were cumulative, but effects on (self-reported) socio-psychological measures demonstrated a U-shaped pattern, while a strong mediating effect of economic circumstances was found. This study, however, had insufficient data to investigate the combined effects of economic circumstances and marital discord. Sun and Li *supra* n86.

<sup>207</sup> A study summarizing the results of key-research from the period 1990-1999 concluded that children of divorced parents, as a group, have more adjustment problems than children of never divorced parents, but that the cause is probably not so much the divorce itself as the troubled marriage from which it sprang. Kelly JB "Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research" *J Am Acad Child P S* (2000) 39, 963-973.

<sup>208</sup> See for instance Whiteside MF and Becker BJ "Parental Factors and the Young Child's Post-Divorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements" *J Fam Psychol* (2000) 14, 5-26.

<sup>209</sup> As an example, in the Whiteside/Becker article the authors studied the relevance of correlations between "hostility", "parent co-operation" and "frequency of father contact" that would probably be taken for granted in the current legal context.

<sup>210</sup> Amato PR, Loomis LS and Booth A "Parental Divorce, Marital Conflict, and Offspring Well-Being during Early Adulthood" *Soc Forces* (1995) 73, 895-915.

<sup>211</sup> Henaghan *supra* n100.

<sup>212</sup> Hetherington and Kelly *supra* n188.

<sup>213</sup> Amato PR and Gilbreth J "Non-Resident Fathers and Children's Well-Being: A Meta-Analysis" *J Marriage & Fam* (1999) 61, 557-573.

simplistic, especially in the contemporary environment where more involved parenting roles are contemplated for non-custodial parents, with collaborative parenting as the perceived ideal in all but the most exceptional cases.<sup>214</sup> However, it has been suggested that joint parenting will only have positive effects if a high threshold of contact with the non-custodial parent is reached, while that parent's parenting style is the most important predictor for the child's wellbeing. A problem with that research is that the results may be influenced heavily with self-selection into such (joint) parenting styles, i.e. their success is related to the parents' own choice for this resolution.

Research also suggests that non-voluntary or highly conflicted joint parenting may have a detrimental effect on the child's wellbeing. There is no clear demarcation where joint custody is beneficial or potentially harmful or what division of parenting roles is most suitable for different relationship constellations.<sup>215</sup> Recent research indicates that forced child contact with both parents, in a situation of continuing inter-parent conflict, is in fact detrimental for the child's wellbeing.<sup>216</sup> Similarly, research is inconclusive about the needs of young children and infants for continuity and consistent care taking in respect of their brain development in circumstances of shifting the child between parents and associated social environments. Essentially, there appear to be at least two schools of thought, which are more motivated by political than by scientific considerations.<sup>217</sup> Although there is an enormous amount of research on the effects of divorce on children, most of this is based on observation by third parties, either parents or professionals who are in some way involved. There is much less material in which the views of the children are directly obtained within the child's context. Examples are an early longitudinal study and subsequent follow up,<sup>218</sup> and some long term studies that followed entire families over extended periods.<sup>219</sup> Since the turn of the 21<sup>st</sup> century there is an increasing interest and consequent research into the experiences of children from their own perspectives.<sup>220</sup> At the same time, there is an increase in the

<sup>214</sup> It has been suggested that the work of Wallerstein and Kelly in the 1980's was instrumental in starting the shift in emphasis to continued contact with both parents: Parkinson supra n164, 244. Parkinson argues that in the US joint custody is but an option, while in most other common law jurisdictions the concept of custody has been replaced by a default position of joint parental responsibility, encapsulated in "*a radical re-conceptualization of post separation parenting*". Fundamental to the preference for a collaborative post-separation parenting model in New Zealand is undoubtedly the work by Lamb and Kelly, see Kelly JB and Lamb ME "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children" Family and Conciliation Courts Review (2000) 38, 297-311. This work is sometimes cited directly in cases to provide support for decisions, see *K V G* Family Court non-disclosed, 20 August 2008, Judge O'Dwyer, FAM-2006-1068, where the mother was allowed to relocate because the child was found to be "at a stage" where it could maintain a relevant relationship with the father by contact on a two-weekly basis. The shared parenting model appears to have popular support as well. Empirical research demonstrated that the "general public" (in this case people awaiting jury duty) considered shared responsibility the best solution in most cases. Interestingly, this study found that people thought that parents' rights and behaviour were relevant, particularly in conflicted cases, where the "perpetrator" should be awarded less or no contact with the child, see Braver SL, Ellman IM, Votruba A and Fabricius WV Public Opinion About Child Custody Available from SSRN :<http://ssrn.com/abstract=1435043>.

<sup>215</sup> Stenhouse G "Comment: Fifty-Fifty Care - a Note of Caution" NZFLJ (2007) 5, 260-264, and see for a similar warning, Carmody T "The 2006 Part VII Reforms, a Judicial Perspective" AFL (2007) 19, January Issue, where Carmody J comments about the equal care presumption: "*There is a continuing debate about whether this is a theoretically valid or sound practical basis for making decisions in a good conscience jurisdiction like ours.*"

<sup>216</sup> Emery, Otto and O'Donohue supra n121, 17. For more recent research see: McIntosh and Long supra n160, and Trinder L and Kellett J *The Longer-Term Outcomes of in Court Conciliation* (Ministry of Justice Research Series 15/07) (Norwich, University of East Anglia, 2007).

<sup>217</sup> For a pointed critique on the generally accepted collaborative ideal and the motivations behind it, see Kates EJ "The Misrepresentations of Michael Lamb and Joan Kelly" Available from <http://www.thelizlibrary.org/liz/lamb-kelly.html#top>, who argues that the men's movement and its lobby was the driver behind Lamb and Kelly's seminal work.

<sup>218</sup> Wallerstein and Kelly supra n79, Wallerstein JB and Blakeslee S *Second Chances: Men Women and Children, a Decade after Divorce* (Grant McIntyre, London, 1989).

<sup>219</sup> For instance Hetherington and Kelly supra n188.

<sup>220</sup> See for instance Timms J, Bailey S and Thoburn J *Your Shout Too: A Survey of the Views of Children and Young People Involved in Court Proceedings Where Their Parents Divorce or Separate* (London, National Society for the Prevention of Cruelty to Children (NSPCC), 2007). The international research was considered in the New Zealand context in Taylor supra n110.

relevance of the children's views in both legislation and the actual court process, a development found in most jurisdictions. This is not surprising if one realizes that the numbers of children affected by divorce are continuously increasing, as are the numbers who experience more than one divorce process. The problem is probably exacerbated by the increasing pressures that are placed on separated parents to maintain some form of shared parenting, with the associated possibilities for continued dispute. Children who experience more than one contentious divorce can end up in extremely complicated and stressful family situations, far removed from the traditional model of a stable and secure environment for emotional nurturing and psychological and social development.

The effects of divorce on the parents are not dissimilar to those on the children, and there is, of course, substantial interaction between the two. Research is again consistent in finding negative differences in wellbeing between divorced and married adults, albeit with limited effect size.<sup>221</sup> Generally, the main stressors that explain the gap in wellbeing are the difficulties associated with continuous discord between the former spouses, decline in socio-economic wellbeing and emotional and practical problems with solo parenting. Moderators that influence stress levels are the availability of social support networks,<sup>222</sup> economic security, and –interestingly- the strength of the belief that marriage is a lifelong commitment or a strong investment of a spouse in his or her marital identity. Parents normally overcome their divorce, with the major stresses dissipating, within a two-three year timeframe, often depending on finding a new life partner, which seems to be interpreted as signifying they have moved on. American studies indicate that 8-15 % of parents continue chronically contentious behavior, including continuing litigation, at the three-year after divorce point.<sup>223</sup> These individuals are more likely to be emotionally disturbed and/or character disordered and intent on vengeance and/or continuing control of the ex-partner. Some never overcome the separation and its psychological effect and suffer permanent long term emotional damage or even develop suicidal or homicidal behavior long after the separation has been concluded.

It must be remembered at this point that much research (especially earlier empirical research) and literature in this field is of North American origin, probably because of the relatively early attention to family law as a specific field in this jurisdiction, and the availability of relatively comprehensive data.<sup>224</sup> The research literature is both voluminous and complex, and fraught with ambiguity and ideological bias. This is particularly the case for research into shared parenting following separation, because of the use of various and different research methodologies and terminology used across studies,<sup>225</sup> the lack of relevant

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<sup>221</sup> Amato and Keith supra n197.

<sup>222</sup> Although these can operate negatively as well, depending on whether they come with “strings attached”. Amato PR supra n62, 1276.

<sup>223</sup> Kelly supra n159. Note that other studies found a higher percentage, for instance Maccoby & Mnookin found that 26% of parents remained in serious conflict after 3-4 years. See Maccoby EE and Mnookin RH *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard University Press, Cambridge, 1992), 234-236.

<sup>224</sup> The US Department of Labour organizes large scale longitudinal studies that have generated vast data sets, spanning the period since 1966. These are readily available to the research community and often used (by early 2007 more than 3,500 learned articles are in some way based on this data). The data sets and all associated information is publicly accessible, and can be used by researchers using advanced retrieval tools via the internet, see <http://www.nlsinfo.org/web-investigator/index.php>. The National Centre for Education Statistics (<http://nces.ed.gov/pubsearch/>) also performs longitudinal studies that are freely accessible and relevant to researchers in this field; see for instance Sun & Li, n206, above.

<sup>225</sup> Smyth supra n41, 7.

science, and the impact of moral values in evaluating psychosocial effects in children.<sup>226</sup> It has been said about this field that the “*perfect empirical study that definitely answers all questions that policymakers and judges face simply does not exist, and maybe never will*”.<sup>227</sup>

### *Post separation parenting arrangements*

Up to the major social changes of the 1970's, the ordinary consequence of divorce and separation was that one parent (almost invariably the mother) obtained custody of the children who were integrated into a new nuclear family if she re-married, which was also the norm. Ongoing contact between the father and his children was often limited and casual, rather than aimed at “active parenting”, as we have now come to understand that term. The main effect of the current approach to separation and divorce is the introduction of the concept of “joint parenting”, whereby the parenting roles that are inherent in the concept of marriage are replaced by a system of arrangements between the parents. This modern approach thus creates a range of hitherto unfamiliar relationships and roles such as the actively involved non-custodial post-separation parent, the post-separation shared-parenting parent-child relationship, and the post-separation parent-parent co-ordination relationship. If one or both parents later re-partner, another range of possible parent-child relationships is created.<sup>228</sup> All these relationships are dramatically different from their pre-separation (marital) counterparts, which contain many default characteristics that have developed over time, and which are largely culturally determined. There is no historical or cultural<sup>229</sup> equivalent for the new roles and relationships and parents are largely left to devise workable arrangements. Something similar occurs where parenting issues arise between parents who never married but had a cohabiting relationship, or even between parents who only had occasional reproductive relationship(s), or where there are no direct biological relationships between the parties and the children subject to the dispute.<sup>230</sup>

The concept of “shared” or “joint” parenting is based on social science research, which recognizes the importance of a role for both parents to satisfy developmental needs of the child.<sup>231</sup> The issue is, however, not without controversy; researchers who doubt the assertiveness with which shared parenting is promoted point to relatively small effect sizes and the lack of statistical rigour of most of the supporting studies. The issue is particularly debatable in situations where there is substantial discord between the

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<sup>226</sup> Emery, Otto and O'Donohue supra n121.

<sup>227</sup> Schepard supra n40, 29.

<sup>228</sup> An English study catalogued the different combinations of children and parents in step-families and found 26 different constellations in that family type alone: Burgoyne and Clark (1984) as quoted in Walker J “Co-Operative Parenting Post-Divorce: Possibility or Pipedream?” J Fam Ther (1993) 15, 273-293, 285.

<sup>229</sup> Although there is an amazing variety of “cultural expressions” found in literature, television programmes or movies that promote different roles and models of post-separation parenting.

<sup>230</sup> It has been well recognized that the biological tie is not strictly determinative in parenting cases, see for instance *B v DSW* (1998) 16 FRNZ 522. By contrast, the relationship can be only biological and still create a substantial dispute, see for an extreme example *Re P (Surrogacy Residence)* [2008] 1 FLR 177 and on appeal *Re P (Residence Appeal)* [2007] EWCA CIV 1053; [2008] 1 FLR 198, where there had been no relationship between the parents. A New Zealand example where the relationship between the parents was longstanding but at best marginal, and where the dispute with the biological father appears to have destroyed the relationship between mother and child and the “emotional father” thus leaving the child in an arguably worse situation, *P v F [Care of Children]* [2007] NZFLR 1093, and its follow up in *GBF v BP* [2008] NZFLR 441, or a situation where male and female homo sexual couples came to a complicated arrangement to procreate an parent *P v K* [2003] 2 NZLR 787.

<sup>231</sup> For a recent discussion see Dunn J “Annotation: Children's Relationships with Their Nonresiden Fathers” J Child Psychol Psyc (2004) 45, 659-671; a comparatively recent meta-analysis of previous research can be found in Bauserman R “Child Adjustment in Joint Custody Versus Sole-Custody Arrangements: A Meta-Analytical Review” J Fam Psychol (2002) 16, 91-102. The seminal work on this issue has been referred to above, see supra n214.

parents, both during and after a marital relationship.<sup>232</sup> Nevertheless, it seems generally accepted that continued involvement of both parents is beneficial for the child in all but the most exceptional circumstances, such as where there would be risk of harm or abuse to the child, or where there is extreme conflict between the parents.

As mentioned previously, the vast majority of parenting arrangements are negotiated between parents, with or without assistance by third parties. While in New Zealand a large number of separating couples seek some intervention from the Family Court,<sup>233</sup> only a very small fraction of the resulting arrangements is actually determined following a formal hearing.<sup>234</sup> Although patterns can be discerned,<sup>235</sup> parenting arrangements tend to vary, and the once almost universal “weekend a fortnight” is rapidly losing popularity. Whatever they may be, these arrangements have a direct influence on the quality of parenting, and thus on the wellbeing of the children, while the necessary co-operation between the parents directly influences the way in which each parent is capable of giving effect to his or her individual role.<sup>236</sup> As a result, very complicated constellations are created with many variables that escape easy categorization<sup>237</sup> or generalization. One thing is clear from the wide-ranging research in this area, it is impossible to provide clear-cut guidelines and decision rules for parenting arrangements, because their success is not determined by objectively determinable variables such as duration of contact, frequency of contact, or number of overnight stays, but mostly by the relationship between parent and child and the quality of the actual parenting that takes place. Successful parenting arrangements are characterized more by a commitment of both parents to make them work than anything else. Good arrangements are reflective of the children’s and the parents’ needs, and therefore require flexibility for adjustment as circumstances change. A reasonable level of coordination and co-operation is therefore also necessary; especially where younger children are involved and where for instance geographical issues complicate the matter. From that perspective, it can be easily seen that ongoing conflict between the parents correlates with less successful parenting arrangements.

Overall, there seems to be agreement that the most important predictors for positive child-adjustment to a post-separation joint-parenting situation are family income (often dependent on the father paying child support), the level of conflict between the parents, the quality of the child’s relationship with and the

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<sup>232</sup> See for a recent overview of research Gilmore supra n2.

<sup>233</sup> While there is no data for the number of parenting disputes between separated, but not previously married couples, the ex-nuptial birth rate (approx. 45%) could be used as an indicator that probably about half of the children involved in separation are from non-married couples. Family Court statistics indicate that annually about 7,500 new parenting disputes are filed: Ong supra n1. Using the above approximation of ex-nuptial parenting disputes, and assuming that no more than one procedure can be completed annually for each conflicting couple, it can be seen that 7,500 cases annually would involve a very large fraction of all separating couples, both married and non-married. This phenomenon calls for further empirical research and analysis, but this is outside the scope of this study.

<sup>234</sup> An often heard figure is that only 5 - 6 % of disputes require judicial determination: Hansard (2007) 641 New Zealand Parliamentary Debates 11462 (J Collins) , or the PHP briefing paper: Boshier PF and Udy D “*Parenting Hearings Programme (Less Adversarial Hearings)*” (Briefing Paper 6 September 2006) (Wellington, Family District Courts, Ministry of Justice, 2006).

<sup>235</sup> See for an analytical study in Australia: Smyth supra n41. A (very limited) study in New Zealand was undertaken in 2008: Robertson J, Pryor J and Moss J *Putting the Kids First: Caring for Children after Separation* (Research Report No 2/08) (Wellington, Families Commission, 2008). At the time of writing this thesis a larger quantitative study is underway, that may provide more detail on parenting arrangements and how they are arrived at.

<sup>236</sup> Whereby especially the level of conflict between the parents is a determinative factor, see below. It has been said that given the levels of conflict and acrimony, that children of divorce rarely have parents that support each other: Stahl PM *Parenting after Divorce: Resolving Conflicts and Meeting Your Children's Needs* (Impact Publishers, Atascadero, 2007).

<sup>237</sup> For a comprehensive attempt, see Smyth, n235, above.

parenting capabilities of both parents, including the parents' capability to collaborate.<sup>238</sup> These are variables that are easy to understand conceptually, but very difficult to operationalize or measure. The problem is confounded because these variables are interdependent, i.e. they strongly influence one another. High parenting quality is consistently related with child wellbeing<sup>239</sup> and is conceptualized as a high level of affectively positive, affirming parent–child interactions, in which the parent is responsive to the needs of the child,<sup>240</sup> and a high level of effective discipline, in which the child knows the rules, and these are consistently and fairly enforced. Studies fail to find strong correlations between frequency and duration of post-divorce contact and parenting quality.<sup>241</sup> However, studies find a negative correlation between the intensity of conflict and parenting quality,<sup>242</sup> and a further negative correlation between child wellbeing and frequent contact with the non-custodial parent in high conflict situations.<sup>243</sup> High conflict in post-divorce situations is thus associated with poorer child wellbeing<sup>244</sup> and, as common sense might predict,<sup>245</sup> this is aggravated rather than mitigated by increasing contact frequency and duration, which is consistent with higher tensions between the parents. In other words: increased contact with a non-custodial parent will not benefit the child where this increases parental conflict.

The way by which parents come to arrangements and the formality of such arrangements vary significantly, between entirely consensual and informal arrangements and court-defined and imposed and enforced orders. Given the importance of the level of post-divorce conflict on children's wellbeing, it is relevant to consider disputes about parenting arrangements in some more detail.

### *Disputes about parenting arrangements*

Disputes about what used to be called custody and access have been called “the new battlegrounds of family law”.<sup>246</sup> Although perhaps caused also by increased interest of fathers in their parental role, the phenomenon is not surprising from a conflict perspective, because other grounds for formalized divorce conflict have been strictly removed by no-fault principles, diverted to social science interventions or to administrative and regulatory procedures. Dispute about marital conduct is therefore now simply irrelevant in the legal context, while property disputes are largely reduced to administrative issues.<sup>247</sup> The –at best ambiguous but nevertheless paramount– welfare principle thus focuses any possibility for

<sup>238</sup> Whiteside and Becker supra n208, Kelly supra n207.

<sup>239</sup> Amato and Gilbreth supra n213.

<sup>240</sup> A study into the effects of parent's warmth on child wellbeing, but moderated for the effect of conflict between them can be found in: Sandler I, Miles J, Cookston J and Braver S "Effects of Father and Mother Parenting on Children's Mental Health in High- and Low-Conflict Divorces" *Family Court Review* (2008) 46, 282-296.

<sup>241</sup> Amato PR supra n198, 36; and Amato and Gilbreth supra n213.

<sup>242</sup> Davies and Cummings supra n76.

<sup>243</sup> Whereby the authors caution about generalizing this finding: Amato PR and Rezac SJ ""Contact with Nonresident Parents, Interparental Conflict, and Children's Behavior"" *J Fam Issues* (1994) 15, 191-207, and further references quoted in Goodman M, Bonds D, Sandler I and Braver S "Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce" *Family Court Review* (2004) 42, 263-279, 265.

<sup>244</sup> Sandler, Miles, Cookston and Braver supra n240, 284.

<sup>245</sup> And which is confirmed by research: Buchanan CM, Maccoby EE and Dornbusch SM "Caught between Parents: Adolescents' Experience in Divorced Homes" *Child Dev* (1991) 62, 1008-1029, who found that the most powerful predictor of “feeling caught” in the parents' dispute was the co-parenting relationship. This research confirmed earlier research that a correlation between frequent contact and “feeling caught” was restricted to high-conflict situations.

<sup>246</sup> G. Palmer in parliamentary debate, as quoted by Henaghan supra n100, 293. Statistics in both Common Law and Civil Law jurisdictions show a dramatic increase of custody litigation, against a background of constant or declining divorce rates. Particularly increasing is the occurrence of custody litigation between parents of non-marital children: Parkinson supra n164, 238.

<sup>247</sup> With the exception of disputes between parties where very large amounts of money and assets or complicated arrangements are at stake, which is not the case in the vast majority of divorces.



extended conflict on the relative merits of the parenting capabilities of the parties and the structure of care and contact arrangements: hence the battleground metaphor. There is little<sup>248</sup> conclusive and statistically convincing academic material about the characteristics of parenting disputes, for instance their typical issues, level of acrimony before and after separation, use of third parties, involvement of extended families and social networks, correlation between pre-divorce conflict and the relationship between children and parents, or even the frequency of occurrence of such disputes as a fraction of all separations.<sup>249</sup>

In New Zealand a large number of conflicting parents appear to engage with the Family Courts.<sup>250</sup> Before coming to the court, however, it may be assumed (leaving aside exceptional cases) that the parents have attempted other ways of resolving their relationship problems and the challenges arising from the decision to separate. Their failure to resolve their dispute autonomously must be seen in a wider context than only that of the Family Court process.

There are many different perspectives from which parenting disputes can be considered. These reflect the place of these disputes in a social and cultural context, which changes over time, and is also reflected in the legal environment in which these disputes develop and are resolved. Family disputes are now considered the province of experts from varying backgrounds, mainly in the social sciences and (to a lesser extent) the legal domain. Before disputes actually involve any of these experts, however, there is normally a range of informal agents that may be involved assisting the conflicting parents individually or jointly. Such a role may be partisan or independent and can take many different forms.<sup>251</sup> Some obvious sources of support, such as family or friends, may in fact be unhelpful because they may not want to be drawn into the dispute, or because they take sides. The result is often a segregation of the circle of family and friends into camps or a loss of social contacts. Social support institutions,<sup>252</sup> such as the Salvation Army, Citizens' Advice Bureaux or churches sometimes offer relationship counselling, or even mediation services, more or less connected to their ideological background. There are too many different institutions and approaches to even attempt to analyse this in any detail. What can be stated with certainty is that it is absolutely impossible for parents to have any understanding of the theoretical or ideological underpinnings of the different services on offer, or even a comprehensive overview of the available services. Even after researching the issue in detail for an extended period of time, one keeps

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<sup>248</sup> Although there is a huge amount of writing that touches on the subject, it is comprised of large numbers of often small studies that consider difficult to compare material.

<sup>249</sup> A relatively old English text asserts that about a quarter of separating couples experience very little tension between them in the period following separation, while almost a third experienced serious acrimony, or simply had no communication at all. The remaining 40% had experienced a variety of tensions and disagreements, but had struggled to behave in a civilized and adult fashion, for their own, but mainly for the children's, sake: Davis G *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988), 25. American material mentions that 8-12% of all divorces result in acrimonious conflict that extends beyond the "normal" period in which matters eventually settle down: Coates CA, Deutsch R, Starnes H, Sullivan MJ and Sydlik B "Parenting Coordination for High-Conflict Families" *Family Court Review* (2004) 46, 246-262. In a longitudinal Californian study it was found that three years after divorce only 29% parented collaboratively, 26% were in high conflict, 41% had disengaged, and 4% altered between some collaboration and discord: Maccoby and Mnookin *supra* n223. In a smaller study about half the cases were in conflict shortly after the divorce, with some changes occurring in both directions, but the overall proportion of conflict situations remaining the same: Stahl *supra* n236.

<sup>250</sup> The reason for this is probably that it is well known that the New Zealand Family Court provides access to free counselling and conciliation services, and/or because lawyers and social agencies refer to those services.

<sup>251</sup> For a recent, but limited, study in the New Zealand context, see Roguski, Duckworth and Chauvel *supra* n34.

<sup>252</sup> These may or may not have funding arrangements with government. For instance the Salvation Army is increasingly dependent of government subsidy, and could be considered a "quasi non government organisation" or in contemporary terminology: a 'Quango'.

finding more support groups, workshops, courses, programmes, and other interventions. A comparison with the weight-control and diet frenzy may seem light-hearted, but is certainly apposite. One can safely say that an entire industry of help and assistance has grown around the deterioration of traditional family and social structures. One type of support group deserves special attention, the activists or rights groups. Parenting disputes remain highly emotional and present an area where a multitude of interest groups, divided along often ideological lines, can add further fuel to the flames of individual disputes. Writers from a feminist perspective use language such as “motherhood on trial”. Fathers’ rights groups emphasize the lengths to which former spouses allegedly go to frustrate any form of contact with the father.<sup>253</sup> Bitter conflict can turn away family and friends and interest groups can present a haven to which the disputants are attracted. Such groups provide an environment with people in a similar situation and offer services ranging from a willing and understanding ear to advocacy and even political activism. Unsurprisingly, this involvement can be highly polarizing, and thus work against conciliatory or collaborative policy objectives. Those inclined to conflict can find sufficient support for their unilateral views in the (ambiguous) law itself, and sufficient one-sided support for such views as well.

Nevertheless, despite all this confusion, the vast majority of disputes remain relatively civil and eventually settle down. The already mentioned period of 2-3 years seems accepted as the time frame in which people normally have overcome the strongest emotions and have re-directed their lives, including some parenting arrangement.<sup>254</sup> For a small number of parents this is not the case, and the conflict escalates beyond what is considered acceptable and/or it continues well beyond this adjustment period, and becomes what in New Zealand is referred to as an intractable dispute.<sup>255</sup> These disputes can also be characterized as high conflict disputes.

### *High conflict disputes*

It is difficult to draw a clear distinction between the two PHP categories of “serious cases”, and indeed between these serious and “normal cases”.<sup>256</sup> High conflict cases share characteristics<sup>257</sup> such as ongoing and entrenched conflict, ongoing litigation, frequent changes in legal counsel, non-responsiveness to standard programs of therapeutic intervention, the presence of mental disorders, poor compliance with court orders,<sup>258</sup> certain demographic indicators, occurrence of physical aggression, and substance

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<sup>253</sup> Henaghan supra n100, 294.

<sup>254</sup> For instance Hetherington and Kelly supra n188.

<sup>255</sup> Clarkson D “The Rights of Children under the Care of Children Act 2004, with Particular Reference to Cases of Parental Alienation or Intractable Contact Disputes” NZFLJ (2005) 5, 91-95; Barwick H, Gray A and Macky R *Characteristics Associated with the Early Identification of Complex Family Court Custody Cases* (Wellington, Department for Courts, 2003); Boshier and Udy supra n234.

<sup>256</sup> There are no New Zealand statistics for the number of high-conflict cases. As recorded above UK material mentions 10% and US material 8-12% of divorcing couples that engage in high-conflict. This must probably be compared with the 5-6% cases in New Zealand that actually make it to judicial determination. This would mean that all of the cases that come to a formal hearing can be classified as high-conflict cases in the “international” understanding of that term.

<sup>257</sup> Some of which relate to the external identifiers of the conflict itself, some to characteristics of the parties and their relationship, and some to the subject matter and use of procedure between the parties.

<sup>258</sup> To the extent that for instance in the UK ideas are discussed to use electronic tagging of parents, similarly to the devices used in home detention: Timms, Bailey and Thoburn supra n220, 15. The highly publicised Skelton “kidnap” saga is a New Zealand example of such behaviour: *Jones v Skelton* [2007] 2 NZLR 192 (HC and CA); *Jones v Skelton* [2007] 2 NZLR 178 (SC).

abuse.<sup>259</sup> High conflict cases often contain allegations of violence between the parents, of (sexual) abuse of the children or of “parental alienation”.<sup>260</sup> Cases tend to engage the court on multiple occasions and often involve numerous agencies, including the police and the Department of Child, Youth and Family Services (“CYFS”).<sup>261</sup> These conflicts can continue for many years, at extreme cost for those involved, in economic, social and emotional terms.<sup>262</sup> There is little agreement between experts<sup>263</sup> why parents engage in such battles and a later chapter will use conflict theory to approach that question. At this point it suffices to say that the necessity to remain in cooperative communication with the other parent requires a separation between objective and emotional issues that some people simply cannot manage or sustain. The resulting situation is one that will lead to any number of behaviours that have been classified as conflict although there is little agreement on the complicated psychological and social processes involved.

The key predictors of positive child adjustment post-separation are family income, the level of conflict between parents,<sup>264</sup> and the quality of the relationship between parents and child and the parents’ parenting capabilities.<sup>265</sup> Both parenting capability and the quality of the relationship between each parent and the child are also directly or indirectly influenced by the conflict between the parents. It is therefore not surprising that attempts are made to address conflict between parents in order to mitigate the effects on their children’s wellbeing. This can take many forms, most often that of programmes that seek to inform or educate the parents about this influence. Although such programmes are normally received very positively by the participants, there is little scientifically credible evidence about their actual merits.<sup>266</sup> Other approaches involve forms of “triage”, “differential treatment” or “diversified case management” to use a few of the phrases used to describe programs that seek to adjust therapeutic or legal processes to the characteristics of the conflict.<sup>267</sup> Yet another approach seeks to alleviate ongoing conflict by providing extremely detailed parenting instructions that leave little room for argument, although the result is often non-compliance, and consequent enforcement problems.<sup>268</sup> Other

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<sup>259</sup> For a qualitative study in the New Zealand context see: Barwick, Gray and Macky *supra* n255. For similar Canadian reports see: Stewart *supra* n66; and Gilmour GA *High-Conflict Separation and Divorce: Options for Consideration* (Canada, Department of Justice, 2004).

<sup>260</sup> Although this term is not without controversy, it is used here because of the recognized patterns of behaviour that are associated with it, and which are certainly part of conflict behaviour regardless of the acceptance of “parental alienation” as a recognised concept.

<sup>261</sup> A functional unit of the Ministry of Social Development, which has the legal powers to intervene to protect and help children who are being abused or neglected or that have behavioural problems. This agency executes powers under the Adoption Act 1955, The Care of Children Act 2004, the Children Young Persons and their Families Act 1989, and other legislation involving personal and community welfare.

<sup>262</sup> It has been said that the 10% of cases that may be characterized as high-conflict cases, actually take up 90% of all the costs and effort: Neff R and Cooper K “Parental Conflict Resolution: Six, Twelve- and Fifteen-Month Follow Ups of a High-Conflict Program” *Family Court Review* (2004) 42, 99-114, 99.

<sup>263</sup> Although many causes appear regularly in the literature, such as unresolved grief, the disadvantages of the adversarial court system, financial problems especially resulting from regulatory child support systems, ignorance of the effect on children, mental health problems, excessive power and control issues carried on from the marriage, and the polarizing role of lawyers and experts that become involved

<sup>264</sup> The effects of conflict pre- and post divorce are time resistant and measurably influence the child’s wellbeing: Fabricius WV and Luecken LJ “Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce” *J Fam Psychol* (2007) 21, 195-205.

<sup>265</sup> See the previous section and the sources discussed there.

<sup>266</sup> Goodman, Bonds, Sandler and Braver *supra* n243; Neff and Cooper *supra* n262.

<sup>267</sup> For instance in the State of Idaho family courts use a highly detailed bench book: “Protecting the Children of High-Conflict Divorce”, that provides detailed background information, protocols and templates to deal with difficult conflict.

<sup>268</sup> This raises the additional problem how child care arrangements can be enforced. There are two distinctive branches in that debate, the first covers the usual situation where both parents are seeking involvement with the child. Rare is the situation where one parent disengages, and the other (or the child) is seeking enforcement. For a recent expose comparing several jurisdictions in

approaches try to tackle the problem before it arises, by way of education before or during marriage, or even as part of secondary school curriculum. All interventions require some conceptualisation of the conflict characteristics they seek to resolve, together with a means of describing and measuring these. Although attempts have been made<sup>269</sup> to comprehensively describe different aspects of these conflicts, a conclusive theory or even an accepted terminology, remains elusive. This makes it extremely difficult to evaluate or compare the various scenarios and their effectiveness.

Nevertheless, and despite often excessive conflict between the parents, the presumption remains that it is in the interest of the children to have contact with both, provided that there are no obvious and direct indicators of present or potential harm to the child or the other parent. The presumption appears to overlook, or at least underestimate, the possibility of emotional or developmental harm from high conflict environments. Although that effect of parental conflict is now well documented, there is limited robust research on the relationships between contact, conflict, and children's wellbeing,<sup>270</sup> with only limited, and relatively recent, recognition for the possibility that the policy of measuring contact by quantity rather than quality may in fact do more harm than good, through its consequence of sustaining or aggravating parental conflict.<sup>271</sup> Based on this recent recognition, further models for intervention are proposed, such as greater involvement of the children themselves,<sup>272</sup> the earlier involvement of experts to provide psychological assessment and therapeutic assistance before child care arrangements are negotiated<sup>273</sup> or after court ordered arrangements have been put in place.<sup>274</sup> Another strand of academic writing considers whether no-fault divorce has perhaps gone too far, and has left no forum for dealing with the emotions surrounding the divorce itself. Here the suggestion is made that no-fault can be the governing principle for the divorce itself, but that it ought to have a place in the negotiations and other procedures that deal with the consequences and arrangements following from the divorce. Yet another branch of investigation considers the ways by which individuals can resolve personal and emotional issues between

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respect of enforcing parenting arrangements, see: British Columbia Civil and Family Law Policy Office *Meeting Access Responsibilities, Background Paper for the Family Relations Act Review*, Ministry of Attorney General Justice Service Branch, 2007).

<sup>269</sup> For instance the Conflict Assessment Scale, which assesses the level of conflict, from minimal to severe. Garrity CB and Baris MA *Caught in the Middle: Protecting the Children of High-Conflict Divorce* (Jossey-Bass, San Francisco, 1994), or the high-low conflict dichotomy proposed by Stewart, see n259, above.

<sup>270</sup> See Cummings ME and Davis PT "Effects of Marital Conflict on Children: Recent Advances and Emerging Themes in Process-Oriented Research." *J Child Psychol Psyc* (2002) 43, 31-63, who suggest that the effects of conflict on children's wellbeing and development are being acknowledged and (partially) understood, but that there is very limited insight in the mediators and moderators that affect this relationship.

<sup>271</sup> See for instance Gilmore supra n2, or Trinder L, Kellett J, Connolly J and Notley C *Evaluation of the Family Resolutions Pilot Project* (Report for the Department for Education and Skills) (Norwich, Centre for Research on the Child and Family, University of East Anglia, 2006), 151.

<sup>272</sup> See for instance McIntosh JE and Long C *Children Beyond Dispute - a Prospective Study of Outcomes from Child-Focused and Child-Inclusive Post-Separation Dispute Resolution* (Final Report for the Australian Government Attorney General's Department) (Melbourne, Family Transitions / LaTrobe University, 2006), for a review of the situation in Australia.

<sup>273</sup> See for instance Harold GT and Murch M "Inter-Parental Conflict and Children's Adaptation to Separation and Divorce: Theory, Research and Implications for Family Law, Practice and Policy" *CFLQ* (2005) 17, 185-205, who argues for increased use of child welfare reports and separate legal representation for children, which is not as widespread in the UK as it is in New Zealand.

<sup>274</sup> This approach was devised by lawyers and psychologists in Denver (Colorado, US) in the early 1990's and has spread to a number of American states. It involves the appointment of a parenting co-ordinator, typically someone with a social science or legal background, at the time the court orders parenting arrangements. This co-ordinator assists the parents on a broad range of issues and helps them resolve issues without escalating the conflict. In some areas the parenting co-ordinator has limited adjudicative powers. For a discussion of the concept, its implementation in several US states and practical and jurisdictional issues that can arise, see: Coates, Deutsch, Starnes, Sullivan and Sydlik supra n249. The constitutionality of appointing such co-ordinators with limited decision making powers was recently tested, see: *Barnes v Barnes* 2005 OK 1 107 P.3d 560 (Oklahoma) where its Supreme Court held that the statute introducing this role was constitutional as it did not override the parent's constitutional right to make decisions about the child (as per *Troxel v Glanville* 530 U.S. 57(2000)), but provided a resolution between the parents, in the light of the overriding duty to the child.

them, and argues that forgiveness might have a place, which could be implemented by “forgiveness training and coaching”.<sup>275</sup>

Nevertheless, and despite these and other suggestions, the ultimate forum for disputes between citizens remains the legal system. The way in which this system deals with these disputes thus remains a benchmark for other processes, and it is therefore necessary to consider the interaction between parenting disputes and the legal process.

### *Legal process and post separation parenting disputes*

The battleground metaphor includes the premise that no-fault divorce removed all grounds for litigation over marital disputes between parents, thereby leaving only parenting issues as legitimate avenues for formal conflict interaction. Because the law provides no clear guidelines or criteria for the determination of the paramount welfare principle, each case will present itself as a unique constellation of parties, children and fact scenario. Obviously, the opponents will disagree about facts, their weight and their relevance. The determination relies on the legal process. There is very little legal argument involved. The entire process focuses on obtaining the evidential foundation to allow the court to reach a decision with some semblance of confidence. To complicate matters, family courts also have a therapeutic function, to be discussed in more detail later, but which involves the idea that the conflicting parties are somehow positively transformed in the course of the process.

The post separation parenting legal process thus interacts on two very different levels with the disputants, it establishes the fact scenario between them in order to make child-focused decisions, and it seeks to improve their future communication and co-operation skills. Before considering the problems facing the system when it tries to achieve these polar opposite objectives, it is relevant to briefly sketch the family law system as it has developed and operates in New Zealand.

## **6 THE FAMILY LAW SYSTEM IN NEW ZEALAND**

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New Zealand has had a specialist family court since 1981, but lacks a coherent and integrated system of family law such as encountered in (codified) Civil Law jurisdictions. Different, sometimes partially overlapping, statutes address various aspects of family law. They use different terminology, legislative structure and language. Apart from these cosmetic differences, the apparent underlying policy objectives are sometimes difficult to align, and it is quite obvious that the entire constellation is the result of ad-hoc developments, rather than of a concerted effort to legislate for this important area of social interaction.<sup>276</sup> In order to briefly discuss the current family law system, it is convenient to begin with the statutory, judicial and legal environment. In addition, family law is an area where social science expertise and discourse play an important role. Family law cannot be seen without its context of social change and the

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<sup>275</sup> For instance Maldonado S "Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce" Available from SSRN: <http://ssrn.com/abstract=1028687> (Wake Forest Law Review) (2008); Emery RE "Inter-Parental Conflict and the Children of Discord and Divorce" Psychol Bull (1982) 92, 310-330; and Sells JN and Hargrave TD "Forgiveness: A Review of the Theoretical and Empirical Literature" J Fam Ther (1998) 20, 21-36.

<sup>276</sup> Inglis supra n115.

subsequent policies and policy objectives that are invariably based on social science principles. But the role of social science and its practitioners is not restricted to informing debate and legal development, it extends right into the legal environment, where social workers, psychologists, counsellors, and a raft of other specialists with a social science background operate as analysts, reporters, experts, and in a range of other roles and functions.

## THE STATUTORY, JUDICIAL AND LEGAL ENVIRONMENT

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### *Divorce law*

As with all New Zealand legislation at the time of colonization, the first divorce law was English statute law, and the early developments closely followed those in England. In the early Colony the only avenue for divorce was under a private act. By 1867 New Zealand enacted its first domestic statute in this area, the Matrimonial Causes Act 1867, which was almost identical to the English Matrimonial Causes Act 1857.<sup>277</sup> This legislation provided limited grounds for divorce, was strongly to the advantage of the husband, and involved some prohibitive procedural complications.<sup>278</sup> The suffragette movement succeeded in convincing the legislature that matters ought to be balanced more evenly, eventually leading to the Divorce Act 1898. Divorce laws were subsequently amended in 1907, 1912, 1920 and 1922, resulting in what have been called the most liberal divorce laws in the British Empire.<sup>279</sup> Further reforms took more than 30 years (the Divorce and Matrimonial Causes Act 1953). In 1963 the Matrimonial Proceedings Act was enacted, which consolidated the law as it stood at the time, and provided 24 different grounds for divorce. Divorce cases were heard in the Supreme Court (the current High Court), which followed a strictly adversarial approach. Older practitioners recall the torment of trying to prove one of the grounds of divorce in contested cases, leading to the Supreme Court being dubbed the “agony court”.<sup>280</sup> Parties who had come to a consensual agreement to terminate their marriage orchestrated these procedures to achieve a divorce. The rules were relaxed with a 1968 amendment to the Act, but they remained rather draconian until the Family Proceedings Act 1980 took effect.

While divorce itself was within the jurisdiction of the then Supreme Court, issues of maintenance, separation and guardianship were within the jurisdiction of the Magistrates Courts (now District Courts), acting under the Destitute Persons Ordinance 1846, amended in 1894 and 1910. The Domestic Proceedings Act 1968 provided a more liberal code, which for the first time also formally introduced the concept of reconciliation, including a duty on lawyers to canvass this suggestion from time to time.<sup>281</sup> That approach remains in the current Family Proceedings Act 1980. This statute has now concentrated and amalgamated divorce law and brought it within the jurisdiction of the specialized Family Courts.

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<sup>277</sup> Carmichael *supra* n97.

<sup>278</sup> The only ground necessary to divorce from a woman was her adultery, while for the man this was only a proper cause if the adultery was with a woman he could not legally marry if his wife was (hypothetically) dead, or if the adultery was coupled with cruelty and/or desertion, bigamy with rape, sodomy or bestiality. Cases could only be heard in Wellington before three judges: Taylor *supra* n110.

<sup>279</sup> *Ibid*, at 25, quoting Carmichael *supra* n97. It must however be noted that through the separate jurisdiction of the Magistrates Courts, England had a rather liberal availability for divorce from the late 1930's, and increasingly so after the Second World War: see Dingwall R and Eekelaar J *Divorce, Mediation and the Legal Process* (Clarendon Press, Oxford, 1988). This different divorce regime through lower courts was apparently not available in New Zealand.

<sup>280</sup> Taylor *supra* n110, 26.

<sup>281</sup> But the practice was probably widespread by the time, as in England. See Dingwall and Eekelaar *supra* n280, 4.

### *Custody law, emergence of the best interest standard*

In the Common Law context, the child's best interest concept developed historically in two distinct strands within the equitable branch of the courts. One strand is founded in the *parens patriae* principle, first asserted in 1696,<sup>282</sup> and based on Chancery's construction of the Crown's prerogative right to act as guardian of subjects unable to fend for themselves.<sup>283</sup> The other strand developed from the courts' role in overseeing the guardianship of children's trust property, under the Tenures Abolition Act 1660. It came to be understood that the exercise of the court's powers for advancing the welfare and best interests of the child went beyond the natural rights of fathers, thereby developing the principle that "*the court would not permit that to be done with a child what a wise, affectionate and careful parent would not do*".<sup>284</sup> Although the jurisdiction itself thus developed quite early, how exactly welfare and best interests are to be understood and how this is to be balanced against interests of parents, or even of society as a whole, remains in continuous flux. Another consequence of the early development taking place in the equitable branch and the Chancery courts is that these operated with a different procedural system, which involved less rigid formality, and allowed a level of inquisitorial intervention.

Originally, courts were mostly concerned with children's property, and very reluctant to interfere otherwise in the parents' dealings with their children, unless fundamental social norms were breached, or the parents were considered utterly unfit. Fathers were assumed to have all (proprietary) rights over children as an aspect of their paternal authority, and the role for the mother was one of "reverence and respect" for their husband.<sup>285</sup> Mothers were simply barred from applying for custody until the Custody of Infants Act 1839 (UK). This Act had a somewhat colourful history as the "Talford's Act",<sup>286</sup> sometimes regarded as the first enactment in response to a feminist movement. It allowed a mother to petition for, and obtain custody of children under 7 years of age. This Act also contained the first legislative references to the interests of the child, albeit that this principle was still subject to parental rights and marital duty. Its relevance in practice was therefore limited, but it became the first custody statute in New Zealand, as a result of it being on the English statute books. Extension of mothers' custody rights took place by way of the Married Women's Property Act 1870, the Law Amendment Act 1882 and the Infant's Guardianship and Contracts Act 1887. The last of these contained stronger references to –and gave broader discretionary powers to the courts in respect of– the welfare of the child. The Infants Act 1908 repeated this provision, but maintained the primacy of the father as the default recipient of child custody. The 1887 and 1908 Acts maintained links between the circumstances of the divorce and

<sup>282</sup> *Falkland v Bertie* (1696) 23 ER 814,818, and see the discussion and references in *Hawthorne v Cox* [2008] NZFLR 1; [2008] 1 NZLR 409, para 74.

<sup>283</sup> An example of the balancing between the appropriateness of state intervention and minimum community standards (in this case of childcare) can be found in *E v Department of Social Welfare* (1989) 5 FRNZ 332, a case under the Children Young Persons Act 1974.

<sup>284</sup> Krieken van R "The 'Best Interests of the Child' and Parental Separation: On the 'Civilizing of Parents'" MLR (2005) 68, 25-48.

<sup>285</sup> I.e. the father had the right to the physical possession of the child, together with the right of control over the child's upbringing. The enforcement of this right, unsurprisingly, was a writ of habeas corpus. Interestingly, this ancient approach has remained relevant where the court has decided on parenting issues and one parent refuses to comply. In such a situation a writ of habeas corpus was used to obtain the "property" of the child, see for instance the *Jones v Skelton* cases. The procedure has also been evoked against a social agency, and was in itself not deemed unreasonable, *DE v Chief Executive of the Ministry of Social Development* [2008] NZFLR 85; CA 358/07; [2007] NZCA 453 (CA), and see obiter remarks referring to this case in *HMM v BGD & HMMand Ors v Hamilton Family Court and BD* High Court, Hamilton, 15 October 2008, Heath J, CIV-2008-419-746 & CIV-2008-419-1427.

<sup>286</sup> It was drafted by a mother, Caroline Norton, who was so frustrated by her legal position that she appealed to government and managed to have it passed into legislation.

custody. The party that was guilty in the divorce proceedings could be declared unfit for custody, although the application of this guilt principle involved some rather particular gender differences, and was quite skewed towards the father's rights.<sup>287</sup> In fact, therefore, from a social and political perspective, the development of the best interests of the child principle was mostly a way to pacify the strongly upcoming women's rights movement.<sup>288</sup>

The Guardianship of Infants Act 1926 was the first to introduce the welfare of the child as the paramount consideration, and the first to place (at least statutorily) fathers and mothers on the same footing in respect of matters regarding the children. It was, however, not until the Guardianship Act 1968 that peculiar differences between mothers and fathers were removed in both legislation and practice. In that Act spouses were no longer described in terms of "living in adultery" or as "guilty" or "innocent" in respect of the divorce. The relevance of such determinations for custody decisions was completely removed. The 1968 Act introduced a new legal construct, by separating the physical possession of the child (custody) from the right to control upbringing (guardianship). This, for the first time, allowed decisions that gave both parents a role in the child's upbringing, independent of the possession of the child. Accidentally, this also provided for the flexibility that was required to cater for de-facto relationships and remarriages, although the perceptions at the time were still firmly rooted in the concept of marriage as a lifelong commitment.<sup>289</sup> The 1968 Act promulgated the welfare of the child as "the first and paramount consideration",<sup>290</sup> a clear indication that custody was no longer about rights of parents, but about determining what arrangement would be in the best interests of the child. The Act was amended in 1969 and the Status of Children Act 1969 was introduced in that year to resolve issues surrounding children born outside of marriage. These legislative efforts completed the transformation from parenthood as a proprietary right based on non-legal societal norms in the context of an almost non-severable marriage relationship to parental responsibilities as a consequence of the simple fact of parenthood, regardless of the actual relationship between the parents. The Care of Children Act 2004<sup>291</sup> continues this theme. It conveys a message of parents' equal status in respect of responsibilities for the nurturing of their children following separation. The Act's purpose is expressly stated as promoting the child's welfare and best interests, by helping to ensure that suitable arrangements are in place.<sup>292</sup> The Act is introduced as a code, and emphasizes that by expressly specifying that it replaces rules of common law and equity.<sup>293</sup> The Act seeks to bring about some of the required changes in the mindset of those involved by introducing new language.<sup>294</sup> The term "custody" was apparently deemed to have too many proprietary overtones and is replaced by "day-to-day care", while "access" was probably too reminiscent of a subservient position, and has been replaced by "contact". The new terminology has been merged into a new type of decision as well. No longer is "custody given" or "access granted", the new instrument is a

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<sup>287</sup> See Ullrich V "Parents at Law" Victoria U Wellington L Rev (1981) 11, 95-122, 111.

<sup>288</sup> Maidment S *Child, Custody and Divorce: The Law in Social Context* (Croom Helm, London, 1984).

<sup>289</sup> Ullrich supra n287, 115-116.

<sup>290</sup> S23(1) Guardianship Act 1968.

<sup>291</sup> This Act came in force on 1 July 2005.

<sup>292</sup> S3 Care of Children Act 2004.

<sup>293</sup> S13 Care of Children Act 2004.

<sup>294</sup> As was indeed apparent from the discussion document that was issued to start the process of amendment and the way the responses to it were summarised, see n13, above.



“parenting order”,<sup>295</sup> a court direction how the parents (and guardians) should give effect to their responsibilities. Such orders can be permanent or interim, and in the latter case procedures are provided to prevent temporary orders being lost in the system.<sup>296</sup> Parenting orders must be specific and explain their precise terms, while there is a further onus on lawyers to explain the effect of orders to their clients, including the children.<sup>297</sup> The Act does not contain any presumptions in respect of the division of parenting responsibilities, but is biased toward joint parenting.<sup>298</sup> The Act’s focus is on the considerations that play a role in determining what is best for the child and on the process of decision making and resolving disputes. Perhaps strangely, contact is still drafted as a parental right rather than a right of the child. I.e. a parent has the “role of providing day-to-day care”, but “may have contact with the child”.<sup>299</sup> The paramountcy of the child’s welfare and best interests is stipulated and the Act contains a list of principles relevant to its determination.<sup>300</sup> These principles include emphasis on parents’ own agreement, continuing relationships with parents and wider family, co-operation between the parents, preservation of identity and culture, and protection from violence. The child obtains a voice under the Act, as the Court is directed to take the child’s views into account and provides that the child must have a reasonable opportunity to express any such views.<sup>301</sup> The child’s role is enforced by the direction that, bar specific circumstances, the Court must appoint a lawyer for the child.<sup>302</sup> Consensual arrangements between the parents are promoted as the most desirable manner to come to arrangements and the Act provides ways for formalizing and enforcing them.<sup>303</sup> Perhaps surprisingly, the Act has no clear and unambiguous provisions for the type of assistance offered for coming to consensual arrangements, or for resolution of disputes in that process. It provides for reference of disputes out of such arrangements to counselling, by redirecting<sup>304</sup> to the relevant sections of the Family Proceedings Act 1980, which promotes counselling and directs lawyers to do the same, but this is focused on conciliation and reconciliation in respect of the marriage, and not on parenting arrangements, unless there is a pending application to the Court.<sup>305</sup> The Care of Children Act thus provides for assistance in dispute resolution about arrangements, but such arrangements must have been formalized before these stipulations apply. The direction in that case is one of counselling (i.e. a specifically therapeutic intervention), not one of dispute resolution, such as mediation.<sup>306</sup>

Recent amendments have introduced mediation as another available means of dispute resolution, but

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<sup>295</sup> Ss47-57 Care of Children Act 2004.

<sup>296</sup> S57 Care of Children Act 2004.

<sup>297</sup> S55 Care of Children Act 2004. In practice this varies substantially, from relatively simple timing arrangements to highly detailed prescriptions including what parents can say in front of the child, whether they are allowed to smoke, how the child is to address them and others and so forth. For an extensively detailed example in a PHP case, see “*B v N (PHP Case)*” Family Court Auckland, 20 November 2006, Judge Somerville, FAM-2004-070-1291.

<sup>298</sup> Arguably, the definition of “parenting” is an obstacle in making any such general statement. The law itself talks about “contributing to development” and “determining important matters” and goes on to give examples of such important matters, before coming to the role of parents who are not day-to-day caregivers. S16 Care of Children Act 2004.

<sup>299</sup> S48 Care of Children Act 2004.

<sup>300</sup> Ss4-5 Care of Children Act 2004.

<sup>301</sup> S6 Care of Children Act 2004.

<sup>302</sup> S7 Care of Children Act 2004.

<sup>303</sup> Care of Children Act 2004 ss 39-43.

<sup>304</sup> Care of Children Act 2004 s40 and s65. Once recent amendments come into force, the counselling activities will be included in the Care of Children Act 2004 itself.

<sup>305</sup> Family proceedings Act 1980 ss18-19.

<sup>306</sup> Although the act may be somewhat ambiguous about exactly what type of assistance is available for separating parents who cannot come to arrangements, the Family Court promotes that it will make counselling available to assist in making arrangements as well. See Ministry of Justice *Counselling* (Brochure 013 issued by the Family Courts).

these amendments have not come into force at the time of writing, apparently as a result of budgetary restraints. The Act contains procedural provisions including the type of evidence the Court can rely on, powers for the Court to appoint a lawyer for the child and/or counsel to assist the court, and powers to obtain reports from experts and social workers. In order to prevent abuse of the Act by overly vexatious and/or litigious parties, the Court has powers to dismiss proceedings, or restrict the commencement of proceedings.<sup>307</sup> The Care of Children Act 2004 generally excludes anything relating to the parents or to the dispute between them that is not relevant to the wellbeing of the child.<sup>308</sup> A notable exception is violence.<sup>309</sup> Protection from violence is one of the welfare principles, but violent behaviour by one party to the other party is of direct influence on the way the Court must deal with parenting matters. One of the consequences once a party has made an allegation of domestic violence in a parenting proceeding is that the court must determine whether violence has occurred and its seriousness. If violence is present, contact between the violent parent and the child is normally to be supervised, or prohibited altogether. Violence is also an issue that connects the Care of Children Act 2004 with other legislation, most notably the Domestic Violence Act 1995 and the Children, Young Persons and Their Families Act 1989.

In summary, the current statutory environment for parenting issues is one where the child's interests are the central focus, while the role of the parents is defined in terms supporting that focus. The way disputes are dealt with, however, leave opportunity to use this child-focused approach as a way to sustain and litigate peripheral issues, for instance by alleging that the other parent is not suitable because of serious character deficiencies that have become apparent in the way the alleging parent was treated. Sufficient creativity will virtually always allow issues between the parents to be reframed as matters that affect the wellbeing of the child, hence the new battleground metaphor as referred to previously.<sup>310</sup>

### *The Family Court*

New Zealand has had a specialized Family Court since 1981, conceived and set up to resolve disputes in a less adversarial manner, with conciliation as a primary dispute resolution method, and a more or less traditional court process as a last resort for those that cannot come to agreement, or for cases that are urgent or unsuitable for a conciliatory approach.<sup>311</sup> Adjectival law is provided by the Family Proceedings Act 1980, the Family Courts Rules 2002, provisions in different substantive statutes and various judicial and administrative directions issued from time to time. The development of the New Zealand Family Courts as a more or less separate judicial entity was recommended by the Royal Commission on the Courts, appointed in 1976.<sup>312</sup> At that time the jurisdiction over family matters was still divided between the Supreme and Magistrates Courts, which provided various avenues for procedural tactics, or even

<sup>307</sup> Care of Children Act 2004 ss140-141. For practical application of this in a PHP case, and subsequent discussion of the issue on appeal to the High Court, see *B v H (PHP Case)* [2008] NZFLR 200 (HC), where invoking this jurisdiction and the threat of restricting legal aid was used to discourage parents that had been litigating for more than seven years.

<sup>308</sup> However, in practice, such matters are often "translated" into issues that have an effect on a parent's capacity to provide for the child's wellbeing.

<sup>309</sup> Ss58-62 Care of Children Act 2004 ss58-62.

<sup>310</sup> It has been suggested that a limited return to fault principles might actually be in the interest of the child, as it would allow the parents to go past the simplistic "single issue" approach and address the real issues underpinning their conflict: Smart C and May V "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes" *J Soc Wel & Fam L* (2004) 26, 347-360.

<sup>311</sup> Boshier PF "The Family Court 25 Years on - Has the Vision been Realised?" Paper presented at the Roy McKenzie Centre for the Study of Families, Wellington, October 2006.

<sup>312</sup> Beattie et al *supra* n17.

harassment, while at the same time many divorce proceedings were orchestrated in order to avoid the divorce restrictions of fault based legislation. All of this was thought to affect the standing of the courts, while exemplifying that formal court process was inconsistent with social developments. The increasing numbers of separations and matrimonial disputes also put severe strains on the courts' administrative organisation and judicial capacity. After considering the developments in other Common Law jurisdictions, the Royal Commission proposed integrated and specialized courts for family matters in New Zealand as well.<sup>313</sup> An important aspect of that recommendation was the idea that family courts should have an additional, therapeutic, aspect. The Commission thus suggested a specialist court, separated from the general courts and with a balance between the formal and the casual, in both conduct of proceedings and physical surroundings.<sup>314</sup>

The Family Courts have no inherent or general jurisdiction. Their operation is restricted to the application of statutes that specifically confer jurisdiction. The substantive law for which the Family Courts can be accessed has, however, continuously increased since the Family Courts' inception. Nineteen statutes now confer jurisdiction on the Family Courts,<sup>315</sup> for family related topics varying from relationship property to testamentary provisions. The workload of the Family Courts has increased markedly since its inception. This is sometimes seen as a sign of the attractiveness of the way it operates.<sup>316</sup> However, this could equally be seen as a symptom of social developments, or even as a sign that the government is increasingly intervening in matters that used to be left to other societal institutions or that were perhaps deemed the exclusive domain for private ordering within the family structure itself.

The Family Courts have been set up under the Family Courts Act 1980 as a division of the District Courts<sup>317</sup> and in the smaller centers they operate within the organisation of the District Courts. In the larger centers the Family Courts have dedicated administrative support and premises. Ultimately however, the administrative organisation of the Family Courts is part of the Ministry of Justice, where the Family Courts and (civil) District Courts are part of the same organisational branch. Although not hierarchically related to the Ministry of Justice, all employment practicalities and work-related infrastructure for Family Court Judges is organized through the Ministry.

Family Court Judges are appointed as District Court Judges with a specific warrant to hear family matters. The ordinary prerequisites for judicial appointments apply, with the added requirement of a specialist background and experience in family law matters, and a personality suitable to deal with such

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<sup>313</sup> The Committee was impressed with the "unified" American model, which itself is not without criticism and need for development, see for instance: Flango VE "Creating Family Friendly Courts: Lessons from Two Oregon Counties" *Fam LQ* (2000) 34, 115-132; Babb BA "Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems" *Family Court Review* (2008) 46, 230-257 and Belgrad HJ "An Introduction to Unified Family Courts from the American Bar Association's Perspective" *Fam LQ* (2003) 37, 329-331.

<sup>314</sup> The Commission states at paragraph 474 of its report: "*The conciliative intents of family law should be emphasised, and a Family Court should therefore be manned by a team with special skills and training who can deal flexibly with human problems as they arise, relating the clients' particular needs to legal necessities*".

<sup>315</sup> As of 2008, see Boshier *supra* n1.

<sup>316</sup> Law Commission *Family Court Dispute Resolution - a Discussion Paper* (Preliminary paper 47) (Wellington, Law Commission, 2002); New Zealand Law Commission *supra* n137.

<sup>317</sup> S4 Family Courts Act 1980.

matters.<sup>318</sup> Family Court Judges can sit on matters in the general District Court jurisdiction, but District Court Judges without a family warrant cannot hear family matters. The Family Courts Act 1980 provides for a Principal Family Court Judge, who is appointed to that position for a period of eight years, and who is responsible for “*ensuring the orderly and expeditious discharge of the business of the Court*”.<sup>319</sup> The role of Family Court Judges differs somewhat from that of judges in other jurisdictions as a result of the less formal settings<sup>320</sup> and the relaxation of rules of evidence,<sup>321</sup> which theoretically gives the judges powers to adopt a more inquisitorial role, although of course restricted by the rules of natural justice and due process that underpin our system of justice. An aspect of this more inquisitorial role (in the case of parenting disputes) is also that the Family Court has the power to call witnesses on its own initiative.<sup>322</sup>

Initially, Family Court proceedings were held in private and reporting was restricted. Following public complaints that the process was too exclusive and insufficiently subject to scrutiny, these rules were gradually relaxed and specified persons can now attend hearings.<sup>323</sup> Files are less accessible than other court files in civil matters,<sup>324</sup> and publication of judgments is restricted. In order to give effect to the conciliatory services, the Family Courts Act provides for the appointment of court officers with roles such as counselling and supervision of counselling.<sup>325</sup> In practice, Family Courts have a counselling coordinator, responsible for organizing counselling, normally through agencies that provide such services. The counselling coordinator also liaises with the lawyer for the child and with appointed specialists, for instance report writers. The counselling coordinator thus manages the conciliatory services provided by the Family Court. The legislation does not provide for a precise description of what these services entail and these court officers depend on operational directions and budgets from the Ministry of Justice. As a result, the conciliatory services of the Family Court are not under the control of the judicial branch, but fully dependent on the executive.<sup>326</sup> Often overlooked is the role of case managers. These are the administrative officers of the court who are responsible for planning, the processing of applications and documents, communicating with lawyers etc. In practice these case managers have in depth knowledge of the cases they manage and a much better understanding of the issues and problems in a case than might be expected.

The Family Courts have been formally reviewed on three occasions, for the first time in 1993.<sup>327</sup> This

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<sup>318</sup> S5 Family Courts Act 1980.

<sup>319</sup> S6 Family Courts Act 1980. For an early interpretation of that role by the current Principal Family Court Judge see Boshier PF “Judicial Leadership and the Family Court” NZFLJ (2004) December, 285; and a later re-visitation of the topic may be found in Boshier supra n7.

<sup>320</sup> S10 of the Family Courts Act 1980 held until recently that “*Family Court proceedings shall be conducted in such a way as to avoid unnecessary formality*” and “*Neither Judges sitting in Family Courts, nor counsel appearing in such Courts, shall wear wigs or gowns.*” By a 2008 amendment the judges will again be wearing gowns, while the layout of courtrooms has also been made more “authoritative”.

<sup>321</sup> This aspect is not of general application, but a procedural direction under relevant legislation. In the case of custody matters see for instance s128 Care of Children Act 2004, which states: “*In all proceedings under this Act (other than criminal proceedings, but including appeals or any other proceedings), the Court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law.*”

<sup>322</sup> S128 Care of Children Act 2004.

<sup>323</sup> For a discussion of this aspect, see Boshier supra n7.

<sup>324</sup> Rule 427 Family Court Rules 2002.

<sup>325</sup> S8 Family Courts Act 1980.

<sup>326</sup> For example budget allocations can determine whether judges do actually have any powers to direct counselling or other social science based interventions.

<sup>327</sup> The review was conducted by what is now referred to as the “Boshier Committee”, after its chairman. The committee was appointed by the Principal Family Court Judge in December 1992, with terms of reference that were narrowly focused on the

review prompted further development of the conciliation services described above, although the report itself went much further and promoted a separate conciliation service, operating alongside, rather than integrated in, the court organisation. The second review was conducted by the Law Commission, which reported in 2003.<sup>328</sup> This report also recommended improving the conciliation services, suggested a mediation service by professional mediators rather than judges, and promoted improved “customer orientation” by family court staff. The Family Courts were also evaluated in the last major review of the entire justice system, undertaken by the Law Commission over a period of some years, resulting in a report published in 2004.<sup>329</sup> This report suggested far reaching changes for the entire court system, but has been largely ignored by government.<sup>330</sup>

### *The specialist bar*

Family law is a specialized area, and practitioners in this field tend to concentrate on it. Some overlap in specializations occurs, mostly with areas such as human rights or criminal law. Parenting cases have another unique feature: a specialized and senior lawyer can be appointed by the court to represent the children. There are approximately 700 specialized family lawyers in New Zealand.<sup>331</sup> Most have extensive experience in this area of law.<sup>332</sup> Parenting dispute is a major part of the workload of family lawyers, more than half of them reported to spend at least half of their work on parenting issues.<sup>333</sup>

Family disputes continue to be seen as having a strong legal context, and lawyers are therefore often the first port of call for separating parents who encounter what they perceive as serious legal difficulties. Lawyers perform a “gate keeping” role to the legal system.<sup>334</sup> There is no statistical information for New Zealand on the proportion of dissolution applications in which lawyers are involved, and how this correlates with parenting issues.<sup>335</sup> This lack of information also applies to parenting disputes, and there is no direct statistical information to support the claim made by many lawyers that their involvement is instrumental in resolving the majority of parenting disputes in which their services are sought. The available statistics show that the majority of parenting disputes result in some application to the court, but that only a small percentage of the cases thus entering the court system require determination. This could well be indicative of the lawyers playing the role as claimed. It is in that context perhaps surprising that lawyers are often painted as promoters of adversarial litigation, supposedly in order to advance their commercial objectives. In reality it seems that family lawyers have generally developed a conciliatory approach to their practice and actively support alternative means of dispute resolution. Developments such as collaborative law, which are actively pursued by some family law specialists, demonstrate the

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balance between the various services provided by the Family Courts and associated professionals, and its increasing financial demands, Boshier et al *supra* n17, 22.

<sup>328</sup> LawComm *Dispute Resolution in the Family Court* (Report 82) (Wellington, Law Commission, 2003).

<sup>329</sup> LawComm *Delivering Justice for All, a Vision for New Zealand Courts and Tribunals* (Report 85) (Wellington, Law Commission, 2004).

<sup>330</sup> NZGovt *Government Response to Law Commission Report on Delivering Justice for All, October 2004*, New Zealand Government, 2004).

<sup>331</sup> This number is derived from the membership list of the Family Law Section of the New Zealand Law Society.

<sup>332</sup> In my surveys, 75% reported experience of more than 8 years in family law practice. (See Part V below).

<sup>333</sup> See for more details Part V, below.

<sup>334</sup> Davis *supra* n147.

<sup>335</sup> A somewhat dated study on a relatively small sample showed that about two thirds of people making a dissolution application had consulted a lawyer. Lee *A Family Court Custody and Access Report Two: A Survey of Parents Who Have Obtained a Dissolution* (Wellington, Department of Justice, 1990).

non-adversarial mindset that is often found in family lawyers.<sup>336</sup> Although this different mindset may be prevalent, this does not mean that some family lawyers do not have an adversarial impetus, or that an otherwise conciliatory family lawyer, once in court, can avoid the still largely adversarial role required by the process. Lawyers have an advisory role as well, which includes the professional obligation to act in the best interests of their client. Although consensual processes may be promoted, such processes still require a detailed analysis of a party's legal position, especially where more than just custody issues are involved, as is often the case. This analysis necessarily involves a rights-based perspective, regardless of the way in which the actual negotiation process is conducted. A resulting, but often overlooked, task of the lawyer is the management of his/her client's expectations. Although lawyers cannot preempt court decisions, it remains their task to inform their clients about their prospect of success, and especially about the legal relevance of the arguments clients may want to advance in these often emotional conflicts.

The ethical issues that surround the practice of law arguably have additional dimensions for those specializing in family law, and particularly for those acting in parenting cases. As remarked before, this involves an exceptional area of law, where the dispute focuses on individuals who are not a party to the proceedings (the children), but whose welfare and best interests are statutorily declared to be the paramount consideration. As the current policy requirement of meaningful relationships with both parents can only be implemented with some reasonable cooperation between the separated parents, the paramount welfare principle virtually dictates that relationships between the parties cannot be utterly destroyed. Apart from the duty to the client, normally subject to the duty to the court,<sup>337</sup> the family lawyer is confronted with additional obligations to the children,<sup>338</sup> and to the spirit of the legislation, which includes a duty to promote conciliation, which requires substantial reluctance in using adversarial tactics. The substantive law thus affects legal practice, while family law procedure (with its focus on non-adjudicative methods) places further obligations on lawyers that are radically different from the 'ordinary' adversarial advocacy model. The result is that the family lawyer is almost destined to operate in a style which may be termed "relational lawyering" or "an ethic of care style", which involves a responsibility to people, their relationships and the wider community.<sup>339</sup>

In addition, the subject matter of parenting dispute requires a more than casual understanding of relevant social and psychological material, which also draws the family lawyer further into an area where abstract legal principles and the associated (sometimes esoteric) arguments lose relevance, and where human interaction is benchmarked against ambiguous policy objectives, in a process that hinges on judicial discretion. This is further exacerbated where the lawyer attains more or less directly formulated

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<sup>336</sup> A small qualitative study undertaken in Queensland demonstrated that, at least for the responding family lawyers, the prototype of an adversarial "gladiator" was certainly incorrect. By the same token, these family lawyers struggled with ethical questions, when attempting to incorporate a child focused approach in their daily practice: Banks C "Being a Family Lawyer and Being Child Focused - a Question of Priorities?" *AJFL* (2007) 21, 37-59.

<sup>337</sup> The Lawyers and Conveyancers Act 2006 s4 provides "fundamental obligations of lawyers", which include "*the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients*". Of further relevance are the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>338</sup> The study referred to above, in n336, records that a majority of lawyers found that the obligation to be child focused was as important as their duties to the client and the court, while in some cases it could even trump those obligations to the point that they would cease to act for a client who would consistently pursue an approach that they considered against the child's best interest.

<sup>339</sup> A typology of lawyer's behaviours and styles is provided by: Parker C "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" *Mon LR* (2004) 30, 49, while the concept of "ethic of care" is argued by Carol Gilligan, as quoted in Banks, n336, above.

tasks in the execution of these policy objectives. The introduction of the PHP provides a good example; lawyers are expected to play an important role, not only in providing information, but in actively educating their clients about the process and about the behavior that is required of them.<sup>340</sup> Lawyers are expected to “buy in” into this process and its objectives, and their duty to the court now seems to include being part of a deliberate and complex system of coercion, whereby the disputing parties, which have withstood all prior attempts at therapeutic intervention are somehow transmogrified into reasonable and objective beings that can focus on the child’s best interests while leaving their own emotional issues at the door of the court room.<sup>341</sup> The PHP thus directly and actively involves lawyers in the therapeutic objectives of the Family Court.

In conclusion, family lawyers operate in a distinctively different area of law, with specific requirements and obligations. These can present them with difficult moral and ethical challenges in their professional role.

### **OTHER PROFESSIONALS INVOLVED IN FAMILY LAW**

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With the increasingly holistic approach to family law and process, a range of other professionals have become part of the legal environment. Their role developed from the parties’ needs or policymakers desires to bring evidence pertaining to the best interest of the child. Common Law procedure provides a specific place for expert testimony, founded on the presumption that expert professionals, bound by their own professionalism and codes of conduct, will provide more or less neutral information to the court, within the sphere of their specific expertise. In practice, however, expert opinions can differ, especially in such nebulous fields as the social sciences, and it is a rare occasion indeed where no expert can be found who is prepared to entertain a radically different opinion from a colleague engaged by the opposing party. In the adversarial context expert evidence is used to demonstrate the suitability of one and the shortcomings of the other parent, or the value of some academic assertion about appropriate parenting roles or behaviour. The predictable result is that the parties’ arguments are simply extended with additional “science” to support their adversarial positions.<sup>342</sup>

Experts represent a particular type of witness allowed to provide opinion, not just facts. This does not allow them to intrude into the court’s obligation to make decisions, although the boundary between making decisions and providing decisive evidence can be difficult to trace. The expert, be it a medical practitioner, a psychologist or a psychiatrist plays an important role and some have developed specializations in these law-related fields. That applies to both practicing and academically oriented social scientists. Family law operates on the intersections between social sciences, healthcare and the legal domain. Especially in the last five decades developments in law (often ideologically and policy-

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<sup>340</sup> See the “PHP briefing paper”: Boshier and Udy supra n 234, and the discussion in chapter 20, below.

<sup>341</sup> It is in that context no surprise that in for instance the Australian model an additional government employee is introduced with a central role in the proceedings and a social science background: Fry D “Recent Developments: The Role of the Family Consultant in the Less Adversarial Trial” *AJFL* (2007) 21, 113-122.

<sup>342</sup> In that context it is perhaps of little surprise that legislation provides the possibility for the court to appoint an (additional) independent expert.

driven) have had support from research in these “soft” sciences, while the increased use of experts<sup>343</sup> from these fields brought these matters directly into the daily operations of the courts as well. To that must be added the social science based interventions that have been incorporated in the law for the purpose of increasing settlement, reducing conflict and controlling court workloads. These interventions have added a range of more or less therapeutic practitioners to the family court scene, varying from counsellors to conciliators to mediators and social workers.

The introduction of all these representatives from the helping professions has left a deep impression on the operation of the Family Courts and on the development of family law and legal process. One effect is the introduction of social science discourse; another involves the re-framing of legal issues into healthcare challenges. This is particularly the case for parenting disputes, where the welfare of a third party to the dispute (the child) is at stake, whose interests are protected by the Court and the now closely associated, rather than independent, helping professionals. It has been argued that the shared parenting ideal that was effectively promoted by the helping professions has effectively replaced long standing custody policy and the associated adjudicative norms, but that this development has been obscured by the social scientists’ focus on the decision making process (through the welfare principle), rather than on the merits of the promoted ideal.<sup>344</sup> A consequence of the second part of that argument must be that there is no real basis to assert that problems with the adversarial system can be remedied by effectively handing over the decision making power to another professional group. The argument then concludes that out of fear for making society too rights-based and law and lawyer driven, a much worse creature has been reared, that of a state using its governmental powers for increasing semi-bureaucratic and welfare- and health-professional based intervention in the private lives of its citizens: the Nanny State. This then raises the question of the objectives and policies which the family law system pursues.

## **POLICY OBJECTIVES**

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There is a myriad of policies underlying legislative and procedural developments that relate to the family as a social phenomenon. At the time of establishment of the new Families Commission (2004) the then responsible ministry for such matters, the Ministry of Social Development, had cause to produce a “first resource” for the incoming commissioners.<sup>345</sup> This 264 page work contains an appendix that helpfully identifies government policies and the related legislative initiatives that had recently been established or were underway at that time. This list covers 36 pages in dense print, not including “public awareness and education” programmes, which fill another four pages. It is difficult to interpret this material other than by concluding that the Government is inclined to micro-manage in this area of social policy. The same may be said about the regulation of legal process and procedure in this field.<sup>346</sup> The overriding policy

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<sup>343</sup> Despite this increased use of experts, empirical data suggests that decisions have not significantly changed, see Mason MA and Quirk A “Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision Making in Custody Disputes - 1920, 1960, 1990 and 1995” *Fam LQ* (1998) 31, 215-236, 231-232.

<sup>344</sup> Fineman *supra* n3.

<sup>345</sup> Ministry of Social Development *New Zealand Families Today: A Briefing for the Families Commission* (Wellington, MSD, 2004).

<sup>346</sup> A good example being the 2004 “baseline review” for the newly amalgamated Ministry of Justice (that integrated policy development and court services in 2003), and which states that this merger should be driving “*leadership of the justice sector and*



objective that emanates from the procedural provisions for matters of marriage dissolution, separation and the care of children is non-adversarial, alternative dispute resolution (ADR).<sup>347</sup> This increasing use and promotion of ADR since 1980 is invariably promoted by emphasizing the shortcomings of, and dissatisfaction with, adversarial litigation. Before discussing the innovations represented in the PHP, it is therefore helpful to first consider the perceived disadvantages of the current legal process.

## **7 DISSATISFACTION WITH THE CURRENT LEGAL PROCESS**

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The continual change and evolution of family law and legal process over the last decades has not resulted in widespread satisfaction with the Family Court in general or with the way parenting disputes are being dealt with specifically. This dissatisfaction is expressed by users of the system, those professionally involved and the many activist and lobby groups, and it was recognized in recent reports by the Law Commission. The complaints are that the process does not achieve the policy objectives, that it is inefficient and inequitable, and that it does not provide user satisfaction. The perceived cause is the adversarial process which is said to have serious inherent deficiencies, while it interferes with the proper application of the welfare principle.

### **THE PROCESS DOES NOT ACHIEVE THE POLICY OBJECTIVE**

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In parenting matters the legal process is not only used to adjudicate disputes between parties but also to achieve the policy objective of collaborative post separation parenting. Achieving this increasingly involves therapeutic interventions, rather than adjudicative determinations. The state's policy objective therefore increases demand on a state provided service, that of therapeutic conflict resolution. In some situations, the policy objective cannot be achieved because the parents are incapable of reaching or maintaining the required collaborative arrangements. There can be several genuinely practical reasons for this failure,<sup>348</sup> but the PHP is mainly concerned with the most frequent and important one: ongoing disagreement and serious conflict between the parents.<sup>349</sup> That conflict need not be about the children at all, and will in fact often be strongly influenced by adult issues about the relationship or its ending. The most relevant characteristic of the discord in the context of post separation parenting is its severity. When that reaches a level capable of frustrating the necessary cooperation between the parents, it will effectively prohibit the achievement of the child-oriented policy objective. Conflict will also interfere with parent-child relations and thus affect the quality of parenting.

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*strengthening of connections between policy development and its operational implementation". Ministry of Justice Report of the Ministry of Justice Baseline Review (Wellington, MoJ, 2004), 157.*

<sup>347</sup> The Royal Commission (see n75 above) formulated it as follows: *"The conciliative intents of family law should be emphasized, and a Family Court should therefore be manned by a team with special skills and training who can deal flexibly with human problems as they arise, relating the client's particular needs to legal necessities. Conciliation should concentrate on helping the parties rebuild some degree of relationship so that they can at least discuss rationally any matters arising out of the break-up of the marriage. In a calmer frame of mind they may be able to work out arrangements for the welfare of the children in a way that minimizes injury to them."* As also quoted by Henaghan *supra* n100, 275.

<sup>348</sup> For instance geographical or financial impediments, health and/or mental health issues, criminal convictions or criminal inclinations, logistical problems, or work obligations.

<sup>349</sup> Whereby it is expressly noted that one or more of the other issues mentioned in the previous footnote may also play a role in the disputes between parents, either in the background or as part of the conflict parameters of the disputes.

Although there is no definitive statistical material, levels of conflict that hinder conciliatory resolution are prevalent in some 5-10% of cases.<sup>350</sup> It needs to be emphasized that that does not mean that the system works perfectly for the remaining cases; there is no data to answer that question.<sup>351</sup> It may, in fact, be assumed that there will only be a limited number of cases where the idealized prototype of cooperative behaviour may be found, while in virtually all cases there will remain some level of conflict. The adjudicative stage of the legal system will only be engaged, however, where two conditions are satisfied: at least one party perceives that whatever arrangement is in place is unsatisfactory, and that party is prepared and able to pursue the matter through to adjudication.

The policy objective of a child's continued substantial involvement with both parents has been elevated to an almost unassailable principle,<sup>352</sup> and it is therefore hardly ever considered appropriate to exclude one party entirely. The outcome of the process will therefore typically involve some arrangement of tasks and responsibilities between the parties. From the perspective of the system this may well be seen as describing the parameters of the parties' future 'cooperation', but in high conflict disputes the parties will interpret this outcome in distributive terms. While the system may focus on therapeutic interventions to focus on collaborative aspects, the parties will attempt to use these for tactical purposes to achieve their (possibly undisclosed) objectives.

I therefore argue that problems are in fact caused by the ultimately adjudicative nature of the court process,<sup>353</sup> whether it operates in a Common Law adversarial paradigm or not.<sup>354</sup> The real conflict will only stop if both parties accept the outcome, which in some cases is simply impossible due to characteristics of the parties or the conflict. By contrast, the dissatisfaction with court process that gave rise to the PHP innovation originates from the assumption that the current process is more likely to create, sustain or aggravate conflict than the alternatives that are proposed. In that view it is not the adjudicative nature of the process that causes the problem, but the characteristics of the process that is used to arrive at a judicial determination.

By whatever route one arrives at it, the conclusion must be that the system as it operates does not achieve the apparent policy objective of achieving collaborative post separation parenting in re-structured families in virtually all cases.

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<sup>350</sup> As already discussed, the often quoted number of 5-6% of cases requiring judicial interventions must be compared with similar international statistics of 10-12%. Because the level of conflict varies with time, and because definitions and measures of conflict are amorphous, it is impossible to provide precise statistics.

<sup>351</sup> The only directly relevant New Zealand research known to me is a study with a limited sample size, which found that about half of parents were satisfied with the counselling services, 63% was satisfied with the mediation conference and about half with the way the judge conducted the defended hearing. Taylor *supra* n110, 329, 332, 344.

<sup>352</sup> Although I will later argue that this approach is illogical, it must be accepted as the current reality.

<sup>353</sup> I.e. the fact that an authoritative third party makes a decision that governs the future relationship between –and the conduct of– the parties to the dispute and the consequent parameters of future antagonism. This assertion may be supported by the fact that in Civil Law jurisdictions the court process is accepted as being just as detrimental to relationships as it is in the Common Law world. See for instance Chin A Fat B *Scheiden: (Ter)Echter Zonder Rechter? Een Onderzoek Naar De Meerwaarde Van Scheidingsbemiddeling* (SDU Uitgevers, The Hague, 2004) and Boele Woelki K *Common Core and Better Law in European Family Law* (Intersentia, Antwerp Oxford, 2005). See for a detailed discussion, chapter 15, below.

<sup>354</sup> For a general expose of the consequences of adjudicative decision making, see Eisenberg MA *Private Ordering through Negotiation: Dispute Settlement and Rule-Making* Harvard Law Review (89)4 (February 1976), 637 (1976); Fuller LL "The Forms and Limits of Adjudication" Harv L Rev (1978) 92, 353-409 and Auerbach JS *Justice without Law?: Resolving Dispute without Lawyers* (Oxford University Press, New York / Oxford, 1983). In the context of divorce dispute see: Davis *supra* n249 or Fineman *supra* n3.

## THE PROCESS IS INEFFICIENT AND INEQUITABLE

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It is apparently accepted that the system as it currently operates is not efficient at resolving difficult parenting cases, despite the reforms that were implemented with the introduction of the Family Court and the various subsequent innovations. The efficacy of non-adjudicative intervention seems to have reached its upper limit at the (very respectable) level of about 95% of cases, but the remaining volume is apparently still considered to be too large, not only in numbers, but also because it includes the serious cases that will inevitably lead to much negative publicity and real human crises. In addition, these difficult cases take up a disproportionate effort from the system as a whole. Many administrative and economic processes display this phenomenon.<sup>355</sup> The identifiable characteristics of the cases that fall within the difficult group will be discussed elsewhere, but it will be apparent that a relatively small number of cases place a disproportionate pressure on the organisational infrastructure of the courts and represent a substantial economical burden.<sup>356</sup> Consequently, there are strong incentives to reduce the number of difficult cases and their use of resources. These economical and efficiency issues also apply at the level of the individual parenting dispute. Taking a matter through the court system is expensive, and any resulting frustration will be added to when observing that the process is inefficient as well.<sup>357</sup> As this latter complaint is not restricted to parenting matters, and not even to the Family Court, it would seem that it is related to the system rather than to the characteristics of the parties or their disputes.

In addition, the economic parameters of the legal process are a source of inequity. To a certain income level legal aid is available, but above that level the costs are prohibitive for all but the seriously wealthy. As a consequence, access to justice is restricted for a substantial part of society, while in individual cases inequality can result from the parties' different access to the financial means to pursue litigation.

## THE PROCESS DOES NOT PROVIDE "USER SATISFACTION"

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Given the somewhat ambiguous nature of the services on offer<sup>358</sup> and the lack of structured and ongoing assessment of the quality of court processes,<sup>359</sup> it is difficult to ascertain the overall satisfaction of court users with the services received.<sup>360</sup> Nevertheless, the question of user satisfaction has occasionally been

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<sup>355</sup> It is commonly referred to as "the 80-20 rule", "the law of the vital few", "factor sparsity", or simply the "Pareto Principle"; after the Italian economist Vilfredo Pareto. The principle further holds that it is recursive, i.e. the rule also applies within the component fractions.

<sup>356</sup> Although, the Ministry of Justice does not provide detailed financial statements from which information can be obtained about the actual costs of specific types of cases.

<sup>357</sup> In a 2006 study it was found that the majority of respondents considered that most people can't afford to go to court, while there are unacceptable delays: AC Nielsen Ltd *Public Perceptions of the New Zealand Court System and Processes* (Wellington, MoJ, 2006).

<sup>358</sup> At least from the perspective of the actual "court clients", i.e. the disputing parties.

<sup>359</sup> There are no systems in place in New Zealand that continuously monitor the performance of the court system e.g. by way of budget/output measures or by way of obtaining feedback from parties or professionals involved in the system.

<sup>360</sup> For a limited study see Saville-Smith K *Alternative Dispute Resolution : General Civil Cases / Prepared for the Ministry of Justice by K. Saville-Smith and R. Fraser* (Wellington, N.Z., Ministry of Justice, 2004) and the AC Nielsen reported quoted at n357, supra. The matter is nevertheless of an urgency that caused the New Zealand Bar Association and the Legal Research Foundation to organise a conference titled "Civil litigation in crisis – what crisis" (22 February 2008). While the general perception under practitioners is that the civil litigation system is highly inefficient, there is little empirical evidence to detail and support such claims.

raised. The outcomes of such studies and evaluations in New Zealand are largely negative.<sup>361</sup>

Unfortunately, most formal studies into this aspect are in some way government executed or sponsored, and thus tend to shroud their critique in elaborate mitigating discourse.<sup>362</sup> A very different tone is encountered when researching the many websites and 'blogs' that represent the views of various action groups and disgruntled individuals (see Figure 5),<sup>363</sup> or reading editorial comment<sup>364</sup> and letters to the editor, even in law journals.<sup>365</sup> As is clear to even the most casual observer of these sources, there is a groundswell of opposition to the operation of the courts and the



Figure 5 Example of an Expression of Dissatisfaction

effect this has on justice as a social value or social value system.<sup>366</sup> That is particularly the case for the Family Court, which seems the continuous target of negative publicity.<sup>367</sup> Given the lack of structured research and evaluation it is difficult to draw definitive conclusions, but the criticisms seem to disclose a number of main themes: a bias towards women which is thought to be embedded in the process and in the mindset of the judges, the costs and delays experienced in the process, and the consequent frustration about its operation,<sup>368</sup> the system's oversensitivity to allegations of violence and abuse, the lack of consideration for marital misbehavior, and the lack of efficient enforcement mechanisms. Recent official evaluations of the court system found dissatisfaction with the operation of courts in general.<sup>369</sup> As a result, the Law Commission proposed dramatic changes to the structure of the New Zealand court system, which would see the lower courts (including the Family Court and Youth Court), brought closer

<sup>361</sup> And New Zealand is not an exception; the author has not found any example of a family court system that is said to operate to the satisfaction of its users.

<sup>362</sup> As an example, the Law Commission wrote: "*We saw our task as being to offer the best possible arrangements for the future, not to act as inspectors or auditors of what has happened in the past or is happening now.*": New Zealand Law Commission supra n137, 1. Also see the way problems are re-framed by the Principal Judge, thus deflecting overall criticism into alleged discrete problems. In article format in Boshier PF "Family Law in New Zealand" AFL (2004) 17, September Issue, and in a similar fashion in speeches: Boshier PF -Untitled- Speech to the Auckland Family Courts Association, Auckland, 21 April 2004 and Boshier PF -Untitled- Speech to Whangarei Family Court Lawyers, Whangarei, 21 April 2004.

<sup>363</sup> From <http://dad4justice.blogspot.com/>, which in turn copies this from [www.talkshoe.com](http://www.talkshoe.com), a blog and a website by activist disgruntled fathers, last visited 24 October 2009. There are also examples of frustrated litigants that continue for many years in their litigation, and try to involve the "system" in it, for an example see *Gunson v Waenga and Ministry of Social Development* High Court Wellington, 21 April 2008, Gendall J, CIV-2006-485-2511 (on a successful strike out application by the Ministry).

<sup>364</sup> See for instance Robertson B "Editorial: The Family Court" NZLJ (2006), which reports on protests outside judges' residences and the common complaints expressed during such demonstrations. The editorial reports as "simple facts" that in no other jurisdictions there are: so many dissatisfied customers, so many reported cases of judges acting in flagrant disregard of statutory limitations or natural justice, or so many complaints about the quality and behaviour of lawyers.

<sup>365</sup> Jackson C, Tichbon B and Roberts V "Letter to the Editor: From the Equal Parental Rights Working Party" NZLJ (2006), 242.

<sup>366</sup> There are an increasing number of cases that involve litigants, and even lawyers who have lost all respect for the court system. In extreme cases this has already led to individuals being incarcerated for contempt, efforts by the attorney general to close down websites etc. For an example see: <http://www.kiwisfirst.co.nz/>; or <http://www.justice.gen.nz/>.

<sup>367</sup> And which goes as far that experienced practitioners have lost faith in the system and are convinced that those directing and leading it have disingenuous purposes. A comment from a respondent in my 2007 practitioner survey may exemplify this: "*the PHP is about Boshier leaving his mark...there is a lot of duplicitousness [sic] around this whole system...*"

<sup>368</sup> In an extreme example the court's process was advanced as ground for provocation in a case where a disgruntled father fatally stabbed his former partner in the waiting room of the Family Court, *R v Laroche* CA2000/04.

<sup>369</sup> New Zealand Law Commission supra n137, 6, where the problems were summarized as: (1) a lack of information or understanding about what the system is, how it can be used to initiate action, and what possibilities exist when someone is drawn into it against their will; (2) The high legal costs and filing fees, coupled with the economic consequences of the distraction from other productive activities which inevitably arises; (3) The time and delay involved and the exhaustion of being caught in the system; (4) People feeling as though they are not able to tell their story, to be understood or be responded to in a way which is meaningful to them. As can be seen, these conclusions are framed as structural problems, and are indeed followed by the remark that many submitters suggested a change to an inquisitorial system, something the Commission rejected. The more important observation, however, is that process failures in terms of quality and quantity are simply ignored, in lieu for an esoteric discussion on structural issues.

to the communities in which they operate, and they would in fact be renamed to “Community Courts”. The inefficiency of the court organisation and administration was suggested as the root cause of capacity and efficiency problems. The government of the day largely ignored the dozens of recommendations, but sought to streamline operational processes by integrating the administrative and logistic apparatus of the courts into the Ministry of Justice.

The Family Court was the subject of an earlier, very substantial, Law Commission report in 2002, which was also prompted by widespread criticism.<sup>370</sup> The Commission recommended new conciliation processes, but importantly, also points out that the Family Court needs to be properly resourced to exercise its function, a comment similar to that made in the 2004 report about the court system as a whole.<sup>371</sup> The commission further stipulated the importance of considering family issues from a holistic perspective, encompassing more than mere adjudication. The commission suggested that social issues, economic factors, public health issues and education aspects ought to be included through cooperation with the associated agencies. What emanates from official evaluations therefore is the continuing development of a “welfare envelope” in which government agencies attempt to resolve any and all difficulties arising from individual choices in lieu of a strictly rights-based approach.

Court users express strong opinions on how the current process operates. Part of those comments focus on how the perceived problems are associated with court resourcing. Other comments involve policy issues and a perceived systemic bias. Nevertheless, the emphasis of policy development remains strongly focused on reducing the number of cases that require judicial determination and reducing the impact each case has on court resources. In other words, the resourcing problem is not addressed by increasing resources or efficiency, but by restricting access to the traditional justice system and by introducing different processes that operate as a precursor to, and alternative for, ordinary litigation. The main argument that is advanced to support this approach is that adversarial Common Law process is unsuited to resolve parenting disputes. In the following section this will be considered in more detail.

### **THE PERCEIVED CAUSE OF PROBLEMS: ADVERSARIAL PROCESS**

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The Royal Commission of 1978 pointed out that adversarial process could be counterproductive in disputes with a large emotional content, such as those in the family courts.<sup>372</sup> The PHP process and similar reforms in other areas of law in New Zealand and other jurisdictions are partly underpinned by the notion that lawyers and the adversarial court process are entrenched in, and cause or exacerbate, an adversarial mindset. In that context adversarial process is often contrasted with various consensual ADR processes that may be used as precursor to, or alternative for, formal litigation. The characteristics of ADR and the differences with litigation will be discussed in a later chapter. Another often encountered

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<sup>370</sup> New Zealand Law Commission *Dispute Resolution in the Family Court* (Report 82) (Wellington, NZLC, 2003), which summarises the complaints as: “the system is biased against men; without notice applications are granted too readily; where orders are made without notice it takes too long for the other party to be heard; matters generally take too long to resolve; children suffer because of these delays; and, not all Family Court professionals are properly trained and skilled.”

<sup>371</sup> Both Law Commission reports were cited in the Family Court Matters Bill as reported back from the Social Services Select Committee, providing recommendations now included in the recently completed legislation that amended several family law statutes.

<sup>372</sup> Beattie et al *supra* n17, 150.

comparison is that between adversarial and inquisitorial process, as employed in continental (Civil Law) legal systems. It is helpful to consider the development of these different systems very briefly,<sup>373</sup> before discussing the aspects of adversarial process that are often seen as most disruptive for family proceedings.

Adversarial process is a characteristic of Common Law justice that has its origins in the ancient trial. That procedure was devised as a mechanism for fact finding, and involved various rituals, which from modern perspectives seem rather archaic.<sup>374</sup> Over time these rituals came to be replaced by a procedure whereby witnesses swore that the truth of the matter was as alleged by the party they appeared for. This led to the unscrupulous practice whereby professional witnesses would swear whatever was required for a fee, and this rather unsatisfactory process later evolved in what we now know as the jury system, whereby a forum of peers has been given the task to establish the truth and give its verdict. In Civil Law jurisdictions another process was used, that of inquisition, which was based on ecclesiastical principles (Roman Catholic Canon Law), and in which the task for finding the truth was placed with the judicial third party who was also responsible to apply the law to the facts. This process was historically not free from problems either, especially where the means used by the inquisitors to obtain factual admissions involved bodily harm. It may be seen that an important difference between the two procedures can be captured in the question whether the parties themselves or the adjudicator is responsible for determining and obtaining the information on which factual findings are based. In a Civil Law system that task rests (at least formally) with the judge and the parties can make submissions if they consider that additional evidence is required, for instance by way of other experts. In a Common Law environment the parties provide the evidence, without any role for the adjudicator other than ruling on admissibility and evaluating it. In that system it is thus imperative that a party provides the court with evidence that most supports its case, and weakens that of the opponent. Clearly, parties will be inclined to leave out what is not considered helpful for their case, despite it potentially being relevant for the decision maker. In a Civil Law system the court applies the law to the facts as it sees fit, with the parties having an option to make submissions as to the relevant application of the law, in Common Law systems the parties have the task of indicating what law is relevant from the start of the case, and they are more or less bound to their choices, with limited opportunity for the court to deviate from the case as it is brought and framed by the parties.

When court procedure became increasingly complicated, the role of the barrister developed as a specialized professional, versed in court procedure and apt at presenting a party's evidence in the best possible light while capable of effectively attacking that of the opponent, by way of cross examination of witnesses and shrewd legal argument. In order to satisfy notions of fairness, complicated rules of procedure and evidence developed, which in turn resulted in the use of the process itself as a way to

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<sup>373</sup> This description of the development of common law adversarial process is based on Coquillette DR *The Anglo-American Legal Heritage* (Carolina Academic Press, Durham, 1999); Berman H, *J Law and Revolution, the Formation of the Western Legal Tradition* (Harvard University Press, Cambridge Mass, London, 1983); Berman supra n87 and Witte supra n70. It must be noted that this topic is of far larger complexity than can be described in a few paragraphs, and that archetypal descriptions of "Common Law" and "Civil Law" are used while differences and commonalities are in fact much more subtle, while varying substantially between different Common Law and Civil Law jurisdictions.

<sup>374</sup> Although anthropologists report that such methods are still being used in primitive tribal societies, see for instance: Chase supra n133.

advance a party's position, i.e. the concept of legal tactics. The barrister's role was modeled on that of the medieval champion, who would offer his fighting skills as a service to determine dispute by way of joust. In analogy with the joust, court proceedings culminated in one decisive event, the trial, after which the winner (and by necessity also the loser) was declared. By contrast, in Civil Law systems the core element in procedure is the "dossier", compiled by the adjudicator and containing the investigations and relevant findings of fact to which the (codified) law is applied. There is no role for cross examination and the other theatrics of the adversarial trial. Often there is not even a trial in the Common Law sense, but a series of court events throughout which the various "inquisitions" take place.

The lawyer as an expert in law is a continental development that originated with the Roman jurists, and although Roman law was taught at the classic universities in England, barristers were not trained at universities, but learned their trade in practice, through the Inns of Court. The separation between the roles of solicitors and barristers has its roots in this historical development.

Similarly, the role and context of the work of judges developed quite differently in Common Law and Civil Jurisdictions. In the former judges were recruited from the bar and their task was to act as arbiters to oversee that the parties complied with the rules in bringing and arguing their case. The facts were historically found by an independent forum, the jury, who used these facts and the submissions (and summary by the judge) on law to reach a verdict. In most Common Law jurisdictions this fact finding role was later included in the judge's task, at least for some areas of law. In Civil Law jurisdictions the judiciary always had a much greater role in fact finding, and judges are specifically trained for their profession, while their career paths are mostly confined within that profession. These distinctions remain to date. Civil Law and Common Law systems incorporate safeguards against human error and more ominous human failings, such as corruption or incompetence, by using appeal procedures. In the Common Law context, an appeal is seen as a new procedure, where the decision of the initial judge is tested against law and procedure, thereby also playing a part in the development of law.<sup>375</sup> In civil law the appeal process is a continuation of the proceedings, which takes the format of continuing work on the case dossier by more authoritative legal experts.

To complicate matters, family law and procedure straddle the divide between Common Law and Civil Law paradigms. Although the development of the Common Law did away with the principles and procedures of ecclesiastical canon law for almost all areas of law, family law re-introduced (or retained) these in substantive and procedural law. In substantive family law, the canonical principles were never really abandoned, but rather replaced with secular notions of fault. The 1517 European reformation was mostly a revolt against the powers of the Catholic Church in secular matters, and although the reformist jurists clearly rejected marriage as an ecclesiastical event, they grounded marriage obligations directly on the scripture, and maintained much of the practicalities of canonical process. The adaptation of these developments into English law preserved some of the procedural elements, as they were applied within

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<sup>375</sup> The grounds of appeal and the extent of its character as a "rehearing" are somewhat fluid and vary over time. There is not much writing on the issue in the context of parenting dispute. A good overview may be found in Inglis *supra* n115, chapter 10. Recent cases that discuss the issue include *B v B* High Court Auckland, 9 May 2008, Duffy J, CIV-2007-404-5016, on appeal as *B v B* [2008] NZCA 312, confirming a recent Supreme Court decision that confirmed that 'rehearing' included the assumption that the appeal court could substitute its opinion for that of the first instance court, even though that was a specialist court with the advantage of having seen the witnesses: *Austin Nicholls & Co Inc v Stichting Lodestar* SC 21/2007; [2007] NZSC 103.

the equitable jurisdiction of the chancery courts, which only disappeared when Common Law and equity merged. When family law (especially divorce law) was first legislated, the fault principles originating from canon law were adopted, but applied in the common law adversarial process, eventually resulting in the problems from which modern no-fault divorce has emerged, including, at least in New Zealand, a family court process that is again integrating inquisitorial (or canonical) procedural elements,<sup>376</sup> seemingly in response to the mischief of adversarial process.

The main arguments advanced against adversarial process in parenting hearings can be categorized into two groups. The first considers the inherent problems that arise because parenting hearings have a goal that is external to the opponents: the paramount welfare principle. The second category includes problems that arise as a consequence of adversarial practice, but as will be seen, these problems are in fact problems that arise from the characteristics of adjudication.

### **ADVERSARIAL PROCESS AND THE WELFARE PRINCIPLE**

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Adversarial process in its proto-typical form focuses on distributive outcomes between opponents, often in a “zero-sum” environment.<sup>377</sup> It therefore has an innate difficulty dealing with interests outside those of the parties to the dispute,<sup>378</sup> particularly where those parties are instrumental to the successful implementation of the result of the process, as is the case in parenting disputes. The traditional focus of the adversarial process is on determination of rights and quantification of entitlements, not on quality of enduring relationships. The adversarial court process may have been suitable for the traditional “clean break” paradigm, but it is not suitable for the new concept of post-separation parenting. The process itself frustrates its paramount objective. The following aspects, inherent to the nature of the adversarial process, characterize that essential problem.

#### *The destructive effect of the win/lose antagonism*

Adversarial process seeks to declare a winner based on evidence and argument. Consequently, the other party is declared the loser. The process thus results in a competition, easily perceived as a zero-sum game. Victory is always a relative concept and the objective of the proceedings is the determination of detailed parenting configurations, which focus on a distribution of parenting roles as a function of time. Victory and loss are thus determined by relative success in obtaining the desired configuration, or frustrating the matrix desired by the opponent. The welfare principle makes concepts such as “parenting skills”, “appropriate role model” and “suitable environment to raise a child” important determinants. These vague notions are readily appreciated as character traits or behavioral patterns of the parties,

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<sup>376</sup> Albeit that these methods are not now used to establish who was at fault or who had sinned against the covenant, but for entirely different purposes, to establish in what way the parents can best serve the paramount welfare principle. This use of “inquisitorial” techniques is well accepted and considered to be useful. The survey of practitioners for this thesis demonstrated that family law practitioners generally think that such techniques do have a place in the New Zealand family law system. The vast majority of respondents (88%) disagreed or strongly disagreed with the statement that “*inquisitorial process should have no place in our common law system*”. As already stated, the use of “inquisitorial” techniques was one of three main planks of the battle against adversarial tendencies, the other two being the use of ADR methodology and the reduction of formality.

<sup>377</sup> I.e. a process that divides what is at stake, without the possibility to create “synergetic” effects, where the sum of the individual results is larger than the issues at stake (the so called win-win solution).

<sup>378</sup> And it is said that this is also the main reason why adversarial common law litigation is a very poor instrument to advance government policy, see Damaska *supra* n148.



which consequently become the focus of the struggle. Each side seeks to establish itself as the ultimately suitable parent, presiding over a network of care wherein the child will thrive, while simultaneously portraying the opposing parent as unfit and incapable and surrounded by undesirable individuals.<sup>379</sup> The result of this strongly antagonistic approach is that parties are forced into entrenched positions from which it is difficult to retreat, and which lead to increasingly extreme allegations. The adversarial process thus causes escalation of conflict.<sup>380</sup> This continuous intensifying of the conflict can destroy any remaining empathy between the parties, making it extremely difficult to maintain the minimal relationship that is necessary for successful collaborative post-separation parenting.<sup>381</sup> The antagonistic character of adversarial process thus escalates conflict and destroys relationships. Unsurprisingly therefore, the rates of re-litigation are high.<sup>382</sup>

### *Problems with the concept of children's rights*

Parenting disputes are ultimately about the child's best interests. Conceptually, receiving day-to-day-care and having contact with a parent are therefore rights held by the child.<sup>383</sup> Nevertheless, the disputing parties invariably perceive them as parent's rights. The adversarial process allows parties to determine the issues, the evidence supporting those issues and the way the case is argued. Although perhaps couched in terms of the child's best interests, the way the issues are approached can be too readily about parties' grievances.<sup>384</sup> The Common Law adversarial process is a procedural system that evaluates the relative rights of the parties. That process is not well suited to evaluating the rights of non-parties. In order to address that problem, it is common in New Zealand<sup>385</sup> that a lawyer for the child is appointed.<sup>386</sup> In practice, this lawyer for the child can attain a somewhat superior position to the parties or their counsel, because he or she represents interests that have legislatively been declared paramount. Nevertheless, the children's interests can be used as a vector to carry issues that are in fact about the parents' dispute and their perceived rights. It has been argued that the approach to ignore the parents' issues altogether is in fact counterproductive, in that it ultimately pits the children against their parents.<sup>387</sup>

There is also a general problem with the concept of "rights" in this context. A "right" can be defined as a freedom to act without interference, in accordance with one's own conscience. The exercise of a right

<sup>379</sup> Catania supra n82, 1248.

<sup>380</sup> This analysis is supported by the results of the surveys which returned a mean score of 3.9 (agree=4.0) to the question "*The adversarial court process often escalates conflict between the parties*". See chapter 20 and Table 13 for details.

<sup>381</sup> Which is also supported to some extent by the views of the lawyers that were surveyed, a mean response of 3.4 was obtained on the statement: "*adversarial court process often results in a worse relationship between parents, destroying any chance of the parents reaching agreement later on*". See chapter 20 and Table 13 for details.

<sup>382</sup> As was mentioned above, only 5% – 7% of the cases initially filed actually proceed to a litigated conclusion. But, as was also noted, some 4,500 of the annual 12,000 cases involve repeat litigants (37.5%). Although there is no data about whether these repeat litigants have a higher probability of completing the repeat process by litigation, it is evident that court involvement is a self-perpetuating activity for a large fraction of those involved in court proceedings.

<sup>383</sup> As this is for instance framed in the United Nations Convention: United Nations supra n4.

<sup>384</sup> Mnookin and Kornhauser supra n15, and Catania supra n82, 1245.

<sup>385</sup> And other common law systems use similar structures to resolve this problem, such as "guardians ad litem" or civil servants that act as a representative for the child.

<sup>386</sup> But this is not always the case, while the child may nevertheless be the clear victim in an extreme battle between parents, for an example see *JMK v PL* Family Court Porirua, 24 January 2006, Judge Mill, FAM-2003-091-000350, where the mother continued the legal dispute, and the father was retracting as a result of the conflict.

<sup>387</sup> Burrows L "How to Control Adults by Means of 'Children's Rights'" Human Life Review (1999) 25, 65-73 also available at <http://www.nkmr.org>; and see Wishart I *Eve's Bite* (Howling at the Moon Publishing, Auckland, 2007).

thus implies the personal (legal) capacity to act, together with sufficient personal conscience to be able to consider the issue at hand. Children do not have that capacity or conscience, and they must rely on people to act for them, normally their parents, who bear that responsibility and must therefore have the authority to act on it. The parents' conscience thus replaces that of the child in its formative years. Advocates for traditional family values argue that the modern emphasis on children's rights is a symptom of attempts by the state to undermine traditional norms and values, by removing this authority to shape and form the child's conscience.<sup>388</sup> Some hint at an underlying agenda of increased state control over individuals, while more extreme opinions suggest even more sinister objectives pursued by homosexual or pedophile pressure groups.<sup>389</sup> Whether one subscribes to such ideas is of course a personal matter, but it is clear that the concept of children's rights changes the traditional connection between parents' responsibilities and the associated authority and right to exercise that authority. This comes markedly to the foreground when courts are asked to determine disputes between former spouses about exercising their parental obligations and responsibilities. Focusing on children's rights in a procedure between the parents necessarily involves creating new constellations of rights and responsibilities that are determined against a background of legislative, judicial and other normative systems from which those involved on behalf of the state operate. Those normative systems can substantially deviate from those of the parents as a result of culture, social-economic group, ethnicity etc. As an example one could consider a parenting dispute between traditionally religious, home-schooling, parents. If a social worker with a strong Marxist world view was asked to write a report, it would unavoidably be influenced by a normative system that is entirely alien to that of the parents, and therefore alien to what the child is accustomed to. Yet this report would be of important evidential value, despite the fact that possibly both parents cannot identify with its underlying assumptions. Adversarial process before a single judge is rather unsuited to deal with such nuances, as it relies on relatively simplistic findings of fact and determination of rights in law.

It is a fallacy to suggest that conflicting parents will simply set aside the issues they consider relevant and focus on the children, simply because the law says so. The effect of not allowing the issues that really exercise the parents means that these issues are re-framed as parenting issues, or that the general hostility is redirected to parenting issues.<sup>390</sup> The end result is that the last thing that binds the parents – their joint responsibility for their children– which should assumedly involve positive relationships for each (albeit not jointly), now becomes the sole source of dispute. Care for, and contact with, children thus gets associated with bitterness and fights and not with nurturing and love.

### *Zealous advocacy and client confidentiality*

An important aspect of the adversarial system is the notion that lawyers must engage in role differentiated behavior:<sup>391</sup> they must do their utmost to achieve the best possible outcomes, even for

<sup>388</sup> This is precisely the argument underlying a string of American Supreme Court decisions, including *Wisconsin v Yoder* 406 US 205 (1972), and which are based on the 14<sup>th</sup> amendment, the so called substantive due process approach, where the relationship between the state and parents is at issue. See also: Lawrence SE "Substantive Due Process and Parental Rights: From Meyer V. Nebraska to Troxel V Granville" J L Fam Stud (2006) 8, 71-118.

<sup>389</sup> Wishart supra n387.

<sup>390</sup> I.e. the battleground metaphor referred to above in n246 and associated text.

<sup>391</sup> A problem encountered by many professionals, and which is normally addressed by way of codes of ethics or codes of conduct. Unsurprisingly, therefore, advocates of collaborative law propose amendments to professional codes, in order to allow restraint of

clients that may have engaged in repugnant, immoral and criminal behaviour, regardless of the lawyer's own views about that behavior. The resulting fundamental tenets of the lawyer client relationship are zealous advocacy and strict confidentiality. Zealous advocacy requires that lawyers must focus primarily on their client's interests and that they ultimately must act as directed or terminate their instructions. It is in that context not surprising that many entrenched and intractable disputes are characterized by one or both parties going through a string of legal representatives. A side-effect of zealous advocacy can be that lawyers go through machinations of their role-playing which serve form but not substance, and which can cause severe delays and agony. The confidentiality requirement creates barriers to information sharing between lawyers, and more seriously, between lawyers and the court. Important information may remain hidden, thus creating an obstacle against achieving the best outcome for the children.<sup>392</sup> This will be aggravated where the information involves suspicion of criminal misfeasance or psychological problems. The role of the lawyer in the adversarial process therefore creates behavior that can be inappropriate for matters in which the court is required to determine the best interest of the child.<sup>393</sup> In the extreme situation, the lawyers' involvement teaches the parents "*nothing but bitterness and anger towards each other*".<sup>394</sup> Some authors propose that lawyers have a responsibility to temper overly adversarial clients, involve themselves in collaborative practice, or indeed engage in a semi-counselling role aimed at reducing such adversarial behaviour.<sup>395</sup> Although no doubt suggested from a well meaning perspective, it can be argued convincingly that such is not the proper role of lawyers in an adversarial system. By analogy, government or court directions that lawyers should behave in certain ways,<sup>396</sup> or should strive to achieve certain outcomes, are arguably at odds with the presumptions of a Common Law adversarial system. The conclusion cannot be avoided that it is the adversarial system itself that is responsible for the role related behavior of legal representatives,<sup>397</sup> and for the consequential effects of that behavior.<sup>398</sup>

### *The process itself affects behavior*

Family Court process is aimed at re-ordering parenting relationships to achieve better outcomes for the child post-separation. However, the adversarial process makes it difficult to properly consider the true dynamics of relationships and the personalities involved. What will be observed by the court and by the professionals assisting the court is affected by divorce and dispute behaviour, which is unreliable to

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zealous advocacy and enhanced information exchange, also between the professionals, see Lande J "Principles for Policy Making About Collaborative Law" Ohio St J on Disp Resol (2007) 22, 619-706, 670. And see, for a discussion in the Australian context and a discussion of principles in different jurisdictions: Family Law Council *Collaborative Practice in Family Law* (A report to the Attorney-General prepared by the Family Law Council) (Canberra, Family Law Council (AUS), 2006).

<sup>392</sup> It can be argued that the adversarial principles in legal representation are irreconcilable with the best interest standard, and that therefore normative "best practice" guidelines should be developed, which could be endorsed by international institutions, for instance the UN: Howe WJ and McIsaac H "Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake" Family Court Review (2008) 46, 78-90.

<sup>393</sup> Noting that, in legal terms in New Zealand (as in most jurisdictions), the child is seen as a third and independent party with (in New Zealand) separate legal representation.

<sup>394</sup> Schepard supra n40, xiii.

<sup>395</sup> See for instance: Slocum RW "A Farewell to Arms: Recognizing, Understanding & Helping the Vengeful Client" Available from SSRN :<http://ssrn.com/abstract=1088855> (2008).

<sup>396</sup> Such as to "educate parties", as directed in the briefing paper for the PHP process, see Boshier and Udy supra n234, or the legislative direction to suggest reconciliation.

<sup>397</sup> This does not address the question whether it is the adversarial character of the process or the adjudicative character of the process that is most determinative for this behaviour.

<sup>398</sup> It must however be noted that the adversarial system itself contains many safeguards that could potentially eradicate many of the negative effects, and this will be discussed below.

predict the parenting- and relationship skills that are relevant to the best interests of the child. This problem is aggravated by the legal discourse in which court proceedings are cast. This involves specific legal language and procedures aimed at judicial decision making and not at the experiences of the individuals involved. Legal discourse is powerful; it represents the application and execution of law. It is characterized by a dominant use of binaries and conceptual formulae. Language is used to inscribe a mix of facts and allegations into structural matrices that are only recognizable for the initiated. The discourse and process are formal and structured, almost ritual, and laced with incantations that are practically meaningless for the disputants. The process has a pace of its own, entirely unrelated to the emotional experiences of those involved, while every step in it is perceived as a climax in its own right. Litigation is experienced as a war with many different battles, each of which holding some prospect of success or failure, albeit never decisive until the main event; the trial. Legal proceedings can overtake people's lives; they can become the focus of their existence, although they are entirely meaningless and unproductive in terms of actual parenting behavior.

A good example how the process forces behaviour is the role of affidavits.<sup>399</sup> One of the limited ways by which parties can communicate with the decision maker is through affidavits, purportedly aimed at summarizing relevant factual material. Relevance in that context is restricted to those facts that can actually have an impact on the decision to be made. However, due to the ambiguity of the applicable criteria, and due to the human trait to attempt to influence the decision maker while providing factual context, affidavits tend to go far beyond their intended purpose. They become a documentary of allegations and perceived injustices; they attack the opponent and seek to create sympathy for the plight of the author. *"They are larded with adjectives and self-serving protestations of surprise, shock, disgust or other emotions."*<sup>400</sup> The normal procedure requires that one party (usually the applicant) files his or her affidavits first, followed by the respondent, after which the first party has a right of reply. As a result, affidavits take on an additional role, that of indirect communication between the parties. By way of the affidavit, the first party shows how far he or she is prepared to go in raising allegations and issues. The reply affidavit then of course seeks to rebut these allegations, and raise some of its own, often supported by additional affidavits from other witnesses or experts. This of course requires further rebuttals and a stream of information exchange is created that increases the severity and number of issues. The process thus creates and aggravates conflict rather than reducing it.

### *The process focus and its outcomes are static and event based*

A problem with court process is that it is mainly concerned with snapshot observations of relationships at the time of divorce and dispute. It allows only very limited possibilities to consider the dynamics of relationships, as they evolve over time due to changing personalities or circumstances. Although this is not specific to adversarial process, the adversarial model tends to magnify the evaluative relevance of one

<sup>399</sup> Ney T, Blank KG and Blank A "Affidavits in Conflict Culture: A Discursive Analysis of a Custody and Access Case" Conflict Resolution Quarterly (2007) 24, 305-326 and Blank KG and Ney T "The (De)Construction of Conflict in Divorce Litigation: A Discursive Critique Of "Parental Alienation Syndrome" and "The Alienated Child"." Family Court Review (2006) 44, 135-148, who provide an interesting analysis of affidavits in a custody matter using postmodernist discourse analysis as proposed by Foucault.

<sup>400</sup> See also Rollie Thompson DA The Evolution of Modern Canadian Family Law Procedure Family Court Review, 41(2), 155-181 (2003), 161-162.

off events. This is the result of its inherent focus on determining facts to find relative fault. Even though the interest of the child may be the paramount consideration, examples abound where the determination of that interest appears to be reduced to in depth analysis of relatively minor events in the past, often between the parties and not involving the child. A good example is the impact of allegations of violence. Where violence has been present, the perpetrator is clearly in a disadvantaged position under the statutory stipulations. Alleging violence can therefore take on a tactical characteristic, even when the alleged violence was minor, actually came from both sides, or was historical. The Court is obliged to make a finding of fact once violence is alleged, and hours can be spent on examining and cross-examining the parties about trivial events that have little bearing on relevant relationship dynamics or parenting skills. Nevertheless, such events can become crucial in the final determination. This also applies to the way parties behave when giving evidence, or even their composure while in court. It is a fiction that a judge is immune for signals that operate on a sub-conscious level, or cannot be influenced by emotional events in the course of proceedings.<sup>401</sup> The process' outcomes also suffer from the lack of consideration for relationship dynamics. The rigid finality of court orders can have the effect of them becoming a fresh trigger for dispute in form or in substance where circumstances change and the interest of the child requires some flexibility. The court order can thus become an instrument of oppression, or a tool to frustrate cooperation. As a result, some disputing couples repeatedly come back to the court when changes in circumstances require adjustment of arrangements. The more detailed these arrangements are, the higher the chance that they may need to be revisited at some point in time.

#### *Lack of inter-party dynamics*

The adversarial process operates by way of dyadic communication between parties and the court. The process discourages and formalizes information exchange between the parties. Once proceedings have started it is very difficult for the parties to interact directly, and virtually impossible to communicate openly. Even where information comes to hand that might create options for resolution, fear of damage to adversarial positions and lack of suitable communication channels will inhibit canvassing such possibilities. As a result, the child's best interests receive a lower priority than tactical and process issues. The lack of inter-party dynamics also means that non verbal communication between the parties is excluded from the process. Resolution options that could rely on relatively inconsequential gestures, such as a brief apology or an understanding that can only exist between the parties because of their shared history, will therefore simply not eventuate once a court process has started.<sup>402</sup> Although it may be said that the court process also stops the parties from engaging in other conflict behaviour, they will be tempted to use the legal process to express feelings that would be more suitable for direct exchange (assisted or not). Forcing communication in litigation discourse invariably leads to complications, extends the legal conflict, involves further third parties etc. The use of alternative, consensual, dispute resolution methods in the course of litigation is an attempt to (temporarily) restore direct communication in order to canvass resolution options. As may be seen, this will not resolve the problem for parties at the

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<sup>401</sup> An interesting example can be found in *JA v LAD (PHP Case)* Family Court Tauranga, 28 November 2007, Judge Boshier, FAM-2007-070-1478, reported as (2007) 26 FRNZ 522. Where the judge is obviously influenced by a lawyer's account of what happened during a lunch or coffee break.

<sup>402</sup> Catania supra n82, 1242.

severe end of the conflict spectrum. For those parties non-litigation events are nothing but a tactical opportunity to gain information or a possibility to continue oppressive behavior. Where no good faith is present, it is impossible to have interactions based on it.

### *The process is inconsistent with the child's perception of time*

The current reality is that parenting disputes take considerable time. Even though the law explicitly recognizes that children have a different perception of time,<sup>403</sup> the legal system seems blind to that recognition once it comes to the practical operation of the court system. In a Common Law adversarial system the logistics of the proceedings are largely controlled by the parties (or rather their lawyers). The court has a mostly passive role; it acts on cues provided by the parties, but within its own operational constraints. Timing and delay can therefore be used as a tactical weapon in the battle between the parties, while the court organisation is already stretched to its limits. This combination provides a lethal cocktail in which months, and even years, may go by before decisions are made, let alone implemented. During this time the child may be “in limbo”, not knowing what will happen, living in temporary accommodation, visiting a “strange” school, being disconnected from friends and other family, not being able to engage in sports and other social activities etc. One of the major additional problems of delay is that it creates a status quo which may be hard to rebut in subsequent court events. Another problem is that delay leaves opportunity for continued (emotional) abuse or indoctrination of the child. From a young child's perception of time, it can easily experience the parenting dispute as occupying the majority of his or her childhood.

### *The process is not inclusive*

The adversarial process excludes the parties and their experiences and perceptions from the decision making process. Although they will be present, and have some opportunity to speak as a witness, this is suppressed and regulated. Giving evidence and being cross examined is a form of discourse that may be useful to arrive at the truth,<sup>404</sup> but it is not a communication process that is suitable to arrive at consensual arrangements. It leaves no room for compromise, but pits deponents against one another in terms of truth and falsehood, with strong moral overtones. At the hands of opposing lawyers, the former partners become pawns in their own game. They are wrung out for admissions about seemingly trivial facts, exposed as “liars”, “perpetrators of psychological abuse” or worse, and their actions depicted in the most egregious light. This is a sure way to eliminate any empathy with the process, which is quickly perceived as oppressive, stressful and unfair. The exclusiveness of the process is even more profound for the main stakeholders in the parenting dispute, the children. Although it is statutorily provided that their views must be taken into account, they are not allowed to be directly involved in the proceedings before the court. To address this problem, the court can (and normally does) appoint a lawyer for the child, who becomes the legal representative for the children.<sup>405</sup> There are also opportunities for the judge to talk

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<sup>403</sup> S4, Care of Children Act 2004.

<sup>404</sup> At least that is the presumption underlying adversarial fact finding.

<sup>405</sup> There remains argument about the appropriate balance in that lawyer's role between traditional legal representation and a more paternalistic approach as an aspect of the welfare principle: Spinak J "When Did Lawyers for Children Stop Reading Goldstein,

directly with the children.<sup>406</sup> That opportunity has some advantages: children generally seem to appreciate it, it provides the court with direct information, gives the court a better appreciation of the child “as a person” i.e. in respect of maturity or the strength with which he/she holds views, and it provides an opportunity to explain matters. There are also risks and disadvantages: the judge may not be competent or sufficiently skilled to professionally deal with children, it may be overly stressful for the child and there are distinct issues with natural justice.<sup>407</sup>

### *The non-context orientation of law and legal process*

Law and legal process tend to simplify and crystallize facts and observations into structured systems. A similar approach is taken in legal reasoning, which proceeds along pre-determined and standardized paths. As a result there is very little recognition that relationships and individuals differ with the context in which they are observed and examined. Instead, through the lawyers’ translation of the parties’ stories and their selection of what is relevant,<sup>408</sup> the legal process re-contextualizes facts and narrative, often leaving the parties with the frustration that they have not had their say about the things that actually concern them. The process was “about them”, but not “with them”.

Another problem caused by the lack of context and the binary decision mode of adjudicative determination is the exaggerated value that is placed on “objective truth”. In a highly emotional parenting dispute it is debatable whether that type of truth can be found, or whether it even exists. Even without being overly post-modernistic, it can be argued that each version of events (despite being contradictory) is correct or “true” for the respective party.<sup>409</sup> A better mode of fact finding might be one that seeks how the different “truths” can be reconciled, rather than one that determines which “truth” is “right”, thereby automatically classifying the other as “wrong”.

### *The role of experts and other professionals*

A problem with the role of experts is that their discourse has to be molded to the requirements of the adversarial process. As this may be difficult or impossible, the result is that the diagnosis is constructed in terms that fit the adversarial process. The knowledge that there will be cross examination of experts, i.e. some confrontation between opinions of experts for opposing parties and/or experts appointed by the courts, results in an economy of information exchange and loss of candour that will impede on possibilities for collaborative problem solving between experts. That problem can be exacerbated where experts in the same field come from different philosophical backgrounds, i.e. where a dispute between parents about the arrangements that best reflect the interest of their child becomes a struggle between schools of thought in some humanitarian science. The devastating result may be an academic battle completely overshadowing, and actually abusing, the real issues in the case at hand. Even where the expert is appointed by the court, a strong expert belief in the merits of one party’s case may turn expert

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Freud and Solnit? Lessons from the Twentieth Century on Best Interest and the Role of the Child Advocate" Fam LQ (2007) 41, 393-410.

<sup>406</sup> Tapp P "Judges Are Human Too: Conversations between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004" New Zealand Law Review (2006), 35-74.

<sup>407</sup> See for more detailed account: Caldwell J "Judicial Interviews of Children: Some Legal Background" NZFLJ (2007) 5, 214-225.

<sup>408</sup> Catania supra n82, 1241.

<sup>409</sup> Ibid, 1241.

opinion into advocacy.<sup>410</sup> Additionally, there is some real doubt whether the involvement of experts actually substantially changes the outcome of proceedings. A research project in the US that compared outcomes in custody cases over different periods in the 20<sup>th</sup> century found no statistically significant difference in outcomes between cases in 1960 and 1990, although the use of experts had increased fivefold.<sup>411</sup> There is at least anecdotal evidence that the use of experts can have serious negative effects, especially where too much reliance is placed on experts' determinations of fact material that is decisively relevant for the case at hand.<sup>412</sup> This is particularly relevant where the statutory directions provide narrow, but conclusive grounds to resist care or contact arrangements. Violence and especially sexual abuse are such grounds, and these can be extremely difficult to establish, especially where very young children are involved. The Court can in such circumstances rely too heavily on expert opinions in fields where science is certainly not exact.<sup>413</sup>

### *The exclusion of other relevant third parties*

Because the adversarial process focuses on the rights and obligations of the parties, it leaves little room for third party interests that may be relevant to the sustainability of any outcome. This extends to for instance social agencies such as welfare agencies, housing departments, church or other social environments in which the disputing parties are involved and even financial institutions. As an example of the last group, a mortgagee of the matrimonial property will obviously have no role in the parenting dispute, yet its indirect involvement may be determinative of the stresses under which the parties are operating, and which thus directly influence their parenting skills, or the environment parents can offer their children. Tax consequences of divorce are another example of external influences that may be highly relevant to the emotional state of the parties, but which rarely have a role to play in custodial matters. Parenting matters can thus have a multiparty character that is insufficiently recognized in adversarial dispute.<sup>414</sup> None of these aspects will be easily acknowledged as being central to a decision about the best interest of the child, but some can have a dramatic impact on it.<sup>415</sup>

<sup>410</sup> This advocacy will be very difficult to detect. For an example where a judge puts aside expert evidence on this basis, see *GBF v BP* [2008] NZFLR 441, [42].

<sup>411</sup> Mason and Quirk supra n343.

<sup>412</sup> An additional argument is that experts' factual assessments cannot be relied on because the numbers of experts in a geographical area is limited, as is the number of legal professionals, court staff and judges. After a relatively limited period, therefore, the situation will be unavoidable where interpersonal relationships may interfere with professional assessment: Kates EJ "Why Therapeutic Jurisprudence Must Be Eliminated from Our Family Courts" <http://www.thelizlibrary.org> Last accessed: 11/8/2009 .

<sup>413</sup> See Henaghan M and Atkin B *Family Law Policy in New Zealand* (LexisNexis, Wellington, 2007) 310-313 for some salient examples in the New Zealand context.

<sup>414</sup> Dingwall and Eekelaar supra n280, 49.

<sup>415</sup> As an example, research consistently demonstrates that economic aspects are the most important determinant for the child's wellbeing following divorce, and the adversarial system with its high costs can be a serious impediment on both parents' economic situation. Well-documented cases abound, where both parents spend the entire value of the property settlement on the legal process over custody and/or where the legal battle has drained the financial resources to such extent that they are unable to privately finance supervised access if that has been ordered, a situation recently referred to in Parliament, during the debate on the Family Court Matters Bill where it was noted: "*It is an extraordinary problem for families, many of whom have spent every last cent on the battle with each other, so that by the time they get to the point where they are having supervised access, they find they simply cannot afford to carry out the kind of orders that have been set down by the court because they cannot even drive the car from Masterton to Palmerston North, as one woman told me. That was because she could not afford a car and even if she did, she could not afford to put the gas in it. She had spent everything on the process of getting the whole thing settled.*". Hansard (2008) 646 New Zealand Parliamentary Debates 15687 (Maharey).



## PROBLEMS THAT ARISE AS A CONSEQUENCE OF LITIGATION

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While the previous category of problems arise out of the tensions between adversarial process characteristics and the main policy objective (the welfare and best interest of the child paramountcy), the second category of problems arises as a result of the way adversarial process, or rather litigation in general, operates in practice. The following problems are therefore often used to argue the case for non-litigation interventions.

### *The impact of access to legal representation*

The main philosophy underlying litigation and particularly its adversarial variant is that of party autonomy. In brief, the state provides the institutions and rules to determine disputes, but whether parties wish to use these, for what reasons, for which disputes and how, is up to them. The result is that any litigation activity involves an amount of procedural tactics that are played out by using not only substantive, but also procedural law. The adversarial system is grounded on the concept of legal representation. The intricacies of law<sup>416</sup> and legal process require specialist knowledge. Additionally, the court's authority is partly based on procedure and protocol which (in combination with due process rules) makes the process confusing and difficult to navigate for the lay person. The specific court culture acts as a filter that reduces cultural differences and emotional difficulties between the parties by translation into a third culture, that of the court. Lawyers, who are part of the court culture,<sup>417</sup> perform this task. Legal representation may also remove the anxiety that results from having to act in a strange, unknown and threatening environment, where rules apply that seem esoteric and incomprehensible. Access to legal representation is therefore a fundamental necessity for using the legal process. Cost is one of the main impediments to this: many will simply not have the disposable funds to engage a lawyer. As a result they will have to either forego representation or rely on legal aid, adding yet another concern to what already is a challenging time. The situation is a "catch 22". If the parties are unable to resolve their differences autonomously, they may have to rely on law and the legal system provided by the state, but this can only be properly used by further reliance and dependence on the state to obtain representation. The adversarial system thus has the potential to create dependency on the state, quite the opposite of the principle of party autonomy on which it is ultimately based. In situations where there are large differences between the economic positions of the parties, this can influence the quality and availability of legal representation, which can create a severe imbalance. An interesting phenomenon is that some gaps in the availability of legal assistance are filled by activist groups, such as 'unions for fathers' or agencies that are involved with protection of women who suffer from abuse. Such assistance<sup>418</sup> will come from strong and pre-disposed value systems, introducing a political element in the dispute that quickly overshadow what is actually at stake between the parties.<sup>419</sup> The parenting dispute, in other words,

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<sup>416</sup> To the extent that even an eminent judge remarked that some legislation is "*virtually incomprehensible except to the trained eye*", Inglis *supra* n115.

<sup>417</sup> And who strictly speaking have a higher obligation to the court than to their clients.

<sup>418</sup> This often takes the format of "McKenzie friends", which has recently been addressed in amendments to family law legislation.

<sup>419</sup> The "discovery" and theoretical development and subsequent debate about parental alienation syndrome ("PAS") is an example of the way by which case-based observations and developing theory from those observations can be used by interest groups to support an essentially political debate, see: Adams M "Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child

becomes part of a political struggle, partly as a result of parties having no access to proper representation. Anecdotal evidence shows how such activist support can be extremely polarizing, not only between the parties, but also in the form of activism against the system as a whole.<sup>420</sup>

*The translation of psychological / social concerns into legal issues*

Law is not the most suitable or effective instrument to control and direct individual behaviour. Likewise, legal process does not provide an optimal forum to assist dysfunctional families, or teach disputants how to approach their differences in order to prevent continuous escalation. An adversarial court hearing is not an educational or therapeutic environment, quite the opposite, it is an environment designed for and aimed at issue reduction and context removal in order to find simplified relevant facts that fit with predetermined concepts that allow the making of structured and defensible decisions. Where the real issues have a psychosocial character, the determination of the simplified legal problem will not resolve the underlying dynamics, and may in fact worsen them. Hurt, anger, fear and the destruction of family support systems are not healed, but exacerbated by the adversarial process, and the parties and children are largely left to their own devices to deal with these problems despite ambitious attempts to legislatively direct that legal representatives have obligations to explain decisions. In other words, the parties to the conflict, and especially their children (where the conflict is about, at least in form), have predominantly psychosocial concerns, but these are forcibly reduced to legal concerns in order to be processed in the (adversarial) court system.<sup>421</sup> The resulting legal outcomes necessarily need to be translated back into relationship parameters, arguably a process for which lawyers only have a limited skill-set available. While adjudication of disputes is a process that is properly located in a legal context, the subject matter of parenting disputes is simply unsuitable for that context. This applies equally for the process and outcome characteristics. Legal issues in civil proceedings, by their nature, involve rights and obligations, not psychosocial issues. The methods available to enforce ordinary court outcomes are largely meaningless for parenting dispute, unless entirely formulated as prohibitions, which is directly in contrast with the purpose of virtually all outcomes. The court process, by its nature, defeats its own objectives, while its authority, based on compulsion, is almost meaningless to practically achieve or enforce the desired outcomes, particularly if the desired outcomes are policy driven and require psychosocial parameters that cannot be affected by the legal process. For intractable and serious disputes, the legal process simply operates in the wrong domain: it is asked to do much more than it can possibly achieve.<sup>422</sup>

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Abuse, Gender, and Fathers' Rights" Fam LQ (2006) 40, 315-338. The author argues (from a feminist perspective) that the development of PAS was little more than an attempt to reframe the debate surrounding abuse by the non-custodial parent in order to reverse the onus proof.

<sup>420</sup> My own court observations confirmed what is obvious from researching fathers' groups' websites: an extremely polarized view about gender roles in parenting dispute and the idea that the court system is structurally biased towards feminist views. Conversations with members of father's rights groups disclose a frightening attitude towards previous partners and women in general that leaves very little confidence for the success of the joint parenting presumption that such groups typically pursue.

<sup>421</sup> This "translation" is therefore hampered by the requirement to use legal narrative and metaphors, that are likely to not have developed at the same pace as the socio psychological relationships to which they are applied, see for instance Berger L "How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes" S Cal Interdisc LJ (2008) 18, Available from SSRN :<http://ssrn.com/abstract=1231584>.

<sup>422</sup> Fineman supra n3, 740.

### *Best interests of the child a difficult criterion*

The “welfare and best interests of the child” is a nebulous concept at best. It has been attacked as an unsuitable standard because of its vagueness, its suspect underlying objectives,<sup>423</sup> and its utter meaninglessness in the absence of legal content.<sup>424</sup> What is best for children depends on values and norms about which reasonable people differ.<sup>425</sup> Theories have been developed and converted into legal presumptions, only to be rebutted by subsequent research.<sup>426</sup> In parenting disputes there is often little difference in parenting skills and capabilities between the opposing parties. The best interest concept creates a false standard but the parties are nevertheless invited to engage in a contest to prove their own superiority and their opponent’s inferiority as measured against that standard. Issues are created out of (sometimes ridiculously) minor incidents to prove one parents dedication and suitability to promote the child’s best interest, while also demonstrating the abject shortcomings of the other. After sometimes lengthy preliminary scuffles, it is up to the judge to evaluate the fiercely competing claims and allegations within a time span in which most humble mortals could not even comprehend a fraction of the often voluminous files.

Theoretically, the law guides and controls this evaluation, but in practice this is restricted to esoteric principles that leave most evaluation and determination to the court’s discretion. Despite being legal specialists, this requires judges to decide on matters they are strictly speaking not competent in, but they nevertheless must tailor their analysis to unique individual cases. Typically, all relevant facts are clouded by the dispute between the parents, while the future possibilities to develop suitable parenting roles will depend on the decision itself. This provides few problems where the issues are obvious; opinions will not differ when a choice must be made between love and cruelty, cleanliness and filth or respect and exploitation. Such clear distinctions will, however, seldom occur and more difficult questions arise, such as the relative importance between individuality and social conformity, creativity and reliability, civility and honesty, sensitivity and achievement.<sup>427</sup> Experts operate in that vacuum to assist the decision maker, but they also suffer from a lack of common theory and accepted standards.<sup>428</sup> It has been argued that the theories and systems that are used for psychological assessment of parents and children in custody evaluations are deeply flawed, in that:<sup>429</sup> First, specifically designed tests (insofar as they are available) to assess questions relevant to custody are inadequate on scientific grounds. Secondly, the claims of some experts about their favourite constructs, such as “parental alienation syndrome” are hollow when subjected to scientific scrutiny. Thirdly, evaluators should question the relevance of the use of well-

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<sup>423</sup> Burrows supra n386.

<sup>424</sup> Henaghan M "Can You Feel the Law Tonight? Family Law in Action" Otago L Rev (2003) 3, 289-305.

<sup>425</sup> Ellman supra n53, 708.

<sup>426</sup> Duggan develops an argument that resolving custody cases in an evidence based process is a fallacy, because it is simply impossible to devise a legal standard or formula that enables a judge to predict the best interest of a child: Duggan D "Rock Paper Scissors: Playing the Odds with the Law of Child Relocation" Family Court Review (2007) 45, 193-213.

<sup>427</sup> Ellman supra n53, 708.

<sup>428</sup> A good example is the highly publicized American relocation case *In re Marriage of Burgess*, 913 P.2d 473 (Cal 1996), where an eminent social science amicus brief was provided, which in turn attracted critique suggesting the opposite opinion: Wallerstein JS "Amica Curiae Brief of Dr Judith S Wallerstein Ph.D., Filed in Cause No. So46116, in Re Marriage of Burgess, Supreme Court of the State of California, Dec 7, 1995"; and critique in: Warshak RA "Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited" Fam LQ (2000) 34, 83-113.

<sup>429</sup> Emery et al supra n121. It must be noted that this monograph is based on American research, where psychological evaluations tend to be much more substantial than is the case in New Zealand, and the findings would therefore probably be worse for New Zealand practice.

established test methods, such as intelligence, personality, psychopathology and academic achievement as relevant for the questions actually before the court. Fourthly, little empirical data exists relating to important and controversial issues, such as whether evaluators should investigate children's wishes, or whether toddlers and infants are in fact helped by overnight visits to non-custodial parents.

If experts were infallible in their predictions about the outcomes of different interventions, the result would arguably be even worse. Would it be in the interest of a child if a judge chooses from the child's possible alternative futures? And if that was desired, how is the judge going to make sure that the intervention decided upon is executed to the required standard? Who, in other words, is responsible if the judicial intervention turns out to be unmanageable in practice? There is no feedback to the court of the actual outcome of decisions, nor is there accountability for results of court decisions. In addition, there are issues in which no expert will be able to help. Examples are the cultural or religious context in which a child is to be raised, or the strategy by which to instill the desired values in the child, especially where that process does not operate as smoothly as envisaged, or where the child itself decides not to comply with the expectations or with the process that has been directed to achieve these expectations.

A particular kind of problem arises when parenting decisions have been made, but where later disagreement arises about issues that are important in the child's life, such as school choice or religious issues. Where once the situation was straightforward, i.e. the custodial parent made such decisions; this has become complicated in the joint parenting and joint guardianship regimes that are currently pursued. Different jurisdictions have chosen different approaches,<sup>430</sup> but an 'ideal' model has not yet emerged.

In conclusion: the child's best interest concept is vague, based on pseudo-science, is undeterminable, and impossible to manage in practice. Despite decades of innovation and development, it has failed to create certainty and stability.<sup>431</sup> The "best interests" that are in fact decided on are at best at a rudimentary and simplistic level, and hardly allow for objective evaluation in hindsight. In that context it is not surprising that there is a dearth of empirical data that conscientiously evaluates the quality of court decisions over longer periods of time. It would be interesting to see whether court decisions on average result in better long term outcomes than any randomized or formulaic process<sup>432</sup> that could be used to make parenting decisions.

### *Poor investigative resources*

The vagueness of the child's "best interests" concept is aggravated by a persistent lack of investigative resources. A proper investigation to determine the child's "best interests" would require in depth analysis

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<sup>430</sup> For instance in Sweden the court has no jurisdiction in these matters after custody decisions have been made, i.e. the parents must agree, which often results in maintaining the status quo. In Norway the primary caregiver assumes a greater role and normally makes the decisions, with the exception of the real important decisions, where the situation is analogous to that in Sweden. In Australia, England and France the courts retain jurisdiction and can be called on to resolve further disputes, as is the situation in New Zealand. A different approach is found in Germany and Finland and in some American States, where the court assigns certain areas of decision making to different parents upon establishing the custody relationships. Other States include provisions for the appointment of mediators or even arbitrators in parenting orders to resolve future dispute. See for a more detailed discussion: Parkinson *supra* n164, 266-267. As may be seen, New Zealand follows the Australian and English practice.

<sup>431</sup> Elrod LD and Dale MD "Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance" *ibid*(2008) 42, 381-418.

<sup>432</sup> Throwing dice would be the simplest possible random process, but one could envisage more elaborate systems where a range of objective variables are entered and subjected to some algorithm.

of the particular circumstances of each individual child in each case, and should preferably be related to various potential outcome scenarios. This investigation would also have to include some assessment of possible changes in circumstances that would likely affect the outcomes of alternative scenarios, and the parenting capabilities of each parent in these different circumstances. While such an investigation can be theoretically conceived, it cannot be undertaken in practice. The lack of resources manifests itself not only in monetary or human resource terms; it is also evident in a lack of standards and norms for investigative reporting about the “best interests” of the child in post separation scenarios. Given the high number of psychological assessments in custody cases and their social relevance, one would expect that there would be in existence a large body of academic research focusing on custody evaluations and their associated scientific underpinnings. That body of work should include evaluations of investigative work and empirical research that compares actual outcomes with the investigative methods and subsequent reports and recommendations.<sup>433</sup> In addition, given that it is well known that the use of structured methods of diagnosis and evaluation far outperforms approaches that rely on heuristics or “professional instinct”,<sup>434</sup> it would be expected that structured methods for the assessment of the child’s best interest would be abundant, again accompanied by relevant scientific work. Nevertheless, and despite the hundreds of thousands of custody evaluations that take place worldwide each year, such a body of academic work appears not to be present.<sup>435</sup> The problem of a lack of a scientific basis for ‘best interests’ investigations is further aggravated by the lack of common principles and methods between the legal and social science disciplines that are involved in decision making in parenting disputes.<sup>436</sup>

Another difficulty is that evaluations tends to focus on psychosocial criteria, such as the children’s development and attachment to caregivers, the interaction between children and parents and between siblings, the children’s adjustment to their home, school and community, and the mental health of the individuals involved. The emphasis on such variables introduces ambiguity and increases the risk of bias, either from the evaluator or the judge. Psychosocial criteria are subject to the introduction of religious, philosophical and moral conceptions that may well be irrelevant to the specific circumstances. It could be argued, especially on the basis of well known predictors for children’s wellbeing that economic criteria and financial evaluations should also be considered<sup>437</sup> and might in fact be preferable; yet these are not undertaken as a matter of course.<sup>438</sup> Other possible parameters could be based on educational or

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<sup>433</sup> This is often referred to as “evidence based practice standards”. See the discussion in Beck CJA, Holtzworth-Munroe A, D’Onofrio BM, Fee WC and Hill FG “Collaboration between Judges and Social Science Researchers in Family Law” *Family Court Review* (2009) 47, 451-467, 454-457.

<sup>434</sup> Grove WM and Meehl PE “Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical and Algorithmic) Prediction Procedures: The Clinical - Statistical Controversy” *Psychology, Public Policy and Law* (1996) 2, 293-323; and Grove WM, Zald DH, Lebow BS and Snitz BE “Clinical Versus Mechanical Prediction: A Meta-Analysis” *Psychol Assessment* (2000) 12, 19-30.

<sup>435</sup> Emery, Otto and O’Donohue *supra* n121, 6, as quoted also in Henaghan *supra* n100, 345.

<sup>436</sup> These differences can be described in terms of the methods through which the disciplines pursue truth, the methods to pursue justice, and the standards used to evaluate evidence. See Beck, Holtzworth-Munroe, D’Onofrio, Fee and Hill *supra* n433.

<sup>437</sup> Brown T, Fehlberg B and Hunter R *Report of a Workshop Conducted in November 2004: Families, Law and Social Policy Research Network*, (Australian Research Council, Griffith University, 2005), where Fehlberg argues that (in Australia) there is little detailed research into the relationship between post-divorce family finances and child wellbeing. In fact, she suggests that the apparent objective to remove lawyers from the parenting dispute may impact on the related financial settlement issues (suggesting the lawyer is a “one stop shop”). The end result could thus be detrimental to the child, where custody issues are traded off against financial issues.

<sup>438</sup> In this context it is interesting to note that submissions to the 1976 Royal Commission already included the suggestion to have lay panels to deal with family issues, with one member being a chartered accountant, while there was no reference to expertise from the

physical health criteria. Potentially this would introduce a further array of experts to assist the court, leading to the nightmarish prospect of the matrimonial dispute being played out between teams of experts with widely varying theoretical, moral or ideological backgrounds, some of them providing insights and perspectives that the disputing parents probably had never thought about, or would have not been aware of but for their litigation.

### *Inability to accurately predict future behavior and circumstances*

Even if a hypothetically perfect decision had been made in the best interest of the child, the child's own behavior or that of the parents can change, as can their circumstances. This is particularly the case where conflict continues, especially where detailed care arrangements require too much contact between the parents or provide too many possible issues for dispute, such as simple decisions about logistics, expenditure and costs, parenting regimes, educational and leisure decisions, and the influence of third parties. Each of these simple and apparently inconsequential matters can turn into a triggering event that influences behavior and dynamics between the parties. Similar effects will result from changes in circumstances. The highly suitable parent who was granted day-to-day care may re-partner with an abusive individual and lose his/her job, resulting in economic distress. At the same time the other, somewhat unstable, "contact only" parent may re-educate and become a shining example of a well-adjusted individual, who remarries into a stable and prosperous relationship. Although this example may seem exaggerated, the reality never ceases to surprise, and no system will be capable of providing for the complexities of human endeavor. Traditional litigation works towards a final and conclusive determination. That is an appropriate way to establish rights and obligations that arise out of activities in the past and the subsequent remedy will (at least theoretically) bring closure for both parties, after which they are free to go their separate ways. A determination based on the collaborative model of post separation parenting can impossibly have this effect of closure. The theoretical concept behind the traditional litigation process is utterly incompatible with the reality of parenting dispute.

### *The process lacks an educational element*

While the court process will result in a determination of the issues placed before the court, it does little to help the parties attain skills to resolve future disputes, quite the contrary. Litigation excludes the parties, and reduces them to objects of fact finding, analysis, conclusion and decision making. In most cases the parties will have a limited understanding of the process, the legal issues involved, and how their fact situation is represented in terms of relevant legal rules or constructs. The process takes place in an alien environment, using protocol and roles that cannot be replicated for private attempts at dispute resolution. The formality of the process creates an atmosphere that is more reminiscent of criticism and punishment than of understanding, compassion and compromise. Empirical studies show that parties are left with the impression that decisions are made about them, not with them.<sup>439</sup> Litigation does not teach parents to deal with these issues and it does not give them the tools to engage in constructive

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social sciences at all. The commission rejected this idea, which in hindsight does appear to have had some merit. Instead, the commission emphasised the role of social workers and counsellors: Beattie et al supra n17, 151-152.

<sup>439</sup> Taylor supra n110, Saville-Smith supra n360.

debate in the future. Research shows that a majority of people who have experienced the adversarial process are dissatisfied with it, and have developed a strong antipathy for the court.<sup>440</sup> They are unlikely to re-engage in litigation, unless they have the personality traits of the intractable disputant, who appears to make continuing litigation a life's goal.

This type of decision making process and its consequences must be to the detriment of the child. It not only fails to teach the parents better decision making skills, what it ultimately teaches the child is that his or her parents, who are normally the decision makers in his or her life, have themselves been reduced to objects of third party-decision making. In difficult disputes a host of strangers will be introduced, who (in the eye of the child) all become involved in decision making in the place of the parents.<sup>441</sup>

*There is seldom a correct answer*

Family conflicts are too contextual and multi-faceted to allow simple and obviously correct answers. Hardly ever do family law decisions represent an elaboration or development of the law, whereby the parties can more or less accept the decision by understanding that their dispute has been resolved by clarifying a legal ambiguity.<sup>442</sup> This also applies to fact finding and legal interpretation of facts. The parties are simply too involved in the situation (both practically and emotionally) to accept that a "higher authority" should determine that facts are different from how they perceive them to be. That applies to facts from the past (i.e. what happened), and applies even stronger to facts in the future (i.e. what is the probability that current observation x will lead to result y in circumstances z). Obviously, both parties believe that what they are seeking is the optimum situation for the child, regardless of the flaws in their reasoning and their sometimes questionable motivation. The result is that judicial decisions always represent a form of sub-optimalization, a choice that represents a compromise the parents couldn't find or reach on their own.<sup>443</sup> It is a rare case where one party obtains exactly what was desired, if only because of the inconvenience, costs and stress of the legal process that always takes away something from any outcome, regardless of its relative success.<sup>444</sup> Consequently, the outcome always results in a situation that is different from –and invariably less than– the one perceived to be the ideal of either party.<sup>445</sup> Because of the character of parenting disputes, every judicial determination has an aspect of discretion, the exercise of which will be interpreted by the parties –or by at least one of them– as an exercise in subjectivity. In other words, whatever the outcome, it will virtually always represent either a perceived loss or a perceived sub-optimal resolution, achieved by subjective decision making. In that light the negative reputation of the family court is hardly surprising.

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<sup>440</sup> Saville-Smith supra n360.

<sup>441</sup> In this context it is actually highly doubtful if increasing the involvement of the child in the process is advisable at all. Especially communications with well-meaning judges, who explain that they are making the decisions, strongly enforce an understanding in the child that its parents, who normally are the authoritative figures, do not in fact have much authority at all, but can be overridden by an absolute stranger in a strange and formalistic setting. It is asking a lot of children to actually understand the abstractions of legal process and the institutions supporting authority, with which their parents are obviously struggling as well. I have not found any research that addresses this question.

<sup>442</sup> And hence perceive the outcome in a way that allows them to "save face".

<sup>443</sup> Note that the increase of "inquisitorial" approaches strongly supports this appreciation, i.e. the fact finder demonstrates to be more capable than the parties and their advisors to correctly analyse their situation and come to appropriate parameters of resolution.

<sup>444</sup> The process constitutes a form of transaction costs that are never part of the situation that is perceived as optimal by either party. Having to absorb these costs will therefore already make any outcome sub-optimal.

<sup>445</sup> By definition, a judicial decision cannot be a win-win solution.

### *Sequence reality and risk aversion*

Sequence reality is the process-induced bias that results from adjudicative structures of information gathering and fact assessment.<sup>446</sup> Legal reasoning and argument proceed by using a mixture of (alleged) fact and logic to construct a legally relevant narrative. This process operates sequentially, recursively and cumulatively, within each issue separately, and between individual issues and their supportive facts. Family matters are often drawn out and an entire self-perpetuating sequence reality can develop that may be substantially beside the entire truth, out of context, and out of sync with inter-party or circumstantial dynamics. The prototype of sequence reality is a proceeding in which a number of sequential (interim) decisions are made, which build upon one another, but where each involves some amount of judicial discretion. In such a case, it is often difficult to go back and re-test the quality or relevance of an initial conclusion or decision, especially where the result of an alternative finding would upset the entire process. In other words the step-wise reaching of conclusions has an inbuilt inertia, a resistance to test its own assumptions. In the case of parenting disputes this effect can be aggravated where interim or preliminary decisions establish a status quo that benefits one party's case in the remainder of the process.<sup>447</sup> An example in the New Zealand context is *S v S*,<sup>448</sup> where judicial caution in the face of allegations of sexual abuse placed the father in a position from which it was impossible to escape. That case also shows the impact of the involvement of experts in such ambiguous situations.

Risk aversion relates to the human character trait that tends to favour risk aversion over uncertain gains, which can be compounded by the way risk and gains are framed. Sequence reality and risk aversion can interact, thereby creating a potent mixture of perpetuated part-truths, semi-established facts, and interconnecting false logic. The art of adversarial advocacy has been described as the art of persuasion.<sup>449</sup> The advocate tells a story: in opening, in the evidence called, in the way cross examination is conducted, in argument, and in closing submissions. Consciously or not, proven facts and correct logic interact with conclusions based on sequence reality and risk aversion and in balanced cases the latter two may well be determinative, because it is impossible to establish where the actual point of persuasion lies. The end result is that important decisions about a child's upbringing and future can turn on the way the dispute scenario is framed, or how it progresses through the litigation process. The process thereby distorts reality and may lead to outcomes that deeply deviate from the premises that were included in the original factual matrix.

### *Child rarely has a voice*

Even though (in New Zealand), the child is represented by a specialist court-appointed lawyer, when the matter comes to a hearing, there is only limited opportunity for the child's own voice. By the same token, it must be acknowledged that there is little evidence that demonstrates that it is actually useful to give the child a direct role in the litigation. It must, however, be noted that in New Zealand and overseas, the

<sup>446</sup> See for a detailed discussion Cooper Davis P and Barua G "Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law" U Chi L Sch Roundtable (1995) 2, 139, 145.

<sup>447</sup> Weinstein JV "And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System" U Miami L Rev (1997) 52, 79-175, 113.

<sup>448</sup> *S v S* [1993] NZFLR 657, *S v S* [1994] NZFLR 26, *S v S* (1994) FRNZ 461, and see for a further comment Henaghan supra n100, 309-312.

<sup>449</sup> Robertson JB and Eichelbaum T *Introduction to Advocacy* (Wellington, New Zealand Law Society, 2000), 9.



involvement of the child in litigation, but particularly in non-litigation processes, is promoted.<sup>450</sup> This development is driven by social science influences rather than by legal objectives. There is very little quantifiable research evidence that demonstrates the merits of increased involvement of children, but there is apparently a strong political incentive to give children a more prominent role.<sup>451</sup> Again, this may be seen from the perspective of a genuine intention to achieve better outcomes for children, or from an undesirable state appetite for direct and unmitigated involvement with young citizens and a desire to bypass the traditional structures of authority and social development.

### *Delays*

Whether caused by a lack of judicial resources, inefficient administrative organisation of the courts, insufficient resources for report writing, or even the parties' or their representatives' own shortcomings, it seems a fact of life that any form of litigation is an extremely protracted and time consuming process. Not only does this cause additional stress and anxiety, it can also lead to injustices, where one party can use delays to maintain the status quo to its advantage. A particular problem with delays is that children have a different perception of time.<sup>452</sup> The old adage that "justice delayed is justice denied" is particularly apt in parenting disputes. Unsurprisingly, delays are generally seen as the largest challenge facing the Family Court.<sup>453</sup> The compounding effect of delays on practically all other negative aspects of the litigation process has been discussed previously, and I will return to the topic in detail.

### *The effect of the process on parents and children*

Litigation is hard on the parties involved, it causes and/or exacerbates stress and anxiety, it affects the parties' financial situation, creates a focus on the past rather than on the future, and generally involves the parties in an emotional relationship (albeit a negative one), which is the opposite of the purpose of the divorce process, which is intended to extinguish (emotional) relationships. Although they are not directly involved, the process also affects the children. The child experiences negative consequences, either following from the divorce and litigation process directly<sup>454</sup> or indirectly, by way of what can be best called "emotional osmosis" from the parents. The process that has the objective to protect the children's interests is thereby actually harmful to them.

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<sup>450</sup> In New Zealand see: Goldson J *Hello, I'm a Voice, Let Me Talk: Child Inclusive Mediation in Family Separation* (Innovative practice fund; Families Commission) (Auckland, Centre for Child and Family Policy Research, Auckland University., 2006). For Australian developments see: McIntosh and Long *supra* n272, McIntosh and Long *supra* n160.

<sup>451</sup> And which is supported by international developments: see art 12 United Nations *supra* n4.

<sup>452</sup> This is actually recognized in legislation, S4 Care of Children Act 2004.

<sup>453</sup> Boshier *supra* n7.

<sup>454</sup> I.e. the change in family stability, diminished parenting, economic effects, uncertainty, loss of relationships with non custodial parent and third parties associated with the non custodial parent. See also the discussion above in chapter 5.

## 8 REMEDYING THE ADVERSARIAL PROCESS

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The disadvantages of adversarial litigation that were summarized in the previous chapter are generally acknowledged and it seems more or less accepted that adversarial litigation is unhelpful in achieving the objectives underlying contemporary family law,<sup>455</sup> while there are additional shortcomings like costs and loss of confidence in the court system. Various remedies have been attempted or proposed. These can be categorized into solutions aimed at:

- Creating alternative processes
- Adjusting the periphery of the court process
- Changing the character of the court process
- Changing the users of the system

Permeating the problems with the adversarial system is the critical issue of delays. Virtually all proposed innovations include aspects to remedy that most pervasive problem, which will be discussed separately, after considering the above four categories of remedies.

### CREATING ALTERNATIVE PROCESSES

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A later chapter will develop a robust theoretical framework to analyse the current conciliatory and the proposed mediation and PHP processes. At this point the word “alternative” in ADR is simply understood as “alternative” to an adjudicative court hearing. One argument to promote ADR in parenting matters proceeds as follows:<sup>456</sup> The concept family can be seen as a set of informal, but ultimately fiduciary,<sup>457</sup> relationships between family members. Connected to these inter-personal relationships are a large number of other social and economical relationships that attach to the individuals in the family, but also to the family as a whole. Following a divorce, not all of these relationships are completely extinguished. Some relationships remain unaffected –for instance the biological connection between parents and children– while others are re-ordered and adapted to the post divorce situation. A period of conflict preceding and during this re-ordering must necessarily be a transitory state. Despite the fact that the marriage itself was unsuccessful, the parties will eventually have to settle into an arrangement of less intense, but nevertheless somewhat fiduciary<sup>458</sup> relationships. It appears sensible to bypass or reduce this transitory conflict period and to resolve the issues in a way that recognizes the continued existence of at least cooperative relationships. Experience shows that ongoing serious conflict only occurs in a small number of cases. Litigation is considered a binary and conflict inducing process. Negotiation-based resolution styles are thought to be more accommodating. They allow the use of different interpretations of legal norms and even different factual narratives, because these are not ultimately tested and determined. Fact finding and adjudicating are replaced by

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<sup>455</sup> See also the results of the empirical part of this study in chapter 20, which found substantial agreement from practitioners with propositions about disadvantages of adversarial process. However, there is also academic comment that the assertion that adversarial process exacerbates the harmful effects of dispute has not been empirically proven, see Henaghan *supra* n100, 281 and Hunter R "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" J Law Soc (2003) 30, 156-176.

<sup>456</sup> Note that this argument focuses mainly on the quality of the process, rather than on economic advantages.

<sup>457</sup> But without the direct legal effects that normally attach to classes of fiduciary relationships, i.e. the term is used here without its technical legal meaning.

<sup>458</sup> The simple fact that the child's interest is paramount gives the relationship a “fiduciary” character.

recognizing mutual self interest and maintaining a modicum of recognition for the other's sincerity and good faith.

This approach provides an environment that avoids the negatives of the (adversarial) litigation process, and it has advantages that include:

- There is less acrimony and related stress
- The process can be faster and it is easier to involve experts at the level of their expertise and not as semi-advocates for one party's position
- The process can be adjusted to suit the parties
- The parties' ownership of the process ascertains support for the outcomes, and compliance will therefore be higher
- The parties have learned that there are other ways of dealing with disputes and have learned appropriate techniques, therefore they will be better prepared to deal with adjustments to the arrangements if changes are necessary
- Consensual processes are empowering, and thus leave room for "face-saving"
- Consensual methods are more efficient and therefore economically preferable, both at micro- and macro-levels

Theoretically, ADR processes can take place in three distinct metaphorical locations: outside the court, on the threshold of the court or within the court. The purpose of the alternative processes at all three locations is always the same, that of settlement.<sup>459</sup>

#### *ADR outside the court*

Here ADR is at a distance, and independent, from the court. There is nothing that prevents disputing parents from engaging independent professionals to assist them in their negotiation or mediation attempts. In fact, private attempts are supported by legislation, which provides for a direct route to have the private arrangement endorsed and thereby made enforceable.<sup>460</sup> It must, however, be noted that the court will not simply "rubber stamp" whatever the parties may have agreed to. Because of the paramount character of the welfare principle, the court will intervene if it considers that the parents' agreed arrangement is not in the best interests of the child, or is otherwise in conflict with legislative or regulatory directions. The ways in which parents reach private agreements have not been the subject of substantial study in New Zealand.<sup>461</sup> The limited research suggests<sup>462</sup> that about 50% of the parents who do not rely in some way on the Family Court processes (consensual or adjudicative) still use a third party to assist them in their negotiations. That third party is often a lawyer, less often a professional counsellor and apparently even less often a professional mediator.

<sup>459</sup> I.e. the objective of these interventions is that the dispute is resolved by the parties reaching a negotiated compromise. Obviously the actual dispute is not resolved at all, but a more or less rational arrangement is constructed to which both parties are willing to subscribe. Empirical evidence shows that in high conflict cases most of these resolutions last no longer than at most a handful of years, often in continuous acrimonious circumstances: Walker *supra* n228.

<sup>460</sup> Sections 40 and 48 Care of Children Act 2004.

<sup>461</sup> The study referred to above (Robertson, Pryor and Moss *supra* n235 ) was limited to only 39 parents from 23 previous couples, and was therefore not representative, given the more than 12,000 couples involved in parenting disputes annually who request some form of court intervention. In addition, the respondents were self selected and therefore considered to constitute a sample with strong opinions and/or satisfaction with their chosen means of resolution.

<sup>462</sup> The report quoted in the previous footnote is not clear on which number of the couples involved did not rely on Family Court services at all. In fact, many of the researched couples did actually rely on Family Court services. It is further noted that the Ministry of Justice (i.e. not the Family Court *per se*) is also provider of a free course "parenting through separation", which is accompanied by written material and an instructive DVD. It would seem that the majority of separating couples with children is some way use the facilities offered by or directly associated with, the Family Courts. I have strong doubts about the accuracy of the Robertson report in this respect, as already concluded above on the basis of statistical information.

### *ADR “on the threshold” of the court*

This may be a prerequisite to litigation or an additional or alternative service that is part of the official dispute resolution system. The threshold system may be executed by independent contractors, but it remains under the court’s logistical control. It provides a connection with the formal litigation process, which includes case management, and a flow of information.<sup>463</sup> Threshold systems are typically created where litigation proves cumbersome and expensive, and where ADR methods (often referred to as mediation) appear to make good sense<sup>464</sup> because they seem to avoid most of the negatives of the adversarial litigation process, and they straddle, by their very nature, legal process and healthcare interventions, i.e. they are seen as therapeutic in character.<sup>465</sup> The Royal Commission on the Courts used similar arguments in its report. Impressed with the then revolutionary specialist Los Angeles Family Court, it recommended a separate Family Court with ADR features, particularly conciliation.<sup>466</sup> The Commission saw conciliation as a process executed by counsellors, i.e. a process with a strongly therapeutic flavor.<sup>467</sup> When considering whether a Family Court should remain a court of law or whether it should properly be classified as a social agency, the Commission favoured the first option, quoting the findings of the Ontario Law Commission.<sup>468</sup> This then posed the question how to combine both approaches, rather than choosing between them. The Commission opined that the family court was to be primarily a conciliation service, with the emphasis on counselling and adjudication as the last resort. It did recognize that the effectiveness of the court-associated “conciliation counsellor” was dependent on the “constructive authority of the court”,<sup>469</sup> and that the provision of therapeutic services would require a well-trained and substantial administrative apparatus.<sup>470</sup> Although the recommendations from the Commission did not explicitly, nor completely, find their way into the legislation that created the Family Courts, the first Principal Family Court Judge, who had a key role in practically establishing the Family Courts, used the suggestions from the Commission as a blueprint for their construction.<sup>471</sup> Although the Commission’s recommendations may have looked revolutionary at the time, they have later been

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<sup>463</sup> Even if that information is only relating to whether the alternative intervention was successful or not.

<sup>464</sup> Despite an enormous amount of research there are no conclusive studies on the benefits or disadvantages of alternative process, and given the many variables involved, it is unlikely that a final conclusion can ever be reached. For an overview of studies with a generally positive conclusion see: Kelly JB "Family Mediation Research: Is There Empirical Support for the Field?" *Conflict Resolution Quarterly* (2004) 22, 3-35. The problems with studying long term effects of mediation compared with litigation and the limited value of such studies are discussed in the conclusions of Emery RE, Lauman-Billings L, Waldron MC, Sbarra DA and Dillon P "Child Custody Mediation and Litigation: Custody, Contact and Co-Parenting 12 Years after Initial Dispute Resolution" *J Consult Clin Psych* (2001) 69, 323-332, 331.

<sup>465</sup> Walker *supra* n228, 280.

<sup>466</sup> The commission did not address ADR theory in any depth. The Commission stressed the importance of distinguishing between conciliation and reconciliation; the second being described as but one possible outcome of the first, which was considered useful whatever the outcome, albeit that reconciliation was considered the ideal, but in practical terms often unattainable. Beattie et al *supra* n17, 149.

<sup>467</sup> The Commission did not, however, discuss in any depth what it exactly meant with the term therapeutic and this lack of clarity has plagued the development of the Family Court process ever since. For a detailed discussion see chapter 14.

<sup>468</sup> Which found that a family court should include both the judicial and the therapeutic functions, which should complement each other. Beattie et al *supra* n17, 150.

<sup>469</sup> *Ibid*, 163.

<sup>470</sup> Including a special “director of support services” and a “reception centre”, sketched as a type of “triage” function. The Commission was very clear about the role of the judiciary, which would have the “*ultimate control over both the judicial and the therapeutic functions of the Family Court*”, and which indeed should be under the “*day to day supervision by the local Family Court Judge*”: *ibid*, 162. For a recent discussion of the concept of triage in family court services, see Salem P "The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?" *Family Court Review* (2009) 47, 371-388 and Zondag B "Family Law and Court Administration: Access to Justice and Getting the Organizational Basics Right" Upcoming article (available at the thesis website).

<sup>471</sup> Webb PRH and Treadwell PJ *Family Law in New Zealand* (LexisNexis, Wellington, 2005), 15.

described as lacking imagination and governed by compromise.<sup>472</sup> Nevertheless, the introduction, and indeed dominance of alternative resolution processes in the family court system can be directly traced to the proposals of the Royal Commission of 1978.

The matter of non-litigation processes within the Family Court was again considered in the major review in 1993,<sup>473</sup> leading to recommendations to establish a separate organisation called the “Family Conciliation Service”, particularly aimed at parenting disputes, and with a mission to resolve the majority of those cases, which would in first instance be filed with that service only. Its primary process was to be mediation, to be carried out by accredited mediators and to the exclusion of judges. The mediation process would be assisted by counselling (the therapeutic function), specialist reports (providing the required social science input),<sup>474</sup> a specific clerical support organisation and impartial legal information service, while counselling coordinators would be responsible for case management and public education.<sup>475</sup> The report further suggested that parties would be restricted from applying more than once for formal court intervention in parenting disputes. The report complained about the fact that the court-related counselling services were (at that time) mostly seen as a precursor to litigation, rather than an alternative to it.<sup>476</sup> It nevertheless concluded that the conciliation services were successful in resolving many disputes at very low costs per case,<sup>477</sup> particularly compared with litigation costs. The report consequently focused on achieving ways to increase the use of conciliation, a proposal in line with what had already been suggested by the Royal Commission fifteen years earlier.<sup>478</sup> The detailed proposals of the Boshier report in respect of alternative processes and particularly the necessary organisation to implement them were rejected in the 2003 Law Commission report.<sup>479</sup> That report did however continue to recognize a distinction that the Boshier report had signaled for the first time, between mediation<sup>480</sup> and counselling, although it re-created some confusion about the terminology used<sup>481</sup> and the objectives of these processes. The Law Commission referred to a study that showed that mediation had little impact on post-divorce conflict and parenting and that mediated agreements were often subject to further litigation,<sup>482</sup> but nevertheless recommended the introduction of mediation, albeit with the stipulation

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<sup>472</sup> For instance the decision to attach the Family Court as a “division of the District Courts” for practical reasons: Inglis *supra* n115, 94 and 103. A specific complaint made by Inglis in respect of the therapeutic and alternative dispute resolution services of the Family Court is that these have been locked statutorily into the limited vision of the 1980’s and are therefore limited in scope and lack sophistication.

<sup>473</sup> Boshier *et al* *supra* n17.

<sup>474</sup> To be made in a standardized form and by specifically trained and accredited specialist report writers: *ibid*, 57.

<sup>475</sup> Including information provision to parties about the conciliation process in order to increase the efficiency of the professional counsellors: *ibid*, 42.

<sup>476</sup> *Ibid*, 38.

<sup>477</sup> The report also mentions that a lot of the counselling work was at the time done by volunteers, and was sometimes frustrated by adversarial attitudes of lawyers advising their clients. *Ibid*, 43-45.

<sup>478</sup> *Ibid*, 51-64.

<sup>479</sup> New Zealand Law Commission *supra* 328, 13.

<sup>480</sup> The Law Commission discussed mediation in some depth and particularly suggested that external mediators be contracted, rather than using an “in house pool” who could be accused of “insider capture”.

<sup>481</sup> The conciliation from the Royal Commission (which was to be executed by a “counsellor” and coordinated by a “counselling coordinator”) was continued in the Boshier report, but this suggested that the process used for conciliation was mediation, with referral to a counsellor where desired. The Law Commission suggested that counselling and mediation should both be provided within the court process, but described counselling as a process to reconcile differences and to explore re-conciliation or conciliation, the latter being described as exploring options and coming to arrangements. The Law Commission further suggested that “counselling”, was to be coordinated by a “conciliation coordinator” a new term for the Family Court Coordinator (who had originally been known as the “counselling coordinator”). Unsurprisingly, users of the court sometimes express substantial confusion about these processes. To this confusion is added by the Law Commission’s suggestions for children’s-, culturally appropriate- and special needs- counselling, which indicate strongly therapeutic, rather than settlement focused interventions.

<sup>482</sup> New Zealand Law Commission *supra* n328, 75.

that it would oppose mediation if the Government would dilute the recommendation in respect of mediator qualifications.<sup>483</sup> The Commission was also adamant that mediation is not suitable for intractable disputes or disputes with severe power imbalances.<sup>484</sup> It was furthermore convinced that a proper model should involve external, contracted mediators.

The procedural system as it currently operates in parenting disputes involves referral to a counsellor for the purpose of conciliation.<sup>485</sup> If the counsellor is (partially) unsuccessful, the next “alternative” step is referral to mediation by a judge. This mediation has the character of a settlement conference.<sup>486</sup> These two steps operate at the opposing edges of the ‘threshold’.

Recent amendments to the Care of Children Act 2004 introduce non-judge led mediation,<sup>487</sup> with its purpose described as diverting less complicated matters away from formal proceedings and to resolve them quickly and inexpensively.<sup>488</sup> Essentially, the changes provide for mediation as an additional alternative to the current references to counselling. The regulation of the mediation and counselling process in parenting disputes has now been brought strictly within the Care of Children Act 2004 and the procedural connections to the Family Proceedings Act 1980 for that purpose have been severed. Interestingly, the amendments also re-introduce more formality in the Family Courts,<sup>489</sup> which will further underline the differences between the formal court hearing and the alternative processes provided within the system. The end result is not dissimilar to the structure sketched in the 1993 Boshier report,<sup>490</sup> albeit that it is integrated within the Family Court itself, rather than being implemented within a separate organisation. For the first time the legislation clearly distinguishes between counselling (conciliation) and mediation processes (as opposed to mediation in judicial conferences), although it does not provide any further elaboration as to what these different processes entail, or what their differences and similarities are. The inclusion of mediation is based on a pilot that followed the recommendations from the 2003 Law Commission Report and which trialed non-judge led mediation in four Family Courts.<sup>491</sup> The formal evaluation of this pilot records that it was highly successful.<sup>492</sup> There was some support for the process from the bar as well.<sup>493</sup> The evaluation of the pilot, however, lacks scientific

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<sup>483</sup> Ibid, 85.

<sup>484</sup> Ibid, 68.

<sup>485</sup> As a first step, either on the parties initiative (when an agreement between them is in place or when they are party to a parenting order), or on referral by the court (when an application has been made, and the matter is therefore before the court).

<sup>486</sup> As the Law Commission suggested that these conferences ought to be called: New Zealand Law Commission *Family Court Dispute Resolution, a Discussion Paper* (Preliminary Paper 47) (Wellington, NZLC, 2002), 89. It must be noted that a settlement conference is different from mediation, although it of course depends on the way individual judges operate.

<sup>487</sup> These have not yet been introduced, apparently as a result of budgetary restraints. It is noted that mediation interest groups are starting to organize courses for court appointed mediators, in which the Principal Family Court Judge provides an introductory session, see [www.aminz.org.nz](http://www.aminz.org.nz).

<sup>488</sup> Explanatory note to the Family Court Matters Bill.

<sup>489</sup> A move concomitant with the Principal Family Court Judge emphasizing in a newspaper interview that Judges are ready to jail parents for contempt and non-conformation with court orders, as a response to concerns that the court has become so informal that people no longer fear the consequences of breaking the law: Nichols L "Judges Ready to Jail Parents" *The Dominion Post* 23 April 2008.

<sup>490</sup> A difference remains in that mediation is not the core process supported by counselling and legal and psychological expertise as it was envisaged in the conciliation service from the Boshier report.

<sup>491</sup> Barwick H and Gray A *Family Mediation - Evaluation of the Pilot* (Wellington, MoJ, 2007).

<sup>492</sup> Ibid, foreword by Belinda Clark, the Secretary of Justice.

<sup>493</sup> See Dunlop N "The Family Mediation Pilot: Where to Now?" *NZLawyer* (2006) 28 July Issue, 11, also available from [www.nigeldunlop.co.nz](http://www.nigeldunlop.co.nz), with another five articles by the same author (listed in the bibliography). It must be noted that this author practiced in Christchurch, which was also by far the most positively responding of the four pilot sites, while it represented three quarters of all mediations in the pilot.

rigour,<sup>494</sup> and was not conducted by truly independent researchers. Although mediation appears to be a logical addition to the range of available interventions, it cannot be said that these advantages have been established beyond reasonable doubt or skepticism.<sup>495</sup> In addition, there are situations in which mediation is unsuitable, such as where domestic violence or sexual abuse is present, where parties suffer from mental health issues, where severe substance abuse is prevalent, or where the parties are engaged in entrenched and bitter conflict. As the incidence of these problems tends to overlap substantially with high conflict or intractable cases, it is unlikely that mediation will lead to a dramatic reduction of the number of cases that will need judicial determination. It is more likely that mediation will provide an alternative or addition to the counselling model for those who are predisposed to a consensual process.<sup>496</sup> As may be seen, the new model contains three different steps “on the threshold” to the judicial process.

### *ADR in the court*

The third location places the alternative process within the formal adjudicative process. Mixing adjudicative and alternative processes is generally considered inappropriate, although there are precedents where this occurs, for instance for small claims in the Disputes Tribunals. In such situations, the alternative and adjudicative interventions are typically separated into different phases of the proceeding. As will be seen, the PHP introduces a new model that not only for the first time brings alternative approaches within the court hearing, it also allows the court to switch back and forth between adjudicative and consensual interventions.

## **ADJUSTING THE PERIPHERY OF THE COURT PROCESS**

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Changing the environment in which the court process operates, may alleviate some of its disadvantages. This includes aspects relating to physical and administrative environment, secondary processes,<sup>497</sup> and procedures to simplify or explain the process, and adjusting the experience and training of those operating in the system. The Royal Commission envisaged the Family Courts as specialist courts operating in a different fashion. It suggested specialist judges and support services including social workers, counsellors and conciliators. The physical court environment was to be adjusted, including separate court rooms and “comfortable fittings” to put the parties at ease. Procedure was amended by relaxing adversarial rules and formal dress, thus creating an “atmosphere of relative informality”,

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<sup>494</sup> For example, the cases that were referred to mediation were (in three of the four trial courts) selected by the court and therefore do not provide a satisfactory sample. Parties had to consent to mediation and were therefore highly self-selected. Of the 540 cases that were offered mediation, 257 completed the process. In 59% of those mediations a settlement was reached on all issues (152). This means that in 28% of all cases where mediation was offered the desired result was achieved, despite the pre-selection and further self-selection process. This can hardly be called successful, and that term was mainly based on rather dubious qualitative analysis, and a rather positive “spin” that was put on the quantitative outcome. The dubious character of the qualitative work follows from the fact that only three of the intended ten cases were used as observation cases, and that from these three not all parties could be contacted following the mediation, hence the researchers “constructed some partial case studies from court information, mediator case reports and participant responses, and used extensive quotes, to give a flavour of what took place in the mediations”. The respondents from who the information was obtained were again self selected, because participating in the evaluation was voluntary, and only a very small number provided response. See Barwick and Gray *supra* n491, 23-25.

<sup>495</sup> This issue will be discussed in more detail in chapter 14.

<sup>496</sup> To support this contention, the approximately 5-7% of disputes that may be categorized as “high conflict” typically withstand attempts at consensual processes because the parties simply cannot, or are not prepared, to communicate and exchange information at a level or in a way that would allow isolation of issues and canvassing of possible resolution scenarios (see chapter 13 on conflict theory). Additional alternative processes will only provide yet another forum to continue the conflict.

<sup>497</sup> Such as the organisation, management and logistics of the process.

thought to be conducive to the overriding goal, that of achieving agreement and conciliation. The Law Commission reports and the Boshier report continued this theme. Apparently the pendulum has recently started to swing back, with comments that the drive for informality reached the point where the court's authority is damaged by informality.<sup>498</sup> Recent legislative amendments re-introduce larger courtrooms with formal lay-outs; the national coat of arms is back in prominent display, the judges don their gowns again,<sup>499</sup> and lawyers are standing when addressing the court, but will not be wearing gowns.<sup>500</sup>

An innovative element of the therapeutic role of the Family Court was the introduction of the counselling coordinator, a functionary initially appointed to coordinate arrangements for counselling, appointing a lawyer for the child, obtaining expert reports, and communicating with the public. The role was designed to form an interface between therapeutic and legal aspects of the Family Courts' work, but it has changed over time and fluctuated in importance.<sup>501</sup> The Law Commission saw the expansion of the coordinators' role as vital for the development of the conciliatory aspect of the court's work. The government did not substantially respond to this suggestion other than stating that the role would be reviewed.<sup>502</sup> Although it is unclear what the status of this review is, it is apparent that a change in the balance between therapeutic and legal processes is likely to involve a change in the profile and importance of this functionary. The current legislative amendments provide no further information on this aspect, which no doubt will be eventually addressed in ministerial directives. The recent legislative amendments also introduce a "Senior Family Court Registrar",<sup>503</sup> a new functionary who has been proposed for some time, but so far referred to as "judicial registrar", a term that better describes what the position entails. This role is to be exercised by sufficiently qualified and experienced personnel, possibly barristers contracted for the purpose, but who would remain free to do such work part-time, alongside a family law practice. The judicial registrar would undertake administrative and case management work as well as some ex-parte applications that now require judicial attention. This would improve the judicial capacity in the system without the need to appoint additional Family Court judges, whose maximum number is fixed legislatively.<sup>504</sup> It must be noted that the 2002 Law Commission was not impressed with the idea of this

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<sup>498</sup> At the introduction of the Bill that included the recent changes, the responsible Minister stated: *"Family Court judges have expressed a concern that Family Courts are sometimes not taken as seriously as other courts. Although the Family Courts try to resolve matters in a less formal way, there are times when defended hearings and binding court orders are necessary. To help ensure that judicial functions of Family Courts are taken seriously, the bill removes the restriction on Family Court judges wearing gowns in court."* Hansard (2008) 641 New Zealand Parliamentary Debates 11462 (Barker).

<sup>499</sup> An aspect that was critically addressed during parliamentary debates, where a member commented: *"I wonder why that is, because the whole idea of judges is that they assert their authority by the sense they make. This is a request that came from the bench of the Family Court through the Principal Family Court Judge, Peter Boshier, a man who went to law school with me. At that time he was very much a left-wing, longhaired radical, who took to wearing a suit when he was admitted to the Bar and went on to higher things. Wearing a gown in court must therefore be important to some Family Court judges to assert their authority, although in my time of appearing in the Family Court, over perhaps 10 or 15 years, I never thought the clothing of the judge made much difference. But if the judge wants to wear a gown, then I say let him or her wear a gown. We have to draw the line at wearing a wig, although that takes me to a school of thought in the Family Court that it is not really part of the District Court. It regards itself at a slightly higher level than the District Court and would like to see itself elevated to the level of the High Court."* See Hansard (2008) 646 New Zealand Parliamentary Debates 15687 (Fairbrother).

<sup>500</sup> The Principal Judge expressed these measures as a "design" to reduce informality, Boshier *supra* n362.

<sup>501</sup> See for a discussion New Zealand Law Commission *supra* n328, 20-25.

<sup>502</sup> New Zealand Government *Government Response to Law Commission Report on "Dispute Resolution in the Family Court"* (Wellington, New Zealand Government, 2003), 5.

<sup>503</sup> By s 4 of the Family Courts Amendment Act 2008, inserting ss 7A-B in the Family Courts Act 1980. At the time of writing this amendment had not yet come into force.

<sup>504</sup> Interestingly, this amendment was introduced by supplementary order paper, which was not produced until after the Bill had passed its second reading. For a further discussion of this issue see Zondag *supra* n470.



role,<sup>505</sup> and suggested deferring a decision until other recommendations had been implemented and assessed.<sup>506</sup> There are various potential problems<sup>507</sup> with the introduction of this role, which in other jurisdictions is sometimes referred to as ‘parenting coordinator’ or ‘special master’.<sup>508</sup>

An important aspect of the ‘periphery’ of the court process is the administrative and logistical operation of the Family Courts. Given its particular nature and complexity, that aspect will be dealt with separately in this thesis, together with the discussion about delays and efficiency.

In conclusion, the “periphery” of the litigation process is a vital aspect of the connection between the therapeutic (ADR) and legal roles of the Family Court. Although its importance was recognized in the various reviews, it remains an area that is largely unresolved and subject to unclear authority. As will be seen, the PHP process relies on many activities in the periphery of the court process, such as specialist report writers, social workers, case managers and the Family Court Coordinator. The quality of organisation of this periphery will therefore have significant impact on the success of the PHP process.

### CHANGING THE CHARACTER OF THE COURT PROCESS

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Proposals that change the character of the litigation process typically involve the introduction of methods that are termed inquisitorial, i.e. changes to the role of the judge. Apart from some incidental comments, there do not seem to have been principled suggestions to fundamentally change the process in any other way, for instance by removing parenting decisions from the court altogether or by introducing panels of experts to make decisions rather than a judge (i.e. a single legal expert).<sup>509</sup> There is confusion about what is meant precisely by inquisitorial process; the term is used to refer to the type of process that is used in Civil Law jurisdictions,<sup>510</sup> but without acknowledging that there are large variations between those systems, and without recognizing that they rely on fundamentally different court structures and legal environments. References to inquisitorial processes suggest a greater role for the judges in deciding the relevant issues and in obtaining and evaluating evidence, as opposed to the judge impartially testing evidence by listening and reading but distancing him/herself from the enquiry. A more detailed description of the process in a Civil Law jurisdiction is included in chapter 15, where it will become

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<sup>505</sup> Arguing that in order to attract suitable candidates the salary ought to be close to that of a judge, and hence not economically advantageous, while probably only capable of attracting unsuitable candidates if the salary was such that real savings could be made: New Zealand Law Commission supra n486, 102.

<sup>506</sup> The matter was discussed again in 2004, when the Law Commission reported that the Family Court judges had advocated for such a role, but it repeated its cautions: New Zealand Law Commission supra n137, 213.

<sup>507</sup> Particularly in respect of mixing executive and judicial powers.

<sup>508</sup> See also: Coates, Deutsch, Starnes, Sullivan and Sydlík supra n249. Note that the role as proposed in New Zealand is not exactly what Coates et al describe. The New Zealand role will be wider in the sense that it will extend to all family court work, not just parenting dispute, but it will be narrower in the sense that the decision making role does not extend to contested parenting situations.

<sup>509</sup> A suggestion that was also made to the Royal Commission of 1978, but firmly rejected, see Beattie et al supra n17, 151. My survey of practitioners also attracted comments that suggested the introduction of specialist panels. One respondent noted: *“For many years (and have practiced for 34 years, I have advocated a panel approach to resolving care issues. This would comprise where appropriate social worker, lawyer, psychologist (counsellor) which would investigate all issues which were relevant (most important) to the circumstances reach a decision and explain to the parties reasons for their decisions and implementation of care arrangements. I have always maintained that in defended proceedings best interest of the child is a test the court applies but has little relevance to the approach parents take to resolving such matters. Retribution for perceived rights or wrongs, petty point scoring and a personal success and thereby an element of control over the other parent often seems to be the desired outcome. Unfortunately the children’s interests become submerged in an effort to establish ‘bragging rights’. The parents often have what I term a soap opera mentality to such disputes and seem to thrive on conflict and confrontation.”*

<sup>510</sup> The Law Commission defined “inquisitorial” as: *“A style of hearing where the judge requests information, asks questions, and exercises control over the information brought before the court”*: New Zealand Law Commission supra n486, 197.

evident that inquisitorial process involves more than a different role for the judge. The Royal Commission did not make recommendations in this respect, while the Boshier Committee was asked to “*examine in particular, whether and in what ways the inquisitorial role of the court should be strengthened*”.<sup>511</sup> The Boshier Committee expressed reservations about changing the role for the judge, and commented that in the existing structure useful influence could be exerted at a pre-trial stage to ensure that material before the court is relevant and that issues are defined to the court’s satisfaction. This would apply to the majority of cases.<sup>512</sup> The Committee thought that in a limited number of cases special rules should apply that would reinforce the ability of the judge to reduce the scope and conduct of a hearing so as to dispose of the matter firmly yet fairly. This would be restricted to cases such as repeat litigants bringing issues that demonstrated no prima facie reason to invoke the jurisdiction of the court again, or where the parties remained locked in conflict and where the welfare of the children was not the prime issue.<sup>513</sup> The Committee made suggestions for a strengthened case management structure, and a leave procedure for repeat applications, but did not advocate a need for fundamental changes to the (adversarial) process. This may be somewhat surprising, as the Committee’s chairman had earlier expressed quite strong sentiments towards a more inquisitorial role, particularly in custody cases,<sup>514</sup> a sentiment that was later repeated and emphasized.<sup>515</sup> In the lead-up to its review of the Family Court, the Law Commission considered that Family Court judges’ role already had some inquisitorial aspects, bestowed on them by substantive legislation.<sup>516</sup> Despite referring to earlier suggestions for more inquisitorial approaches<sup>517</sup> and receiving submissions from the Family Court Bench, the subsequent report did not discuss changes in the judicial process.<sup>518</sup>

## CHANGING THE USERS OF THE SYSTEM

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Strategies in this category vary from attempts to inform parents about the effects of divorce on the wellbeing of their children to intense therapeutic interventions. This can include marriage education, aimed at teaching appropriate dispute behaviour during the marriage, divorce education i.e. how to organize matters to achieve a “positive” divorce; parenting education, or even information sessions that demonstrate objectively that divorce may not be a good idea at all.<sup>519</sup> The approaches in this category

<sup>511</sup> Terms of reference for the Boshier committee: Boshier et al supra n17, 28.

<sup>512</sup> Although this must be seen in the context of the other recommendations from the Boshier Committee, which suggested a much sharper distinction between ADR processes and litigation.

<sup>513</sup> Boshier et al supra n17, 73-74.

<sup>514</sup> Boshier PF “Truth or Proof - Evidential Issues” Paper presented at the New Zealand Law Society Family Law conference, 1991.

<sup>515</sup> Boshier PF “What’s Next after Case Management?” BFLJ (NZFLJ) (1997) 2, 149-152.

<sup>516</sup> “*The role of a Family Court judge differs somewhat from that of a judge in the general jurisdiction of the District Court. Current family legislation contains inquisitorial aspects; the judge may receive such evidence as he or she sees fit, regardless of whether it would be otherwise admissible in a court of law. The Family Court judge may call for reports from the Director-General of Social Welfare, doctors, psychiatrists or psychologists in respect of the child or person. Additionally, the Court may call witnesses on its own behalf rather than just relying on the witnesses that the parties call. In this way, it might be considered that the role of the Family Court judge is more inquisitorial than the more traditional model of impartial, judicial decision making. In particular, cases involving children lend themselves to a more active, inquiring judicial approach*”. (Footnotes omitted): New Zealand Law Commission supra n486, 11, and see the references to legislation quoted there.

<sup>517</sup> Particularly the 1991 Boshier speech, see n514.

<sup>518</sup> In fact, apart from noting it in the glossary, the word “inquisitorial” does not appear in the report.

<sup>519</sup> An idea that develops the following argument: Although maintaining an unhappy but low conflict marriage entails a degree of sacrifice from the spouses, this situation may not be as onerous as some might think. Most adults live more than two-thirds of their lives without children in the household. Spending one-third of one’s life living in a marriage that is less than satisfactory in order to benefit children – children that parents elected to bring into the world – is not an unreasonable expectation. This idea is especially compelling, given that many people who divorce and remarry find that their second marriage is no happier than their first.

overlap with the therapeutic elements of the alternative processes category, as the educational aspect of an intervention is one of the characteristics by which different types of therapeutic mediation can be distinguished. For instance, counselling is typically aimed at creating an understanding of what has happened and coming to grips with its effects. Mediation, on the other hand, focuses on the future; it is aimed at creating workable arrangements and possibly the mindset required to sustain them. Although it acknowledges emotions, it is not concerned with seeking their roots, but with creating constellations of arrangements that allow emotions to be bypassed or mitigated. Although these theoretical differences between mediation and counselling can be drawn relatively sharply, the point where one process merges into the other in practice is impossible to determine. This problem is exacerbated for conciliation, which is a form of mediation. ADR texts appear to agree that conciliation is a form of mediation that takes place in a statutory or regulative environment, where the independent third party has the specific objective to assist the parties to find agreement in terms that comply with this policy objective.<sup>520</sup> The educational character of conciliation is therefore also highly directive towards implanting values that conform to policy. Where the educational function of brochures, information sessions, intake interviews and even counselling is quite clear, the educational aspects of the ADR processes mediation and conciliation are not discernible for parties that come to a court for assistance. There certainly is no prior informed consent to undergo a process that more or less covertly seeks to adjust their behavior or even their way of thinking.

Education is a very explicit objective of the PHP process and the legal professionals involved get clear directions as to their role in this aspect. The constitutional and practical qualms that can be raised about this will be addressed below. As a general comment it may be said that re-education of citizens to comply with behavioral objectives of government policy reeks strongly of overly detailed state intervention. This may be acceptable where recipients of such education are aware what is happening and voluntarily subject themselves to a level of indoctrination. It is dubious if this remains acceptable without consent, particularly where this approach is couched in terms of assistance in resolving inter personal disputes. Ultimately, the demarcations between education and indoctrination and between overt and covert application of these interventions, is an ideological distinction which results from political choices. It is therefore highly inappropriate if decisions to implement processes that eventually affect behavior and even thinking are introduced without any relevant scrutiny. A Common Law system is based on clear perceptions of individual autonomy, and its dispute resolution systems reflect those. Using the legal process itself to intrude on individual autonomy may be considered desirable in this type of disputes, but the introduction of that use should be subjected to more scrutiny than has now been the case.

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Furthermore, such an arrangement provides an important benefit for parents, while it also helps to balance the costs. Parents – especially fathers – are able to maintain continuous relations with co-resident children. Given the pain experienced by most noncustodial parents following separation from their children, this should be an incentive to invest extra effort in the marital relationship. Garrison *supra* n90, quoting Amato & Booth.

<sup>520</sup> See for instance: Hutcheson P and Hooper S "Mediation" In: Spiller P (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999), 58 ; and Boule L, Jones J and Goldblatt V *Mediation : Principles, Process, Practice* (Butterworths, Wellington, 1998), 68-69.

## THE CRITICAL PROBLEM OF DELAYS

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A major complaint about the Family Courts is that matters take too long.<sup>521</sup> This is not only a problem in itself; it aggravates many of the other problems.<sup>522</sup> Delays can be addressed in different ways. First, additional resources can increase the capacity of the system, whereby it should be able to process cases faster. Secondly, the number of cases requiring judicial intervention can be reduced, thus leaving some capacity to increase the speed of dealing with the remaining cases. Thirdly, the system's overall efficiency can be increased through better management and infrastructure, increasing its capacity, and thereby potentially increasing its speed. Fourthly the judicial part of the process can be changed to make it speedier. It may be obvious that these approaches can be combined, while they also share effects with the other remedies discussed.

### *Increasing resources*

This may seem straightforward, but there are difficulties involved, the most important being that it is impossible to properly allocate additional resources if it is not clear where the bottle neck of the process is located. Currently the system appears to be assuming that judges are the crucial resource. There are several barriers to increasing the number of judges, and it is therefore unsurprising that attempts have been made to increase judicial capacity in other ways, for instance by way of the introduction of a "Senior Registrar".<sup>523</sup> There is a risk with that approach, as it effectively involves a shift from judicial to executive determination, i.e. the creation of institutionalized justice. While that may be appropriate in principle,<sup>524</sup> it should not be introduced by stealth under the guise of administrative efficiency. The move to expanding judicial capacity may also be misconceived, because it is unclear how judicial resources are affected by other resources and there is no information available about critical paths in the current practical operation of the Family Courts. How the PHP affects those resources is unclear, no information has been provided as part of the PHP pilot project documents. My observations and the comments from practitioners confirmed that PHP cases were treated with priority, which is unfortunate, as it leads to unreliable information about how the PHP process would operate in normal conditions.

### *Reducing the number of cases*

Reducing the number of cases that reach the stage of judicial involvement can be achieved in three ways. The first involves a further increase in non-adjudicative interventions. There is a limit to the effectiveness of that approach, which is governed by an economic principle, that of marginal efficiency.<sup>525</sup>

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<sup>521</sup> This was the conclusion of both Law Commission reports that considered the operation of the Family Court: New Zealand Law Commission supra n328; New Zealand Law Commission supra n 137; and see Taylor supra n110, 362-365.

<sup>522</sup> My surveys found that practitioners consider that many of the perceived disadvantages of the adversarial mode of litigation would actually disappear if the process could be made to operate much faster, see chapter 20.

<sup>523</sup> See for the Family Court's urgency to introduce this role: Boshier PF "The Three Changes I Would Most Like to See Occur in the Next Three Years" Speech to the NZLS Family Law Conference, Auckland, 17-18 September 2009. See for a discussion in the context of the issues raised in this section of the thesis: Zondag supra n470.

<sup>524</sup> This approach is, it can be argued, already used in many areas, such as employment and ACC.

<sup>525</sup> First described by Keynes, in the context of the efficiency of the application of capital; i.e. rational investment decisions. The principle may be described as the relationship between the costs involved in resolving one extra case through non-litigation intervention and the reduction of costs by reducing the number of cases that require determination by one case. Assuming that the alternative processes are normally more efficient and that the quality of outcomes is generally the same, the theorem would hold

Secondly, access to judicial interventions can be restricted.<sup>526</sup> Thirdly, non-court determinations could be introduced, for instance specialist tribunals<sup>527</sup> or by allowing privatized, consensual, determinative interventions, for example arbitration.

### *Improving overall efficiency*

The need to improve the efficiency of the system has often been emphasized. The Royal Commission commented that the proposed Family Court should be staffed with personnel of high calibre, that it should have clearly delineated responsibilities to the community, proper funding and best use of resources.<sup>528</sup> This theme was repeated in the Boshier Report and in both Law Commission Reports on the Family Court.<sup>529</sup> The Government endorsed these Law Commission suggestions, considering: <sup>530</sup>

*That the largest gains for the court system can be achieved most quickly and economically by focusing effort on making improvements to court processes. Process improvements are therefore accepted as a priority in the short term.*

Given that context it is surprising that there has been very little structured attention to the actual organisational operation and operational efficiencies of the Family Court system,<sup>531</sup> which has a substantial annual cost.<sup>532</sup> In its current structure, the Family Court organisation is a complex entity. The Family Courts are a division of the District Courts, have no formal inherent jurisdiction, and rely entirely on the bureaucratic organisation of the Ministry of Justice for their administrative and logistical apparatus and other infrastructure. This also means that the therapeutic function of the Family Courts is not executed as part of the judicial aspect of the Court organisation, as it was clearly intended, but is in effect entirely under executive control and direction. The dependence of the judiciary on the executive branch for administrative organisation and resourcing raises practical issues that can be traced back to New Zealand's executive model of court administration that was exacerbated in 2003 when the Department for the Courts was amalgamated within the Ministry of Justice. The problems caused by this model are well recognized<sup>533</sup> and include:

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that alternative interventions will be used to the point that the effort involved in resolving one additional case is less than the effort involved in resolving that case through the litigation process.

<sup>526</sup> This response requires that thresholds are created that restrict access to the judicial process. Thresholds can be organized by directing that certain non-judicial processes must be traversed before the litigation option is available, or by exclusion of specified substantive issues. An example is Australia, where a certificate from a dispute resolution provider is required before a parenting matter can be filed. There is anecdotal evidence that the effect of such compulsion merely is that parents "go through the motions" of dispute resolution, only to obtain the certificate: see for instance the opinion of an experienced practitioner (last accessed 20 March 2009) at: <http://australiandivorce.blogspot.com/2008/04/going-to-court-about-your-children-step.html>.

<sup>527</sup> One of the suggestions that was made in Australia, see chapter 10.

<sup>528</sup> Beattie et al supra n17, 147.

<sup>529</sup> With the 2003 report stating that its recommendations that involved requiring efficiencies and extra resources, should be given priority: New Zealand Law Commission supra n327, 215.

<sup>530</sup> New Zealand Government *Government Response to Law Commission Report on Delivering Justice for All, October 2004* (Wellington, New Zealand Government, 2004), 40.

<sup>531</sup> The closest being the "baseline" reviews that followed the merger of the Department for Courts into the Ministry of Justice, and which was highly critical of everything organisational and administrative in the Department for Courts. This report reads like a highly political document, both in what it represents politically (organisationally integrating policy development and implementation through the operation of the courts) and from a managerial perspective (setting a base line for future evaluation and long-term planning). See: Ministry of Justice supra n346.

<sup>532</sup> The overall costs of the "District Court services" are reported as over \$150 million (2006-2007 year), but there is no specification of those numbers: Ministry of Justice *Annual Report "Delivering First Class Justice Services* (Wellington, MoJ, 2007), 75. This had increased to more than \$172 million for the 2007-2008 year: Ministry of Justice *Annual Report 2007 - 2008* (Wellington, MoJ, 2009).

<sup>533</sup> See for instance a comprehensive report prepared for the Canadian government: Canadian Judicial Council *"Alternative Models of Court Administration"* (Ottawa, Canadian Judicial Council, 2007).

- Budgeting and resourcing difficulties
- Divided loyalties of the court staff
- Lack of judicial input in executive decision making and prioritizing
- Dependence of the judiciary on the executive for operational data and statistics
- Reliance of the judiciary on relatively low-ranked bureaucrats for the implementation of administrative or procedural reforms
- A direct impact from governmental structures on judicial operation and hence decision-making
- An appreciation by the public that the courts are part of the Ministry of Justice, rather than a separate branch of government<sup>534</sup>
- Lack of accountability and transparency, both for the efficiency of the judiciary and for the executive departments providing administrative and logistical support
- Lack of clear quality standards and ways to ascertain these
- Complexity in organisational structures and communication between judicial and executive personnel
- Impediments to long-term strategic planning

These problems have direct effects on the efficiency of the overall court process, and thereby on its capacity and the speed by which it is able to resolve cases. There can be no doubt that the users of the legal system consider it to be inefficient, slow, overly bureaucratic and excessively costly.<sup>535</sup> It is virtually impossible to obtain any information on the actual operation of the administrative and logistical apparatus of the Family Courts,<sup>536</sup> apart from the highly abstract statistics that are produced by the Ministry of Justice, and the nebulous organisation charts and annual reports that it publishes. Employees of the Ministry are secretive about court data and actively dissuade research into the Family Courts' operation.<sup>537</sup> The attitude within the public service that "*data collection extrapolation and interpretation is not a priority*"<sup>538</sup> seems to continue unabated. The information provided about the Family Courts in the Ministry's annual reports is extremely limited, despite these being subtitled with the slogan "*Delivering first class justice*".<sup>539</sup> The most recent annual report<sup>540</sup> provides that the Ministry managed 91,300 substantive applications for the Family Courts and supported 20,000 sitting hours in the 07-08 year.<sup>541</sup> In terms of quality of services, the report contains the appraisal that 90% of survey responses about Family Court cases rate the management/file preparation as "meeting expectations or better". There also is 90% survey response that rates "courtroom support as meeting expectations or better". These responses are obtained through six-monthly surveys of a sample of judges, where the answers to the survey questions are measured on a 5-point scale where "meets expectations" is the

<sup>534</sup> I.e. "access to justice" becomes a budget- and executive issue rather than principled fundamental rights issue.

<sup>535</sup> Or, as it was carefully framed by the Government: "*there are some real concerns about the operation and administration of the court system. The Government accepts improvements are necessary to ensure that people feel their cases are dealt with quickly and efficiently, that they have had a chance to argue their point, and that they achieve resolution*": New Zealand Government supra n330, 2.

<sup>536</sup> Or as the Law Commission framed it: "*The statistical information that is available, however, does not assist in making any quantitative assessment of the process*" and "*Throughout the preparation for this paper, we have encountered problems in relation to accessing information about how the Family Court system is operating.*", and "*Statistical information is either simply not available, unreliable or not collected consistently. As noted in the 1993 Boshier Report, there is an alarming paucity of information.*": New Zealand Law Commission supra n486, 2 and 49-51.

<sup>537</sup> As shown in the Ministry's disapproval of my desire to research and evaluate the PHP pilot. (A copy of a letter from the Ministry is available from the author)

<sup>538</sup> As the Law commission noted in its preliminary paper, New Zealand Law Commission supra n486, 53.

<sup>539</sup> Ministry of Justice supra n532. It is difficult to find annual reports that are less informative than those produced by the Ministry of Justice.

<sup>540</sup> Ministry of Justice supra n532.

<sup>541</sup> Given that there are 43 Family Court Judges, this number provides interesting information about the proportion of judges' work spent on preparation and other activities.

median value, while there are also “formal and informal feedback processes”.<sup>542</sup> In practical terms there is simply no real information available about the quality and efficiency of the administrative organisation of the Family Courts, or about the costs of the Family Court system to the taxpayer.<sup>543</sup>

Without any significant data it is very difficult to reach conclusions about possible improvements in efficiency of the court administration, but it is beyond doubt that huge improvements could be made by modifying and modernizing the administration of the Family Courts. Whether one is involved with the system as party to a dispute, as a lawyer involved in a case, or in the context of talking with and observing registry staff and their work, it is abundantly obvious that the Family Court administration is highly inefficient.<sup>544</sup> While I have not met one Family Court employee who wasn't motivated to perform his or her tasks as required, the system is simply designed and managed in a 20<sup>th</sup> century bureaucratic and utterly inefficient manner. The ICT systems of the Family Court are well behind what would be practically possible or even what may be called contemporary standards. The central information system to support the courts' primary process is the Case Management System (CMS), which was introduced with much fanfare in 2003. The inaccuracy of the data in this system is notorious and it appears incapable of generating the sort of information that is necessary for long term planning. It is technologically backward<sup>545</sup> and is surrounded by a level of secrecy that appears designed to hide its shortcomings.<sup>546</sup> The current organisation is incapable of even thinking of ways to make real use of modern technology in the core process of the Family Courts, obviously an area where immense possibilities are conceivable and available.<sup>547</sup> Apart from improving administrative and logistical procedures, the current developments in the use of information technology in alternative dispute resolution, have great potential for use in parenting disputes, but these developments seem to escape the Ministry's attention. Although increasing the system's efficiency has been recognized as a logical first step to resolving one of the most poignant current problems there appears to be little interest in seriously investigating this approach. The current organisational dogma of large, bureaucratic and monolithic structures has clearly proven not to result in the efficiencies and qualities that are required. It is suggested that this is a topic that requires the most urgent attention.

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<sup>542</sup> In other words, these quality surveys measure the opinions of judges about file management and courtroom assistance as provided to the judges, and measured on a rather unbalanced scale. There is no mention at all about the actual court users. See annual report at 75.

<sup>543</sup> Pilot programmes like the PHP and the mediation pilot rely entirely on policy input, budget, administrative- and logistical support from the Ministry, and are being evaluated by the Ministry itself or by “independent” researchers that are directly connected to the Ministry. Evaluations of such programmes never contain complete datasets or even verifiable statistical calculations, and tend to rely heavily on qualitative research. There is no information about the economic characteristics of such pilots and budgets and budget evaluation are not disclosed.

<sup>544</sup> Or as the Principal Family Court Judge expressed it: “Our processes can be cumbersome and we over manage some of our cases, spending too much time on them, while not reaching others that really do need time, more speedily.”: Boshier supra n523.

<sup>545</sup> In the words of the Principal Family Court Judge: “Over 87,000 applications are filed in the Family Court each year, and all of them are initiated by paper. In an effort to manage this unwieldy scene, we have created case flow management systems and the Court has an electronic case management system. But the case management system, or CMS as it is called, does not manage our casework, it only records the extent of our management.”: *ibid*.

<sup>546</sup> Ultimately, it contains nothing but process data, no substantive information about parties or cases, so there is no reason why the Ministry should be overly precious with the system and the data in it.

<sup>547</sup> As an example, during almost all hearings that the author witnessed, substantial time was spent discussing whether all parties and the court had the same up-to-date documents and reports. A relatively simple system to file documents online would reduce all of this confusion, while it would also substantially reduce the amount of back-office time involved with dealing with a variety of letters, emails, faxes and couriered documents.

### *Improving hearing process efficiency*

The PHP process provides a good example of improving hearing process efficiency. It has characteristics that increase judicial involvement and it would therefore, at first glance, appear counterproductive. However, the judges' involvement is concentrated at the early stages, and has the objective to reduce the number of cases completing through the system, to reduce the scope and depth of cases continuing through to a full hearing, and to streamline the process for those cases. While these changes are understandable in terms of efficiency, they must be balanced with their impact on quality.<sup>548</sup> It must be noted, that from the four approaches to reducing delays, this is the only option that can be directly effected through the judges' involvement.

From the range of possible methods to remedy the perceived problems of the adversarial process discussed in this chapter, the PHP innovation includes aspects of introducing alternative processes, changing the character of the court process, changing the users of the system and improving hearing process efficiencies. As can be seen, the common element of the innovations included in the PHP is that they are all based on changes in the role and powers of the judges. In that sense, the PHP seems to represent a judicial answer to the perceived problems within the current operation of the Family Court, rather than a legislative or an executive answer. This raises the issue of "judicial leadership", and this must now be considered.

## **9 JUDICIAL LEADERSHIP IN THE FAMILY COURT**

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The Family Court was designed to include a therapeutic characteristic.<sup>549</sup> Therapeutic jurisprudence evaluates the legal system by applying social science criteria.<sup>550</sup> Legal interventions are thus analysed by way of the benefits and burdens they are likely to produce for the mental health and wellbeing of those involved,<sup>551</sup> and law and legal process are studied as therapeutic agents, within a normative context.<sup>552</sup> Therapeutic justice involves the evolution of a court's role from that of an independent umpire to a proactive problem solver. This raises important practical questions, for instance about the best way to achieve optimal outcomes or the limits of intervention. Introducing a therapeutic role unavoidably converts an institution into an active social agent, a fundamentally different role from that of courts in the traditional Common Law sense.<sup>553</sup> A further consequence is adjustment of legal processes to attune them to therapeutic objectives. ADR methodology and inquisitorial techniques are examples of procedural adjustments that allow a therapeutic objective. Another possibility involves the use of triage techniques such as those used in the medical world, i.e. the use of diagnosis and differential treatment,

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<sup>548</sup> Natural justice is one of the aspects of quality, and this will be discussed in the evaluative chapters.

<sup>549</sup> Beattie et al supra n17.

<sup>550</sup> Particularly from the disciplines dealing with mental health in a social and psychological context. The Boshier report, commented: *"In our view a good many cases should be subject to early counselling intervention and on-going conciliation in a way more consistent with a mental health model than a justice model."* Boshier et al supra n17.

<sup>551</sup> Schepard supra n40.

<sup>552</sup> I.e. the results (in terms of benefits or damage) cannot be proven in absolute terms by empirical research and by applying the scientific method. Evaluation of interventions involves a comparison with behavioural norms and standards in a social context.

<sup>553</sup> For an in-depth analysis of the societal roles of courts as compared between common law and civil law systems see Damaska supra n148.



which in the court environment is sometimes referred to as “differentiated case management”. Although the Family Courts have thus been conceptually different since their inception, and consequently developed differently from the ordinary courts, this is not always understood. Their place within the legal system has had the effect that their functioning continues to be understood by litigants<sup>554</sup> in the traditional (common law adversarial) context. This may well be a factor that explains why the average consumer of court services is rather dissatisfied with the product supplied: it is simply different from what is being sought. Additionally, the potentially advantageous outcomes achieved by therapeutic justice must be weighed against other critical values, of which due process of law (natural justice) is the most relevant. Therapeutic jurisprudence does not provide answers, or even a methodology for that evaluation.<sup>555</sup> The balance between therapeutic and legal intervention must logically follow formal law and policy development, and be implicit in the way the Family Court considers its role and process. In the context of parenting disputes this may therefore be analysed by considering the published views of judicial authority. The Principal Family Court Judge has views that have been well documented over a substantial period of time. His Honour considers his role to be one of judicial leadership,<sup>556</sup> implying that he is advocating for his views to be translated into court process, or even perhaps in legislative directions.<sup>557</sup> It is interesting to note that the Australian Family Court displays a similar concept of judicial leadership.<sup>558</sup> There the Family Court judiciary has had a leading role in developing not only the Family Court and its jurisdiction and procedure, but has indeed been also taking a leading role in developing and testing new approaches in close partnership with social science academics.<sup>559</sup>

The New Zealand Principal Family Court Judge is on record as advocating for increased inquisitorial powers,<sup>560</sup> stronger case management,<sup>561</sup> strengthening the compulsion powers of the Family Court,<sup>562</sup> increasing the openness of the Family Court,<sup>563</sup> increasing formality in order to achieve greater authority,<sup>564</sup> introducing a “judicial registrar”,<sup>565</sup> distancing ADR processes from the formal court process,<sup>566</sup> providing information and education programmes for parents,<sup>567</sup> and increasing the role of children in the court process.<sup>568</sup> Apart from judicial speeches and presentations both nationally and

<sup>554</sup> And no doubt to some extent by practitioners as well.

<sup>555</sup> Winick supra n148, 197-198.

<sup>556</sup> Boshier supra n319.

<sup>557</sup> The appropriateness of such ambitions will be discussed elsewhere.

<sup>558</sup> Harrison M *Finding a Better Way. A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Canberra, Family Court of Australia, 2007); and see Bryant supra n160, who talks of the “*Family Court taking a lead role in promoting child centered practice.*”

<sup>559</sup> See Harrison supra n558.

<sup>560</sup> See Boshier supra n514; Boshier supra n515; Boshier supra n311.

<sup>561</sup> Boshier PF “Judicial Control over the Trial Process.” Speech to the Australian Institute of Judicial Administration 22th AIJA Annual Conference, September 2004.

<sup>562</sup> Boshier PF “Transforming Dispute Resolution in the Family Court” Paper presented at the 4th annual LexisNexis Child Law Conference, Auckland, March 2005, and the article based on that paper: Boshier PF “Transforming Dispute Resolution in the Family Court” NZFLJ (2005) 5, 53-57.

<sup>563</sup> Boshier PF “The Family Court and the Future” Speech at the Law Faculty, University of Otago, Dunedin, July 2004.

<sup>564</sup> Boshier PF “Family Law: The New Era - Professionalism in the Family Court” Paper presented at the New Zealand Law Society Family Law Conference, Wellington, October 2005.

<sup>565</sup> Boshier PF “Better Outcomes in Family Disputes for New Zealanders” Paper presented at the International Forum on family relationships in transition, Australian Institute of Family Studies, December 2005; Boshier supra n7.

<sup>566</sup> Boshier et al supra n17; Boshier PF “The Family Court in a Changing Climate” Speech to the New Zealand Psychological Society, Wellington, 30 August 2004.

<sup>567</sup> Boshier PF “A Vision for the Future: Dispute Resolution in the New Era of Child Law” Paper presented at the Lexis Nexis Child Law Conference, Auckland, May 2006.

<sup>568</sup> Boshier PF “The Care of Children Act - Does it Enhance Children's Participation and Protection Rights?” Paper presented at the Children's Issues Centre 6th Child and Family Policy Conference, Children and young people as citizens: Participation, provision

internationally, Judge Boshier has been active in promoting his views to parliamentary subcommittees, been proactive in publishing decisions that might otherwise not have been made public but that were apparently considered to be contributing to public debate,<sup>569</sup> or that were seen as particularly instructive.

While judicial activism is a well understood concept in Common Law jurisdictions,<sup>570</sup> judicial leadership is much less understood, and seems to also involve active lobbying, media appearances, publicly discussing views on a wide range of topics, the use of the judicial role to disseminate information through judgments and using procedural innovations to achieve substantive goals. While judicial activism is confined by the cases coming before a court, and normally operates only within higher and appeal courts, judicial leadership can apparently be practiced by judges of inferior courts as well, and extends beyond judicial decision making. The PHP process demonstrates another avenue of judicial leadership; it can operate by changing the role of the judge in order to achieve outcomes that would otherwise require legislative or executive involvement. Although the question is outside the scope of this thesis, it is doubtful whether there is a constitutional basis for this new phenomenon.<sup>571</sup>

### *Summary of Part II*

In this part I discussed the context of parenting disputes and their legal treatment. I concluded that the decline of marriage and the decreasing relevance of the associated concept of the “traditional family” is not a social pathology itself, but that it presents questions for which no answers have yet been found, while the state’s interventions may well be a cause, rather than a possible solution to the resulting social problems. I traversed the development of law and legal process in New Zealand, and the dissatisfaction with current legal process and the institutions implementing it. I analysed in detail the alleged cause of the problems, the nature of adversarial litigation, and presented a structured way of categorizing proposed remedies for the perceived problems. I concluded that the PHP is made up of innovations within the judicial sphere of influence, but that it fails to address the most important and permeating problem; that of the organisational efficiency of the family court system. Finally I observed and expressed my doubts about the constitutional validity of a rather novel phenomenon: “judicial leadership”.

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and protection, University of Otago, Dunedin, July 2005; Boshier PF “Contact and Relocation: Focusing on Children; Involving Children in Decision Making: Lessons from New Zealand” Speech to the Centre for Children and Young People, Byron Bay, NSW, May 2006; Boshier *supra* n7.

<sup>569</sup> At times this has lead to controversy, as in the “*Jones v Skelton*” saga, which attracted much publicity and public comment, and where His Honour considered that providing details would assist the general public’s understanding of the matter and the court’s position in it. This then lead to litigation against the Family Court.

<sup>570</sup> But it must be noted that there is much disagreement about its appropriateness or its limits.

<sup>571</sup> This can be contrasted with the statutory role of the Principal Family Court Judge, which is responsibility for the expeditious discharge of the business of the Family Court in consultation with the Chief District Court Judge; Family Courts Act 1980, s6.

# PART III

## A NEW APPROACH IN AUSTRALIA AND NEW ZEALAND

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### *Introduction*

Similarities between Australia and New Zealand include legislation and legal systems, the social developments surrounding marriage and divorce, and the problems arising from the maladjustment between social developments and the evolution of family law. The approaches to these problems are, perhaps unsurprisingly, also comparable. The Australian procedural efforts are ahead of those in New Zealand and have been expressly acknowledged as the Genesis of the PHP innovation. It is therefore helpful to discuss the Australian situation before describing the New Zealand innovation and comparing and contrasting the two.

## 10 AUSTRALIA

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### *The Australian Family Law system*

It is outside the scope of this thesis to describe the Australian family law system in detail. The principles in family law are comparable with New Zealand,<sup>572</sup> and developments in law and legal process are similar. Since 1976 Australia has had a specialized and superior federal court of record for family matters, while some cases could also be brought in the Federal Magistrates Court. In May 2009 the Federal Attorney General announced<sup>573</sup> that the family law jurisdiction of the Magistrates Court will be merged<sup>574</sup> into the Federal Family Court.

### THE INTRODUCTION OF THE CHILDREN'S CASES PROGRAM (CCP)

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Australia's divorce law has the same roots as that of New Zealand with all state legislation ultimately based on the English Matrimonial Causes Act 1857. A unifying exercise took place with the introduction of the Matrimonial Causes Act 1959 (Cth), but the Australian constitution prevented federal legislation in the areas of custody and guardianship. Eventually almost all states referred their legislative powers in this area to the Commonwealth, thereby giving jurisdiction over these matters to the Federal Family Court. In 1983 it obtained its own rule making powers,<sup>575</sup> resulting in a largely federalized family law system. A 1994 committee convened to simplify the family rule system defined the ideal procedure as one that provides as little complexity as possible, that offers the opportunity to determine disputes by methods other than trial, that provides a system tailored to the 95% of applications that will settle in any

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<sup>572</sup> As everywhere, in Australia the relationship between social developments and family law and procedure is one of ongoing development. For a recent sketch that places the CCP/LAT process in this development, see Boland J "Family Law: Changing Law for a Changing Society" ALJ (2007) 81, 554-576.

<sup>573</sup> As reported in: Gibbs K "Federal Magistrates Court to Be Scrapped" The New Lawyer (2009) 5 May Issue.

<sup>574</sup> This resulted from a report into the efficiency of the court operations in family matters, see: Semple D *Future Governance Options for Federal Law Courts in Australia: Striking the Right Balance* (Canberra, Attorney-General's Department, 2008).

<sup>575</sup> The unifying legislation had retained this within the legislature and executive branches.

event, and that ensures that matters that proceed to trial will be determined in a fair, equitable and timely fashion.<sup>576</sup> It also commented on the desirability of court powers that would allow case management in a more structured and interventionist approach. This laid the foundation for developments that introduced increasingly inquisitorial approaches. A number of reviews and reports by the Australian Law Reform Commission also touched upon proceedings in the Family Courts,<sup>577</sup> but their mainly legal analyses did not provide much support for drastic changes in court procedure. In May 2000 the (Federal) Australian Government established a “Family Pathways Advisory Group” to advise it on how to: “*achieve an integrated family law system that is flexible and builds individual and community capacity to achieve the best outcomes for families*”. This group produced a report in 2001,<sup>578</sup> recommending a holistic view of the family law system with court proceedings as a last resort only, but it did not specifically comment on the legal process itself. In 2003 a standing committee of the House of Representatives was given the task of holding an inquiry into custody arrangements following separation. The Family Court made strong submissions,<sup>579</sup> advocating for less adversarial trial methods, and promoting its Children’s Cases Program (CCP) pilot, which was underway at that time.<sup>580</sup> The resulting report “Every Picture Tells a Story” focused on presumptions of shared parenting and the importance of reducing separation conflict.<sup>581</sup> It suggested the formation of a “Families Tribunal” that would deal with all but the most difficult cases. That suggestion was not followed by the government, but another suggestion was accepted: a less adversarial approach to litigation involving the care for children.<sup>582</sup>

The Australian Family Court has taken a leading role in developing new approaches to legal process, particularly in cases that involve the care of children, and it has not shied away from political lobbying to advocate for its views and suggestions. In 1997 it undertook a pilot for cases involving allegations of serious child abuse.<sup>583</sup> This provided some empirical support for the proposition that a team effort under strict judicial management encouraged early identification of the issues, and could lead to earlier

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<sup>576</sup> Harrison supra n558, 20.

<sup>577</sup> Australian Law Reform Commission *For the Sake of the Kids: Complex Contact Cases and the Family Court* (Report no. 73) (Canberra, ALRC, 1995), which generally complained about the disadvantages of adversarial process, particularly that the paramount principle requires that the interests of the child, and not the dispute between the parents should be the focus of proceedings. Its recommendations include a focus on early determination of complex cases and the use of alternative methods of dispute resolution. Australian Law Reform Commission *Seen and Heard: Priority for Children in the Legal Process* (Report no.84) (Canberra, ALRC, 1997), which among its many recommendations makes some reference to a desirability to use more inquisitorial interventions. Australian Law Reform Commission supra n577, a general review of the federal court system, which took a broader approach in comparing adversarial and inquisitorial approaches, and which was critical of the quality of the procedural changes in the Family Courts. Its findings were based on extensive empirical data gathering, but were severely criticized by the then Family Court Chief Justice.

<sup>578</sup> Family Law Pathways Advisory Group *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Canberra, 2001), and see Commonwealth of Australia *Government Response to the Family Law Pathways Advisory Group Report (out of the Maze - Pathways to the Future)* (Canberra, Attorney General’s Department, 2003).

<sup>579</sup> Harrison supra n558, 42.

<sup>580</sup> See infra n593 and associated text.

<sup>581</sup> House of Representatives Standing Committee on Family and Community Affairs *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Canberra, the Parliament of the Commonwealth of Australia, 2003). It is noted that this report and the findings of the committee appear extremely anecdotal in character and supported by rather one-sided analysis of the relevant socio-psychological material.

<sup>582</sup> It has been suggested that “accepted” in this sentence should rather be read as “seized upon” in the coincidental circumstance that the committee report’s suggestion of a tribunal was not constitutionally viable, but that the Family Court was at the time trialling its CCP programme: Chisholm R “‘Less Adversarial’ Proceedings in Children’s Cases” *Family Matters* (Australian Institute of Family Studies) (2007) 77, 28-31.

<sup>583</sup> The “Magellan” project which ran in two registries with assistance from a research team from Monash University. Although it involved only 100 cases, it was subsequently rolled out across Australia.

resolution and to outcomes that were more likely to “stick”.<sup>584</sup>

This approach was then extended to disputes between parents about the care for children following separation. A pilot project started in 2004 under the name Children’s Cases Programme (CCP).<sup>585</sup> Its main plank was to achieve what is now called the Less Adversarial Trial (LAT). The approach has been described as a *“bold step towards bridging the gap between common law systems of litigation and the European civil law system”*,<sup>586</sup> and as *“reforming the common law system”*.<sup>587</sup> The legislative changes that formalized this LAT model are said to have *“swept away the restrictive rules of evidence and placed the control of the proceedings in the hands of the judge”*.<sup>588</sup> Parties are no longer free to engage in a *“forensic war between each other”* while at the same time the *“highly developed system for mediation and resolution of disputes”* has been enhanced with the introduction of the role of a family consultant.<sup>589</sup> This role, previously known as “counsellor” or “mediator”, now describes an individual with a social science background and experience, who acts as an advisor to the parties and the court. The perceived disadvantages of adversarial practice, together with the rising costs of litigation and the rapidly increasing numbers of self-represented litigants were said to be driving these fundamental procedural reforms.

The design of the CCP process was strongly influenced by study and observation of German process in family matters. The aspects of German process that appear to have intrigued the developers of the CCP were the judge’s powers to engage directly with the children and the parties, the opportunity to bypass the influence of lawyers on the proceedings, the role of social workers by being involved with the family before the court and throughout the court process, and the possibility of addressing the parents’ issues in a way that acknowledges their emotions, but only in order to help them focus on the future needs for the children. The designers of the CCP appear to have been enthused most by the seemingly absolute character of the powers of the German judges.<sup>590</sup>

Given the potential legislative and constitutional constraints to the CCP experiment, the Family Court sought an opinion from Dr Griffith QC, a former Solicitor General, about the preliminary design of the CCP process. Given the proposed consensus that would be required<sup>591</sup> before participating in the pilot and given that the ultimate aim of the proceedings was the (legislated) welfare and best interests principle for the child, Griffith considered that the process remained constitutionally valid and did not amount to an inappropriate use of judicial powers. He concluded that the restrictions on evidence were not out of step with the already accepted procedure in children’s matters, and that natural justice would

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<sup>584</sup> This term is regularly found in documents promoting both the CCP and PHP innovations. Its meaning includes transparency, compliance and durability of outcomes.

<sup>585</sup> The decision to commence that project was taken after a family court judge visited Germany and France to examine “European approaches” first hand. See foreword by the Honourable Diana Bryant, Chief Justice of the Family Court of Australia in Harrison *supra* n558.

<sup>586</sup> *Ibid*, ix.

<sup>587</sup> *Ibid*, 35.

<sup>588</sup> *Ibid*, ix.

<sup>589</sup> *Ibid*, ix.

<sup>590</sup> *Ibid*, 40-42. Note that the vast differences between the entire judicial structure and particularly between the education and experience of judges in Germany and Australia were largely bypassed in this discussion, and dismissed with the statement that “Australian judges have proved themselves to be adaptable and enthusiastic about adopting new approaches”.

<sup>591</sup> The CCP relied on a provision in the Family Law Act 1975 that allowed dispensation of certain procedural stipulations with the consent of the parties, see Meredith G “The Children’s Cases Program Pilot” AFL (2005), June Issue.

not be compromised as long as determinations were made impartially, on the basis of all relevant material, and that parties were given adequate opportunity to be heard. Reference to the '*parens patriae*' principle was made: the sovereign (now replaced by the democratically elected government), through the legal system, exercises care over subjects who cannot fend for themselves.<sup>592</sup>

The pilot started in two Family Court Registries in March 2004, and included an evaluation process for which data was collected until December 2005. However, before the pilot was completed, the Family Court decided that the programme would be offered beyond the pilot phase. By that time it also became apparent that legislative amendments to introduce 'Less Adversarial Trials' were on the cards.<sup>593</sup> The issue thus changed from evaluation of the CCP to how it would be implemented. In 2005 the Family Court discussed legislative amendments with the Attorney General's department, and made further submissions to the standing committee that had produced the "Every Picture Tells a Story" report, based on the then twelve months experience with the CCP in the two pilot registries.<sup>594</sup> The Court's views strongly influenced the drafting of the new Division 12A, which legislates the LAT process, and came in force in July 2006.<sup>595</sup> The changes in court process must be seen in the context of a much wider reform of family law in Australia, aimed also at providing dispute resolution and relationship support services at community level, a development that (among other objectives) sought to reduce the workload of the court system. The 2006 amendments to the Family Law Act 1975 also solidify the pressure towards shared parenting by introducing a rebuttable presumption of shared care,<sup>596</sup> apparently as a result of effective lobbying by fathers' rights groups.<sup>597</sup> A potential effect of the presumption is an increase in the number, complexity and severity of disputes and thus an increase in the workload for the court system,<sup>598</sup> which it now meets with its new procedural and therapeutic<sup>599</sup> powers.

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<sup>592</sup> Harrison supra n558, 45. For a discussion of the *parens patriae* principle, see above chapter 6.

<sup>593</sup> A discussion paper of November 2004, already strongly hinted at this: Australian Government *A New Approach to the Family Law System: Implementation of Reforms, Discussion Paper* (Canberra, 2004), 15.

<sup>594</sup> I.e. this "experience" was based on only some 100 cases, and before the evaluation report was available.

<sup>595</sup> Harrison supra n558, 48.

<sup>596</sup> "Except where that would be contrary to the child's best interests", s60B Family Law Act 1975(Cth). And see Australian Government supra n593, 10-11. The underlying assumptions of shared parenting in the Australian context are discussed in McIntosh JE "Legislating for Shared Parenting: Exploring Some Underlying Assumptions" *Family Court Review* (2009) 47, 389-400, an article that raises more questions than answers. For a discussion of the development towards the presumption in Australia, its operation and an analysis of the early cases, see Howard G "Shared Parenting at Work - the Reality" *AFL* (2008) 20, August Issue. He concludes that the presumption is no solution for the high conflict and intractable cases. See also McIntosh JE and Chisholm R "Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research" *AFL* (2007) 20, January Issue.

<sup>597</sup> Nicholls S "The New Family Dispute Resolution System: Reform under the Family Law Amendment (Shared Parental Responsibility) Act 2006" *Bond University Student Law Review* (2007) 3, Article 3.

<sup>598</sup> An Australian Federal Family Court Judge argued that the law itself is more complex and discretionary, while increasing overlaps with other legislation and continuous change in law and social context add to the complexity: Altobelli supra n133. See also comments by the Chief Justice, who argues that the new streamlining and filtering processes will remove all but the most difficult cases from the Court's case load: Bryant supra n160. For a contrasting view by a former judicial officer see Fogarty J "Family Court of Australia - into a Brave New World" *AFL* (2009) 20(3), 1-24. A reflection on Fogarty's comments in the New Zealand context can be found in Zondag B "The Parenting Hearings Programme - into a Brave New World?" *NZFLJ* (2009) 6, 189-202.

<sup>599</sup> The CCP innovation is explicitly recognized as a therapeutic intervention by the Australian Chief Family Justice, see Bryant supra n160.

## THE EVALUATION OF THE CCP PILOT

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The CCP pilot process included an evaluation process<sup>600</sup> conducted by a team from Griffith University under the leadership of Professor Rosemary Hunter.<sup>601</sup> The evaluation<sup>602</sup> was intended to be based on the first 100 cases to enter the programme in each of the two registries where the process was trialed. It was assumed that that number would be reached by July 2004, with those cases concluding by November 2004, allowing for a completed evaluation early in 2005. In reality the voluntary take-up was much slower and the cases tended to take longer than anticipated. As a result the pilot was ruled off by December 2005 with a total of 168 completed cases. The evaluation suffered from substantial changes to the CCP process during the pilot period, and from procedural differences between the two participating registries. According to Hunter, the decision to introduce the process before the trial was concluded reduced the enthusiasm of research participants and the relevance of the entire evaluation exercise.<sup>603</sup> The evaluation was designed to include quantitative and qualitative methodologies including analysis of court data, interviews with parents and children, self-completion diaries for judges and monitoring of media reports. The latter of these was abandoned when it became evident that there was little media attention apart from that generated by the court itself. The judges' diaries provided no meaningful data as some judges refused to keep a diary and the others did so for limited periods or in idiosyncratic ways.<sup>604</sup> The interviews with children were eventually replaced by a (very limited) research project by Dr Jennifer McIntosh. Hunter produced an extensive report by June 2006, a summary presentation by August 2006, and journal articles based on the study by November 2006.<sup>605</sup>

Hunter records the main objective of the CCP as “*achieving better outcomes for children*”, with “*making family law cases more timely and cost effective*” as a secondary objective. Because these objectives cannot be measured directly, she assumed that better outcomes for the children will be achieved if the court process:

- Is not prolonged
- Minimizes adversarialism
- Does as little damage as possible to the parental bond
- Is child focused and provides assistance in achieving cooperative parenting
- Results in parties being satisfied about the way their case was conducted and its outcome
- Effectively resolves the dispute
- Avoids future returns to court

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<sup>600</sup> The integrated approach to the evaluation of the pilot was consistent with the Family Court's promulgated concern for policy and procedure development on the basis of research evidence.

<sup>601</sup> A researcher who had previously demonstrated strong evidence based approaches and did not unequivocally underwrite the opinion held by most from a social science background, namely that litigation and lawyers must be avoided at all costs. See for instance Hunter *supra* n455, where she contrasts policy advocacy of alternative dispute resolution and demonization of lawyers and court proceedings with research evidence that calls those assumptions into question, concluding that restrictions on the availability of publicly funded legal aid does not necessarily lead to parties choosing alternative methods, that lawyers are in fact less adversarial than self-represented litigants, and that lawyer representation and litigation may produce more satisfactory and appropriate outcomes than mediation in some family disputes.

<sup>602</sup> Hunter R *Evaluation of the Children's Cases Pilot Program: A Report to the Family Court of Australia* (Nathan, Queensland, Socio-Legal Research Centre, Griffith University, 2006), 7.

<sup>603</sup> *Ibid*, 8.

<sup>604</sup> *Ibid*, 10.

<sup>605</sup> See n602, Hunter R "Evaluation of the Children's Cases Pilot Program" PowerPoint presentation, available at [http://www.familycourt.gov.au/presence/connect/www/home/about/less\\_adversarial\\_trials/](http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/); Hunter R "Child-Related Proceedings under Pt V I I Div 12a of the Family Law Act: What the Children's Cases Pilot Program Can and Can't Tell Us" *AJFL* (2006d) 20, 9-25; and Hunter R "Achieving Better Outcomes for Children" *LSJ* (2006) 44, 68-70.

Although the evaluation is carefully positive about most of these aspects, Hunter emphasizes that this success was highly dependent on the receptiveness of the parties for this type of intervention,<sup>606</sup> while some of the benefits might turn out to be unsustainable in the long term because of the special attention and extra resources that were available for the CCP pilot cases. Hunter found that CCP cases did not produce a higher rate of settlement, and were less likely to produce sustainable outcomes. Success was also found to be highly dependent on the character and efficiency of individual judges and the manner in which CCP cases were dealt with in each registry (i.e. the administrative support). Flexibility in procedure and reduced formality were described as virtues of the CCP, allowing judges to adjust the process to the requirements of each case. Hunter's evaluation found that the CCP had gone a considerable way towards achieving its stated objectives, but she identified several areas where there remained clear scope for improvement and areas where the evaluation was unable to draw conclusions. Hunter's positive findings were thus substantially hedged by provisos, while the limitations of the evaluation exercise led her to the somewhat ambiguous final conclusion that the CCP pilot *"provides an important platform for the future development of child-related proceedings in the Family Court"*.<sup>607</sup>

McIntosh' study is much more positive in its conclusions, but was based on only a very small sample and was initially presented as *"exploratory"* and as a *"small sub-study which sits besides the larger Hunter study"*.<sup>608</sup> It focuses on the impact the CCP has on parenting capacity and child wellbeing. The research was based on a retrospective design formulated around semi structured personal interviews by telephone. Although Hunter and McIntosh both accepted the presumption that adversarial process exacerbates conflict, there is an important difference between their approaches. Hunter attempted to find empirical proof by comparing CCP cases with a sample of traditional process cases. McIntosh, however, considered that there is an *"ethical mandate"* to integrate therapeutic interventions within dispute resolution, and that:<sup>609</sup>

*The essence of the reform goes beyond the expedition of settlement, to address and accept a new order of social responsibility for ensuring that parenting relationships and family adjustment after separation are not further eroded through adversarial processes.*

Clearly, Hunter remains skeptical whether the court process itself is the culprit and she is unable to prove that empirically, while that is a foregone conclusion for McIntosh, who does not consider the question and sets out on a course that evaluated the court process as if it was a healthcare intervention.<sup>610</sup> I am uncertain whether to attach significance to the fact that Hunter's final report is difficult to obtain, and is rarely referred to in later publications, particularly those emanating from the Australian Government and Family Court, while the McIntosh report is quoted regularly and available online through Government websites. McIntosh appears to be highly involved in further research and experimental developments,

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<sup>606</sup> The required consent for entry into the pilot thus creates a pre-selection of individuals that would be most likely to be positively affected by the type of process on offer, that already had less severe disputes, and/or that perceived benefits of the process in terms of costs and speed. See Hunter *supra* n602, 21-24.

<sup>607</sup> Hunter *supra* n602, 70.

<sup>608</sup> McIntosh J *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being* (Final report to the Family Court of Australia) (Victoria, 2006), 7.

<sup>609</sup> McIntosh JE *ibid*, 6.

<sup>610</sup> It may be unsurprising that Hunter has a legal background, while McIntosh is a child-psychologist.



such as those related to child inclusive proceedings.<sup>611</sup>

Without wishing to detract from its doubtless merits, it is difficult to escape the conclusion that the Australian less adversarial approach was in fact more a product of judicial leadership based on social science assumptions than a real research based innovation. That conclusion is supported by a statement made by the Chief Justice, who remarks that the Court had embarked on the CCP pilot by the time she was appointed and that:<sup>612</sup>

*It was obvious to me that it was a major advancement in the ongoing efforts of the Court to more effectively hear disputes about children, and one that accorded with my own experiences about limitations of conventional adversarial hearings.*

At the time of writing there are no further quantitative empirical studies available that evaluate the process now it has been formally legislated.<sup>613</sup> It is, however, noted that the Australian Family Court considers itself a successful innovator within the Common Law world in this respect, and is actively promoting its less adversarial trial approach internationally.<sup>614</sup>

### FEATURES OF THE LESS ADVERSARIAL TRIAL PROCESS

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The LAT process is implemented through legislation, regulations, rules and judicial directions.<sup>615</sup> Five central principles govern the exercise of the court's powers under it:<sup>616</sup>

- The central focus on the needs of the children and the impact of the proceedings on them
- The managerial role of the court
- The importance of safeguarding the child and parties against violence
- The promotion of a cooperative and child focused mindset
- The avoidance of delay, formality and technicality

The Act provides for mandatory "general duties" in giving effect to the principles, such as deciding which issues require investigation and which can be disposed of summarily, deciding the order in which issues are dealt with and the giving of directions, appropriate use of technology, encouraging alternative means of dispute resolution, dealing with as many aspects as possible on a single occasion and where possible without requiring attendance.<sup>617</sup> Judicial powers are defined broadly, and include the possibility of making interim findings of fact and interim determinations and orders where this may assist determination of the dispute. The Court may at any time appoint one of its family consultants to assist

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<sup>611</sup> For instance McIntosh and Long supra n160 and McIntosh and Long supra n272. See also a joint article with the Chief Justice: McIntosh JE, Bryant D and Murray K "Evidence of a Different Nature: The Child Responsive and Less Adversarial Initiatives of the Family Court of Australia" Family Court Review (2008) 46, 125-136 and an article by the chief justice on the subject: Bryant supra n160.

<sup>612</sup> Harrison supra n558, iii. And see the comments made by the full bench in the first LAT case that was appealed on procedural grounds: *Truman v Truman* [2008] 38 Fam LR 614, at [7] and the footnote to that paragraph.

<sup>613</sup> Although there is a more general evaluation of the reforms proposed: Australian Government *A Framework for the Evaluation of the Family Law Reform Package* (Canberra, AIFS, 2007).

<sup>614</sup> For instance by travelling abroad to give presentations, see Family Court of Australia supra n46, and by providing scholarships to international post-graduate students: Baker H "Family Law Down Under: Can the Old World Learn from the New?" IFL September [2009], 165-173.

<sup>615</sup> Div 12A Pt VII Family Law Act 1975 (Cth); Ch 16/16A Family Law Rules 2004 (Cth); Family Law Regulations 1984 (Cth); Practice Direction No2 of 2006 issued by the Chief Justice of the Family Court on 7 July 2006 (Note that this direction was revoked in March 2009 by Practice Direction No3 2009, which also revoked previous Directions in respect of the CCP programme).

<sup>616</sup> S69ZN Family Law Act 1975 (Cth).

<sup>617</sup> S69ZQ Family Law Act 1975 (Cth).

the parties and/or the Court, and can order the parties to confer with this consultant.<sup>618</sup> The LAT provisions exclude parts of the Evidence Act 1995 and the Court may give any weight it deems fit to evidence falling under these exclusions,<sup>619</sup> while it is also expressly stipulated that exclusion of the Evidence Act 1995 does not revive the operation of the Common Law.<sup>620</sup> The court may consider any opinion given by a family consultant with the consent of the parties, or without their consent if that opinion was given as sworn evidence. If the Court applies the law against hearsay, it is provided that evidence given by children remains admissible, even where that would amount to hearsay.<sup>621</sup> In respect of evidence relating to violence or child abuse the Court may require government agencies to provide documents or information.<sup>622</sup> This legislative framework of judicial powers can be effectively translated in layman's words as follows: *"The judge, rather than the parties or their lawyers, decides what information is put before the Court and how the trial is run"*.<sup>623</sup> Although the LAT evidential powers have been described as revolutionary,<sup>624</sup> it has also been argued that the process merely focuses and emphasizes already existing rules.<sup>625</sup>

No LAT trial can start without the parties first completing a questionnaire, which becomes part of the evidence.<sup>626</sup> This document emphasizes the need to raise any concerns about safety, to set aside differences, and to think about what is in the interest of the children. It analyses and documents the circumstances of the parties, such as employment, housing, drug/alcohol abuse, safety issues and their role in current parenting arrangements. It records the children's circumstances such as schooling, health, financial support and parenting arrangements. Finally, it provides a structured manner by which the parties can describe the desired future care arrangements.<sup>627</sup> The trial formally starts at the first hearing *"when the judge begins his/her inquiry into the dispute"*.<sup>628</sup> Although the trial may conclude on that first day, any further hearings are part of the same trial; there is no distinction between interlocutory and/or preparatory stages and the traditional culminating trial event. A family consultant is assigned when a case is filed, and is present throughout to provide expert support to the parties and the Court. The parties are sworn in and are asked to confirm the content of their questionnaires. Each will then have the opportunity to talk directly with the judge about the case, in their own words. If desired, parties can leave this to their lawyers.<sup>629</sup> Following this information gathering stage, the judge decides the issues to be determined, who (if anybody) should provide written evidence and what about, if expert reports will be required, and whether a family report is required. The latter will normally be prepared by the

<sup>618</sup> Ss 69ZR and 69ZS Family Law Act 1975 (Cth).

<sup>619</sup> The Court further obtains additional duties and powers in respect of evidence that give it a wide ranging discretion about obtaining additional evidence and controlling the manner in which all evidence is given. This includes restrictions in respect of the matters to which evidence can relate, limiting or prohibiting cross-examination, and accepting evidence that has been given in any other proceeding before another court or tribunal.

<sup>620</sup> S69ZT Family Law Act 1975 (Cth).

<sup>621</sup> S69ZV Family Law Act 1975 (Cth).

<sup>622</sup> S69ZW Family Law Act 1975 (Cth).

<sup>623</sup> Family Court of Australia *Child Related Trials, Client Questionnaire* (Brochure and questionnaire, document no. 010706 V2, available from <http://www.familycourt.gov.au>), 2006) and Family Court of Australia *Less Adversarial Trials* (Brochure no. BRLESS/ADV.0308 VI, available from <http://www.familycourt.gov.au>) (Canberra, FCA, 2008).

<sup>624</sup> Fogarty supra n598.

<sup>625</sup> Fitzgerald P and Fernando M "Has the Less Adversarial Trial Process Abolished the Rules of Evidence?" *ibid*, 25-35.

<sup>626</sup> Family Court of Australia "Child Related Trials Client Questionnaire" Family Court document 010706 V2 (2006).

<sup>627</sup> A successful experiment with the use of this type of questionnaires (in property cases) in the UK is reported in Roberts supra n147, 459.

<sup>628</sup> See the brochures referred in n623, above.

<sup>629</sup> The CCP evaluation found that most parties opted to speak themselves and appreciated that: Hunter supra n602, Ch 5.1.

assigned family consultant. When it appears to the judge that there is sufficient information to decide some or all issues he or she will do so, possibly using interim orders that may be evaluated at a later stage. Further hearings may be by telephone/video-link. The judge can refer parties to other community based services, such as counselling or parent education. Decisions can be appealed, but not until after the trial is completed, and not if orders were made by consent.

The role of the family consultant deserves attention.<sup>630</sup> They are psychologists or social workers specialized in family issues,<sup>631</sup> and they assist both the parties and the Court by giving advice and evidence, by writing reports<sup>632</sup> and guiding the parties through the court process, including canvassing the possibilities of consensual dispute resolution in mediation sessions. Once assigned to a case, the parties must communicate with the consultant and everything that is said can be given in evidence, while the consultants also have an obligation to notify a child welfare authority if there are maltreatment issues or a risk of exposure to psychological harm. The family consultant thus represents a “fourth voice”;<sup>633</sup> that of the social science perspective and political ideology underlying the culture shift embedded in the Australian reforms. This role is a good example of what was pointed out before:<sup>634</sup> the state in its assumed role as moral guardian adds to the issues between the parties and/or reframes the parties’ issues<sup>635</sup> to use the dispute resolution process to achieve outcomes that align with policy objectives. Placed within an inquisitorial context, the focus of the proceedings thus shifts from the dispute as it is perceived by the parties to the dispute as recognized, accepted and promulgated by those policy objectives.

Since July 2007, parties are obliged to attempt mediation (now called family dispute resolution or “FDR”) before they can access the Family Court,<sup>636</sup> unless there are specific circumstances that make that inappropriate, such as cases where violence is present. There is anecdotal evidence<sup>637</sup> that a certain cohort of clients (the intractable cases) seek to use the FDR process to gain leverage for their case within the court system.<sup>638</sup>

Procedural aspects of the LAT, the limitation of appeals, the role of the family consultant and the application of natural justice in the LAT process have been challenged on appeal.<sup>639</sup> This established that: the procedural freedoms afforded to the courts do not abrogate the necessity to identify and

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<sup>630</sup> For a further description of this role and its development see: Family Court of Australia “Family Consultants” Fact Sheet FSFCo706V2 (2006); Fry D “The Role of the Mediator in the Children’s Cases Program of the Family Court of Australia.” Paper presented at the Family Law Association Conference, Auckland, 2006 and Fry supra n341.

<sup>631</sup> They must have at least 5 years experience and a relevant degree. It is a substantial job, which pays around AU\$85,000.

<sup>632</sup> In accordance with regularly updated guidelines.

<sup>633</sup> The parties being the first two and the children the third.

<sup>634</sup> In chapter 5.

<sup>635</sup> Deborah Fry, one of the first Family Consultants (see n630 above), describes an observation of part of this process as follows: “It may be that the parties observing the judge listening intently to what the mediator is saying also gives it greater weight and “truth”. Whatever the reason, it is noticeable that parties listen very intently, often nod in agreement, not infrequently cry, and make eye contact with each other while the mediator is speaking....”: Fry supra n341.

<sup>636</sup> The procedure to achieve this compulsion involves a certificate to be issued by a certified and registered FDR provider which records that unsuccessful attempts at FDR have been undertaken. Kaspiew supra n151.

<sup>637</sup> There is no robust statistical data about the success rates of the FDR interventions, the number of cases going through the various phases of the system, characteristics of the type of cases or the issues that are being dealt with, or of any correlations such as type of cases and success rates or characteristics of intractable cases.

<sup>638</sup> Morris K and Fletcher L “At the Coalface: The Impact of Changes to FDR for Service Providers” Family Relationships Quarterly (2007) 6, 11-12.

<sup>639</sup> The LAT process was discussed in detail by the full bench of the Family Court in *Truman v Truman* [2008] 38 Fam LR 614. In that judgment the background of the LAT and the legislation, court rules and regulations and practice directions were traversed in detail and thus strongly affirmed in “Common Law terms” as well.

describe the grounds on which conclusions were reached,<sup>640</sup> the court may refuse the right to appeal interim decisions until the LAT proceedings have been concluded,<sup>641</sup> and the court may set time limits for appeals.<sup>642</sup>

## THE WIDER CONTEXT OF AUSTRALIAN FAMILY LAW REFORM

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The LAT approach must be seen in the wider framework of the Australian Government's response<sup>643</sup> to the 2003 "Every Picture Tells a Story" report. Besides the legal changes, significant reforms at the community level were initiated, involving a package of services including early intervention, education and information, counselling, specialized prevention services, and a range of dispute resolution services. The objective is to bring about a culture change aimed at shifting dispute discourse and conflict behaviour from law and legal rights to the preservation of, and negotiation about, relationships.<sup>644</sup> Central to these community based reforms is the introduction of 65 Relationship Services Centers, described as "*the cornerstone of the new family law system*".<sup>645</sup> These centers are to be a source of information at "all stages of the relationship cycle", and providers of information, counselling and dispute resolution services with the emphasis on an integrated response to client needs. The programmes and information that is provided is more or less standardized, as is the manner of operation of each centre, although they are not part of formal government structures.<sup>646</sup> The dispute resolution methodology used is mediation, using parenting plans to focus the parties on the children and as an instrument to guide the discussion towards settlement.<sup>647</sup> The federal government supports these decentralized service providers with intensive advertisement campaigns, information materials, office and procedure manuals, funding,<sup>648</sup> a central telephone hotline service and websites.<sup>649</sup>

The Australian approach can be summarized as an attempt at taking relationship difficulties out of the legal environment for all but the most entrenched cases, while also fundamentally changing the legal process for these difficult cases. Only time will tell if this approach will meet its objectives. The tension between the social science based therapeutic approach and a legal approach to parenting conflict has been described in the introductory chapters of this thesis. It is clear that in Australia the former has dominated recent developments, although it has been noted that the ideological and financial rhetoric

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<sup>640</sup> *Crestin v Crestin* [2008] 38 Fam LR 420, at [33].

<sup>641</sup> *Truman v Truman* [2008] 38 Fam LR 614, at [83-84].

<sup>642</sup> *Ibid*, at [92].

<sup>643</sup> Australian Government supra n 593 and Australian Government *A New Family Law System Government Response To "Every Picture Tells a Story"* (Barton, Commonwealth of Australia, 2005).

<sup>644</sup> Australian Government "A New Family Law System: A Message from the Attorney General the Hon Philip Ruddock" Press release 31 July 2005.

<sup>645</sup> Australian Government *Family Relationship Centers* (Fact Sheet 5), 2006). For a sharply contrasting view about the benefits of such centres: Sharma *A Family Relationship Centres: Why We Don't Need Them* (Issue Analysis No70, 12 April 2006) (Leonards NSW, The Centre for Independent Studies, 2006), who argues that such centres will focus on the simple cases and "park" the hard cases, thus not really resolving any problems, but essentially copying existing services, at great cost to the taxpayer.

<sup>646</sup> These centres fit well within the description of a "Quasi Non Government Organisation". See also supra n252.

<sup>647</sup> See for Australian research on parenting arrangements and the way these can be graphically represented to assist in dispute resolution: Smyth B and Chisholm R "Exploring Options for Parental Care of Children Following Separation: A Primer for Family Law Specialists" *AJFL* (2006) 20, 193-218; Smyth supra n 4141; and Smyth B *Post Separation Patterns of Parenting in Australia Who Opt for Which Patterns and Why?* (PhD Thesis)(Swinburne, Swinburne University of Technology, 2005). In ADR terminology this technique is referred to as a "common document" method, i.e. the parties focus the discussion on reaching consensus on a document that describes the parameters of the parenting arrangement.

<sup>648</sup> The budget for the introductory three-year period that started in July 2006 was \$AU 400 million.

<sup>649</sup> The setup is reminiscent of that of commercial franchise operations.

supporting the current reforms was already present when the Family Law Act 1975 was passed.<sup>650</sup>

A comprehensive evaluation of all the 2006 reforms has been proposed by the Australian Institute of Family Studies, and this will result in several interim and partial reports, eventually leading to a full program evaluation by 2013.<sup>651</sup> The current evaluation proposal does not include specific research into the effectiveness of the LAT approach in the Family Courts. Unfortunately, it is probably unrealistic to expect that there will ever be significant and persuasive empirical evidence to determine whether the new initiatives have been successful, or whether they are simply a reflection of the pervasive opinions within the social sciences and related political influence spheres.

## 11 THE NEW ZEALAND PILOT

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The PHP pilot in many ways adopted the Australian CCP approach. The innovations were introduced under judicial leadership: they are the judiciary's response to what it perceived as problems the Family Court faces.<sup>652</sup> A handicap of judicial leadership is that it is practically restricted to the realm of the judiciary, i.e. court process rather than legislative interventions or structural changes to the entire family law system.<sup>653</sup> The boundaries to judicial activity in this respect will be discussed below, but at this point it is important to repeat the observation that the Principal Family Court Judge is on record as having strongly advocated much wider changes to the family law system and the process in the Family Court.<sup>654</sup> The New Zealand Government always rejected organisational separation, or indeed any attempt to structurally locate family law dispute resolution outside the court system. Clearly it was not prepared to amend procedural law as swiftly as the Australian government was prepared to either. The PHP therefore never obtained the wide power base of the Australian innovation.

The PHP process is based on the CCP model,<sup>655</sup> and a pilot was considered shortly after the CCP trial started. A draft process was prepared by members of the bench, and in analogy with the Australian approach, an external opinion was obtained, in this case from a prominent barrister.<sup>656</sup> However, it took until 2006<sup>657</sup> before the pilot was announced.<sup>658</sup> The argument by which the PHP is promoted starts with assumptions about the disadvantages of the adversarial process, followed by the observation that the

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<sup>650</sup> Nicholls *supra* n597, 8.

<sup>651</sup> Australian Government *supra* n613.

<sup>652</sup> Judge Boshier referred to the PHP as a judicial initiative: Boshier *supra* n1.

<sup>653</sup> Although the Australian judiciary did not hesitate to lobby politically. A similar trend can be noticed in New Zealand. The major difference between the two is that the Australian government acted legislatively and at the executive level by creating an entirely new system of family assistance. This is clearly not the case in New Zealand.

<sup>654</sup> The 1993 Family Court Review (of which His Honour was the principal author), promoted an organisational separation between consensual and court interventions, comparable with what was introduced in Australia in 2006.

<sup>655</sup> In all introduction material, speeches and even Family Court brochures, the CCP is mentioned and referred to as evidence of the success of the new process.

<sup>656</sup> Jefferson S "Draft Opinion - Family Court Pilot Programme" Opinion provided to the Principal Family Court Judge, September 2004. It must be noted that this opinion was largely based on the Australian CCP process and its consensual nature, while that aspect was not retained in the actual pilot. Also, between the date of the opinion and the start of the pilot, the relevant legislation was substantially changed, and it appears that the design of the PHP process as implemented was at variance to the characteristics of the process as described in the documents on which the opinion was based.

<sup>657</sup> It is noted that the fundamental reorganisation of the Department for Courts, by integrating it into the Ministry of Justice, had been undertaken in 2003. It is conceivable that the exact parameters of the required budgets and organisational issues surrounding the pilot took some substantial effort to organize.

<sup>658</sup> Boshier PF "The Parenting Hearings Programme: Les Adversarial Children's Hearings" Paper presented at the Auckland Family Courts Association, Auckland, September 2006.

process needs to (re-)focus on the interests of the children. The argument then proceeds to presume that these problems can be cured by changing the role and powers of the judges, which will (it is suggested) also lead to increased speed, more flexibility and less formality. The argument is concluded by referring to the “successful” project in Australia and its subsequent nationwide introduction.

## OBJECTIVES OF THE PHP PROCESS AND PILOT

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The PHP was introduced with the following statement:<sup>659</sup>

*The aim of this new process will be to introduce a less adversarial system for resolving conflict; a system that is properly managed by the Court rather than being driven by the parties and that keeps as its overriding objectives the need to resolve difficult cases speedily and fairly and putting the needs of the children first and foremost.*

The PHP briefing paper states:<sup>660</sup>

*By avoiding delays and providing faster resolution of cases, the new process is intended to significantly reduce the damage that protracted and bitter litigation does to the co-parenting and parent-child relationships. It's intended to produce better and more appropriate outcomes for the children, ones that “stick”. In this way, the new process will provide better and faster access to justice, and will increase public confidence in the Court system.*

The official PHP materials do not provide clear and explicit objectives for the PHP process or its pilot. A consultative report produced in 2008<sup>661</sup> provided a bullet-point list of “initial intent and objects of the PHP programme”<sup>662</sup> and a further list of “extended intent and objectives of the PHP programme”.<sup>663</sup> The first overlaps with what may be extracted from the introductory presentation and the briefing paper. The second contains a number of additional items that appear mostly aimed at achieving policy objectives underlying the PHP. The second list also contains a strong statement about the alleged cause of the current problems: the adversarial Common Law process. It thus pre-determines the evaluative outcome of the listed objectives, in an approach somewhat comparable with the McIntosh evaluation and the judicial response to that in Australia.

The PHP objectives are analysed in more detail in detail in Part V. The objective of the pilot is presumably to test whether the PHP process is capable of producing the outcomes or effects that are intended, although no criteria are provided.<sup>664</sup> As in Australia, before the pilot was completed and evaluated, the Court announced that the PHP process will be continued.

## FEATURES OF THE PHP PROCESS

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The PHP process is intended to strongly affect parents’ attitudes, and seeks to achieve that by providing a process that will assist them to “*transcend the blinkers that separation conflicts often create*” and to

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<sup>659</sup> Ibid, 1.

<sup>660</sup> Boshier and Udy supra n234.

<sup>661</sup> Mahon A, Smith E, Hannan C, Garner K, Moffat M and Stein L *National Consultative Committee Parenting Hearings Pilot: Draft Report* (Available from NZLS Family Law Section member website) (Wellington, NZLS Family Law Section, 2008).

<sup>662</sup> These lists have been included in the appendices on the thesis website.

<sup>663</sup> This additional list closely aligns with a judicial presentation: Smith E “Parenting Hearings Programme: Less Adversarial Children’s Hearings” Paper presented at NZLS Conference, Family law - Flying High, Christchurch, November 2007. Judge Smith was involved in the consultative report, and it may be assumed that she is the author of both lists. An article written in 2009 contains another version of this second list: Smith supra n7.

<sup>664</sup> In her last article, Judge Smith (a PHP judge presiding over one of the evaluative committees), actually states not to be aware of any such criteria: Smith supra n7, 6.

*“redirect their attitudes and behaviour along more productive lines”*.<sup>665</sup> Unsurprisingly, parent education is considered crucial and the lawyers are to play an important role in that respect,<sup>666</sup> assisted by the instructional video, the brochures and the introduction by the judge at the start of the preliminary hearing. The parties play an active role in the process through direct interaction with the court. A single judge will manage a case throughout and play a more pro-active inquisitorial role, with tight control over the proceedings. The judge will determine the issues to be addressed and the process for doing this. The judge can limit evidence and/or require additional evidence, can engage with the parties, their lawyers, the lawyer for the child, and the child in a judicial interview. The judge has the option to use ADR techniques during the hearing to conclude individual issues within the otherwise adjudicative environment. Individual issues can also be judicially determined before an overall decision is arrived at. This makes it possible that issues are isolated and concluded consensually or through determination by the judge, while the remaining issues are left for judgment following the completion of the entire procedure. Figure 6 provides a flowchart of the PHP process.<sup>667</sup>

The process has four stages: (1) chambers hearing, (2) urgent first call hearing, (3) preliminary hearing and (4) final hearing. Although cases may be signaled as suitable for the process at the first stage, confirmation of entry into the programme is not until stage two.<sup>668</sup> The distinction between the two types of cases that will enter into the programme follows from their mode of entry: urgent cases enter the programme at stage one, while the intractable cases enter at stage three. Stages one and two are part of the ordinary process for urgent matters.<sup>669</sup> The chambers hearing is not a hearing in the true sense of the word, but involves the judge considering the applications in chambers, followed by the issue of protection orders and setting a date for the urgent first call hearing.<sup>670</sup> The first call is a short conference for directions. At that point it becomes clear whether the matter will be defended, a lawyer for the child can be appointed and briefed, reports can be ordered and other case management directions provided. The decision for entry into the PHP is confirmed and deadlines are set. The timing objective is to have the preliminary PHP hearing within two weeks from the first call conference, which itself should be scheduled within 14 days of identifying that a case is suitable for the PHP process. Cases that have unsuccessfully followed the ordinary route (i.e. conciliation and possibly mediation) can be considered for the PHP at this point as well, although that will not be by way of a first call conference, but rather through a registrar’s hearing, which is part of the ordinary case management process.

Whatever the entry-route is, the directions will include that the parties are provided with the explanatory material and watch the DVD before the preliminary hearing.<sup>671</sup> This DVD shows actors enacting a PHP hearing. It has a strong educational content, aimed at focusing the attention on the children’s interests rather than on the parents’ issues. Further directions may relate to service of further pleadings, affidavits

<sup>665</sup> Briefing paper: Boshier and Udy supra n234, 2.

<sup>666</sup> To such an extent that it is suggested that the support and “buy-in” of lawyers will be an important component of the pilot’s success: *ibid*, 4.

<sup>667</sup> Based on the PHP information material and drawn by the author.

<sup>668</sup> This acts as a filter for cases in which the respondent does not engage in the Court process at all.

<sup>669</sup> Typically protection orders or interim parenting orders.

<sup>670</sup> Applications under the Domestic Violence Act 1995 are cross referenced to parenting order applications in almost half (47%) of the DV cases, Ong supra n1, 71.

<sup>671</sup> The observed practice has been that where parties had not viewed the DVD before the hearing, the matter is adjourned so they can watch it in Court before the judge returns.

and/or proposals for care arrangements, further instructions for the lawyer for the child, instructions about judicial interviews with the children, and whatever else may be relevant to ensure that the matter can be fully contemplated at the preliminary hearing.

The preliminary hearing starts with administering the oath to both parties. They are informed that they will remain formally 'on oath' throughout the proceeding, regardless of whether they give formal evidence or not. The consequence is that the judge can rely on anything said, even when the style of judicial engagement is informative or mediative. The judge delivers a standard opening, which essentially summarizes the information from the DVD and court brochures. The parties then have the opportunity to directly address the judge. It is envisaged that this is a 'prepared' statement in which they provide some background, identify the relevant issues and make proposals.<sup>672</sup> The judge will ask questions of the parties presenting their case, and there may be some discussion with the lawyers. Following these presentations from the parties, it is usual practice that the lawyer for the child also provides an oral statement.

The preliminary hearing will allow the judges to determine what the real issues between the parties are, and what will be required in terms of evidence and process to determine these. However, it may well be that after hearing the parties, the judge thinks he/she can engage in discussions/proposals to resolve some of the issues, or that some issues are amenable to immediate determination. The format of the hearing allows for this flexibility, albeit limited by the duration of the preliminary hearing which is set for two hours (but which in practice tends to last longer). It is envisaged that many cases will be resolved/determined at this hearing, in which case it is followed by a judgment, also recording any consent orders.

If there needs to be a final hearing, this will be set down for a date within two months of the preliminary hearing.<sup>673</sup> The judge will provide orders in respect of required further evidence and limitations on what can be addressed in additional evidence.<sup>674</sup> Reports can be ordered, and the exchange of information between the parties and/or report writers will be organized. The directions for the final hearing will include an obligation on both parties to make "frank and open" disclosure of all matters that are relevant to the best interest of the child. The control over affidavits and witness statements is not limited to the issues to be addressed, but also goes to format and length.

The final hearing differs from the traditional adversarial format in that the judge plays a highly directive and managerial role. The extent and format of evidence will have been detailed at the preliminary hearing, and the judge ensures compliance with those directions. Deposition of evidence at the final hearing follows a more or less traditional format, albeit that the judge will intervene regularly, restrict questions and answers, and ask frequent questions. The PHP briefing paper is inconclusive about the use of alternative methods during the final hearing, whether the parties will remain on oath, whether the

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<sup>672</sup> These proposals have been described as being "pivotal" in preparing a case, Brown T "PHP Process - Practical Tips" *The Family Advocate* (2009) 2009, 8-9.

<sup>673</sup> Although there is at least one case where the final hearing seems to have followed immediately on the preliminary hearing, *P v A (PHP Case)* Family Court Dunedin, 25 May 2007, Judge O'Dwyer, FAM-2002-012-641.

<sup>674</sup> A good example of very detailed directions can be found in *W v K (PPH Case)* Family Court Dunedin, 15 February 2007, Judge Smith, FAM-2006-012-001192.



final hearing is in fact a continuation of the preliminary hearing (as in Australia), and the exact role of experts and court-appointed lawyers in the course of the final hearing. The matter will always be concluded by way of a judgment, whether that records consensual arrangements or a determination by the Court. In the latter case the Court must still provide reasons for its findings and determination. Appeals from decisions made in the course of the PHP process remain amenable to appeal under the traditional rules for appeal. There are no current provisions for adjustment of the appeal process.

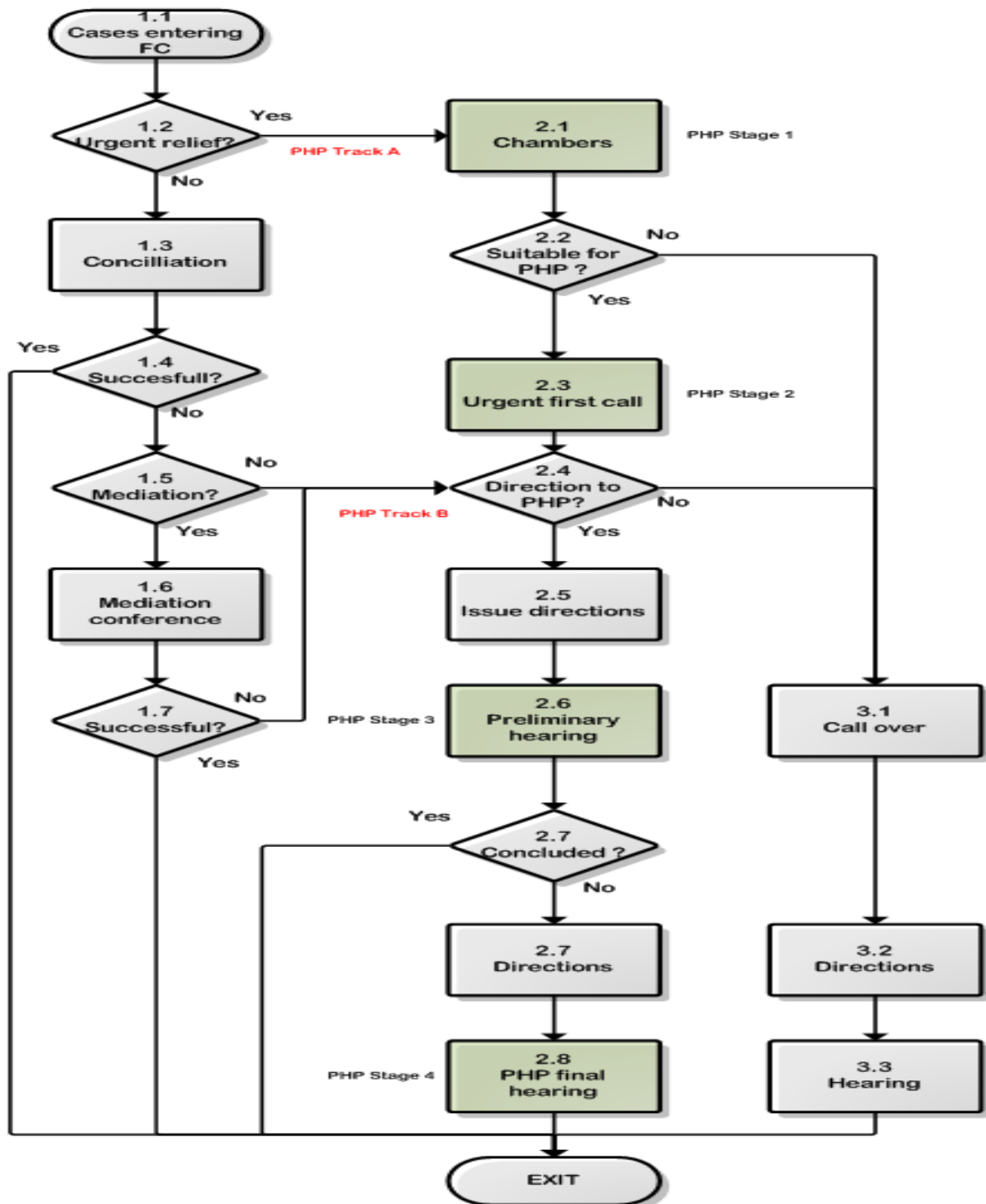


Figure 6 Flowchart for the PHP process

## THE OFFICIAL EVALUATION OF THE PHP PILOT

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The only reference to a formal evaluation<sup>675</sup> in the PHP information material was a notice to parties and lawyers that they could be approached for that purpose. No criteria were disclosed, and it is doubtful whether any had been formulated.<sup>676</sup> The evaluation approach was revealed when the pilot was well underway. Two committees were formed to coordinate between the Ministry, judiciary and practitioners, and apparently to manage/undertake the actual evaluation process. One committee, the “Evaluation Advisory Group”, consisted of six employees of the Ministry of Justice, a member of the Family Law Section (Mr Mahon) and a Family Court judge. This group apparently served to create a forum to discuss the evaluation process as it was undertaken by the Ministry. The second group was the “National Consultative Committee” which consisted of a Ministry employee, a Family Court judge, two members of the Family Law Section (including Mr Mahon), a specialist report writer and a Family Court coordinator. The Consultative Committee established site-groups in each PHP pilot area. The site-groups were asked to consult with the local bar and other professionals and to provide semi-structured feedback to the Committee, which subsequently produced a draft report by October 2008,<sup>677</sup> including the following conclusions:

- The PHP is well supported by the pilot sites, particularly by those lawyers, report writers and social workers, who have actually been involved in PHP cases
- All pilot sites developed somewhat different approaches; some ‘fine tuning’ would enhance the benefits of the PHP
- Prior training before implementing the PHP process is important
- Close monitoring of PHP cases by the registries is necessary
- Not all cases (especially cases involving s60 issues) are suitable for PHP
- Half of the registries identified a reduction in waiting times, potentially attributed to PHP. It may take up to 12 months from its start for those effects to ‘filter through’ the system
- Some pilot sites expressed concern about the effect of the PHP’s resource requirements on other urgent matters<sup>678</sup>

The Committee also canvassed the idea of a standard questionnaire to be completed by the parties prior to the PHP process (in addition to affidavits), based on the model and process used in Australia.<sup>679</sup> The Committee’s report attaches a memorandum about a visit to Australia by Mr Mahon to study the Australian system, and contains a number of suggestions for an amended PHP process. The Committee’s report has been provided to a range of stakeholders and fed into the evaluation process through the Evaluation Advisory Group, and probably through Mr Mahon’s participation in both groups.<sup>680</sup> As a

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<sup>675</sup> I attempted to be involved in the official evaluation and engaged in communications with the Principal Family Court Judge and the Ministry of Justice to achieve this, but was unsuccessful. The Ministry was collecting logistical information through its information systems, but it was not prepared to make that available to me. The Ministry did not to disclose how they would undertake the official evaluation, but initially suggested that it would be contracted to an external agency. I was directed to monitor the GETS website, which is the New Zealand Government tender website, where any requests for third-party tenders would be published. Subsequent correspondence with the Ministry eventually disclosed that the formal evaluation would be entirely conducted by Ministry staff.

<sup>676</sup> In the 2009 article, Judge Smith notes not to know of any agreed criteria against which the outcome of PHP cases can be objectively measured. Nevertheless, she says to assume that a gathering of those involved in the Family Court would soon reach consensus in support of a child focused hearing process: Smith *supra* n7.

<sup>677</sup> Mahon et al *supra* n661.

<sup>678</sup> This appears to be the opposite effect of the previous point, assumedly applying to the other half of the pilot sites.

<sup>679</sup> The Australian form can be downloaded from [www.familycourt.gov.au](http://www.familycourt.gov.au).

<sup>680</sup> Mr Mahon played a role in promoting the recent approach to issues relating to children in the Family Courts. by organizing the April 2006 Auckland Family Court Association conference, where two of the four Australian CCP judges gave presentations, as did

result, views from the profession have possibly influenced the evaluation process (as opposed to solely being a source of data through surveys). The official evaluation report was published on 19 October 2009, after this thesis was substantially completed.

## **12 THE CCP AND PHP COMPARED**

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### **CIRCUMSTANCES LEADING TO CCP AND PHP INNOVATIONS**

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Australia and New Zealand struggle with increasing workloads in parenting matters, caused by the growing numbers and complexity of parenting disputes, combined with policy objectives that increasingly seek normative interventions into individual behaviour. These interventions arise as a result of an increasing emphasis on the paramount welfare principle and the dogmatic belief that this requires ongoing, cooperative involvement of both parents. Both countries have retained courts as the institutions of last resort to resolve family matters, and the courts are directed by voluminous and detailed legislation that underpins the interventionist policy objectives. Increasing court workloads are a logical result of these developments. The traditional adversarial litigation paradigm is fundamentally unsuitable to achieve the dispute resolution and litigation behavior desired by the policy objectives and it is therefore unsurprising that an eye is cast to procedural systems that may be more amenable to the interventionist objective. Inquisitorial procedures suit that profile and they have, to a limited extent, been part of the Australian and New Zealand family law rule systems. The circumstances in which the CCP and PHP innovations developed were thus similar, while both jurisdictions already actively use each other's legal developments and experiments. I suggest that the CCP/PHP procedural innovations are effectively driven by the desire to create interventions that facilitate the implementation of policy objectives and that seek to achieve this in an organisationally and economically efficient manner.

### **THE SURROUNDING LEGAL AND SOCIAL INFRASTRUCTURE**

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Despite the similarities in legal system and social context, the organisation of the court administration and fiscal priorities represent areas of substantial difference. The Australian Courts have retained direct judicial management of resources and infrastructure. This is not the case in New Zealand following the integration of the Department for the Courts into the Ministry of Justice in 2003, which brought the courts effectively under executive control. The Australian Family Court appears at an advantage in that respect, and can act more decisively if it considers procedural innovations prudent. It also seems that there has been a greater willingness in Australia to invest in the area of family law, particularly in respect of social science-based interventions, organized at community level. Although some of those interventions have been available in New Zealand for some time through the Family Courts, these have not resulted in dramatically reducing the occurrence and characteristics of difficult cases, and have not

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one of the counsellors closely involved with the CCP trial, and a family law practitioner see: Collier D and Stevenson J "The Children's Cases Program" Paper presented at the Family Law Association Conference, Auckland, 2006; Fry *supra* n630; Adams N "The Children's Cases Program: A Practitioner's Perspective" Paper presented at the Family Law Association Conference, Auckland, 2006. These presentations were largely positive of the CCP approach and its results.

resulted in strongly reduced workloads for the Family Courts.<sup>681</sup>

In both countries the issues surrounding childcare following separation are being dealt with in a continuously experimental setting: research institutes produce a stream of reports and suggestions, lobby groups represent a wide range of more or less doctrinal perspectives, politicians are bent on social engineering, and judiciaries actively engage in the political discourse, because of their assumed judicial leadership. The vacuum left by the changing social perception of the concept of family and associated obligations is filled by legislative and regulatory directions about appropriate behavior in post-separation social interaction. Dispute resolution is a major problem in that environment, and both jurisdictions continue to actively develop alternatives to the traditional court process. In Australia those alternatives are pursued by the government, but take mostly place outside the court system, to such an extent that access to litigation is now restricted to those who have first attempted mediative interventions through specialized social agencies. In New Zealand, the Family Courts –albeit in their executive manifestation– have retained at least managerial control over alternative dispute resolution.

### THE FEATURES OF THE PROGRAMMES

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The procedures of the CCP and PHP processes are very similar, the most pertinent difference is the flexibility the New Zealand judges have in adopting different styles of intervention. The Australian model does not provide for mediative engagement by the judge. Where such an intervention might appear possible, that role is reserved for the family consultant, in the course of an adjournment for the purpose.<sup>682</sup> Following such an adjournment, the family consultant may be asked to report on the discussions and this information can be used by the Court,<sup>683</sup> but the procedure appears aimed at ensuring that the role of the judge is not tainted by being involved in bargaining attempts or inappropriate disclosure in the context of negotiation. The role of the family consultant is a distinctive feature of the Australian process, for which no comparable provision is made in New Zealand. The New Zealand legislation provides the courts with opportunities to request a variety of reports, but this lacks the case management character of the Australian system, where the responsible consultant engages with the parties prior to and during the court process. The Australian process thus synthesizes the legal and social science interventions while maintaining a clear procedural distinction between the adjudicative and mediative approaches. Ultimately, the judicial function does not actively engage in non-judicial methodologies and, hence, an emphasis on legal quality of the litigation process can be maintained.<sup>684</sup> This is clearly not the case in the New Zealand situation, where the mediative interventions by the judge

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<sup>681</sup> By 2008, the New Zealand Family Courts dealt with almost 90,000 applications, of which 33% related to parenting matters: Boshier PF "Solving Custody Battles: Is the Family Court Serving Us Well?" Paper presented at the Child and Youth Law Conference, Auckland, March 2009. The statistics from the Ministry, disclose a somewhat lower number of about 62,000 applications that are actually completed, of the about 90,000 that are contained within the system at any point in time: Ministry of Justice *Family Court Statistics 2008 (Case Disposal Lists Only)* (Wellington, MoJ, 2009).

<sup>682</sup> This approach is of course available in the New Zealand context as well, as it is within the judge's discretion to adjourn the hearing for the purpose of such an attempt, but New Zealand does not have the family consultant function.

<sup>683</sup> For which specific rules have been developed about the right to cross-examination, see chapter 10 above.

<sup>684</sup> Aspects of this have been tested on appeal; see the cases referred supra n639, n640 and n641.

are arguably in breach of natural justice and possibly in breach of the actual court rules.<sup>685</sup>

The differences between CCP and PHP are more than superfluous: the surrounding social service structure and its relationship with the courts is very different, the Australian administrative and logistic process can be more closely managed at macro- and micro-level, the Australian system has the advantage of the role of the family consultant, and it does not have the problematic mixture of mediative and adjudicative interventions within the hearing process. Given these differences, it must be concluded that using claims about the success of the CCP (itself a claim of dubious merit), to promote the PHP is too far-fetched. The processes involved are too different to reliably make that assertion in such a general manner.

### **THE FEATURES OF THE PILOTS**

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The Australian pilot was characterized by voluntary entry into the process and by an integrated evaluation process by independent researchers. The New Zealand pilot had neither of these. It compelled the parties' participation, while the evaluation was essentially undertaken by the promoters and developers of the programme. In Australia the evaluation struggled with the lack of pre-determined objectives, and it was hampered by a much slower uptake of the process than expected. The pilot project never met its research parameters. One evaluation aspect was replaced by the McIntosh study, which arguably departed from a pre-determined mindset. There was no information about the methodology of the New Zealand evaluation when the pilot started. No results have been made public at the time of writing. This prohibited a detailed comparison between the pilots and their evaluations.<sup>686</sup>

The pilots were judicial initiatives in response to legislative policy objectives, supported by a strong conviction about the disadvantages of the adversarial process and the opinion that a change of judicial powers could remedy these perceived shortcomings. In both cases the judicial opinions about the success of the pilot programmes effectively pre-determined the continuation of the innovations before formal evaluations had been concluded. This was particularly the case in Australia, where the process was legislated while evaluation was still underway. Although the PHP has not yet been legislated in New Zealand (or included in the Family Court Rules), the process was continued and extended beyond the pilot. It remains to be seen whether the official evaluation of the PHP will have an impact on the decision to continue the process and whether its characteristics will be adjusted if it is.

### *Summary of Part III*

In this part I described the legal context of parenting conflict in Australia and the circumstances that led to the CCP procedural innovation that was later legislated as the LAT. I concluded that the Australian context is very similar to that in New Zealand, thus making it reasonable to base innovations in New Zealand on successful Australian examples. The Australian Family Court enthusiastically promotes its innovations, but I suggested that the CCP concept was less a research based development than a result of

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<sup>685</sup> See for instance the argument developed in Parsons E "System Integrity" Paper presented at the Auckland District Law Society Family Law Conference, Auckland, 22 September 2008, and the argument in chapter 17, *infra*.

<sup>686</sup> I compared the pilots in slightly more detail in a recent article: Zondag *supra* n598.

judicial leadership, largely based on social science dogma and fitting within a strategy of implementing increasingly interventionist family policy in a fiscally efficient manner.

After describing the PHP process I contrasted it with the CCP process, concluding that there are some fundamental differences between the processes and their environment that make the claims about advantages of the PHP based on the experiences with the CCP quite unreliable. The most prominent of those differences are the surrounding non legal family support system in Australia, the integrated social science based role of the family consultant in the Australian legal process and the hybrid character of the PHP innovation.

# PART IV

## THE PHP FROM DIFFERENT PERSPECTIVES

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### *Introduction*

In this part I consider the PHP process from several theoretical perspectives. First, the PHP is proposed to resolve cases that display extreme conflict behaviour. Conflict theory may provide an understanding why some conflicts have such characteristics, and whether a PHP intervention can provide a remedy. Secondly, the PHP provides another “alternative” process to the existing range of ADR interventions. There is much ambiguity in ADR terminology generally, but legislation and court rules confound matters further, by referring to ADR processes without an attempt at defining them. There is also uncertainty about the exact PHP procedures, particularly in respect of these “alternative” components. It is therefore useful to consider alternative dispute resolution theory, and to use that to analyse the PHP process and its procedural colleagues. Thirdly, the PHP was introduced as an attempt to mitigate adversarial tendencies by using inquisitorial methods, an idea based on family law process in Civil Law jurisdictions;<sup>687</sup> it is therefore apposite to have a closer look at such a system and to draw parallels and conclusions from that investigation. Fourthly, the PHP information emphasizes compliance with the rules of natural justice. The constitutional dimension of that claim must be considered. Fifthly, the PHP process must be accommodated within the Family Court’s procedural system, an issue that has been given little attention thus far, but which poses interesting challenges.

## 13 CONFLICT THEORY

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The term ‘conflict theory’ in this thesis is not synonymous with its usage in sociology, where it denotes a theory of social order that investigates ideologies such as capitalism or socialism in the context of a group’s ability to exercise power.<sup>688</sup> In this thesis, “conflict theory” refers to the understanding of individual behaviour in conflict situations and the structure of conflict. It includes the application of that understanding to conflict resolution processes. The text of this chapter builds upon my previous research in this area.<sup>689</sup>

### THE SOCIAL FUNCTION OF CONFLICT AND RESOLUTION SYSTEMS

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Two equally valid, but opposing, statements can be made about the utility of conflict in social interaction. The first acknowledges that the existence and development of society requires cooperation between

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<sup>687</sup> The “idea” was already present in the work of the Royal Commission, raised in the reviews of the Family Court, and introduced again following direct judicial observation, see Carruthers D “Report of Inquiry into the French (Investigative) Judicial System” BFLJ (NZFLJ) (1996) 2, 301-307, and via the Australian CCP, which was based on observations in Germany.

<sup>688</sup> The term is often ascribed to Karl Marx, who starts the Communist Manifesto with: “*The history of all hitherto existing society is the history of class struggles.*” Marx and Engels *supra* n141.

<sup>689</sup> See Zondag B *The Structure of Civil Conflict, a First Step to Computer Assisted Dispute Resolution* (Masters Thesis)(Palmerston North, Massey University, 2005).

individuals, but that individualistic tendencies create tensions, resulting in conflict. Conflict is therefore an unwanted, but unavoidable feature of social interaction. The second suggests that competitive tensions drive the development of society as a whole, and that conflict is therefore a necessary feature of societal improvement. In the first view conflict has a negative connotation: it is to be avoided, or resolved as soon as possible. This view is represented in the classic philosophical approach to social conflict. It can be traced back to Plato and Aristotle and was further developed in writings of the “social contract” theorists, notably Hobbes, Locke and Rousseau. Ultimately it leads to the view that conflict is abnormal and dysfunctional, and that it should be eradicated.<sup>690</sup> The second statement takes the opposite perspective. Development is itself fuelled by conflict-based motivations (the survival of the fittest theory). Support for this approach can be found in the work of Charles Darwin<sup>691</sup> and philosophers who based their work on Darwin’s evolutionary theories, such as John Dewey.<sup>692</sup> This perspective leads to the conclusion that conflict is not something to be avoided or eradicated, quite the contrary; conflict is seen as necessary for the proper functioning and development of groups of interacting individuals.<sup>693</sup> As always, reality will occur somewhere between the extremes: conflict has productive and destructive characteristics, and there are, as a result, functional and dysfunctional conflicts.<sup>694</sup>

Functional conflict tends to focus on substantive issues. Once these are resolved the emotional and relationship issues are normally resolved as well. There is a balance between competitiveness and cooperation. Parties use a variety of behaviours to come to acceptable solutions, and they operate from a belief that win/win outcomes are possible. In order to achieve this, goals are defined broadly, on the basis of interests, rather than on the basis of positions. Productive conflict outcomes include:

- Stimulation of innovation, creativity and growth
- Improvement of societal decision making systems, including process and precedent
- Finding of alternative approaches to problems that occur regularly
- Creation of synergetic solutions to common problems
- Enhancement of individual and group performance
- Improved communication structures and procedures
- Articulation of appropriate relational boundaries
- Reconciliation of legitimate interests
- Desirable re-distribution of resources or social power
- A basis for positive personal change, based on empathy between the opponents at a personal level

Dysfunctional conflict involves aggression and attempts to hurt the opponent. Undercutting the other party’s interests is accepted as a tactical means of improving strategic position. Force and coercion are used to ‘win’ rather than resolve a conflict. Behaviours are rigid and inflexible; goals are defined

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<sup>690</sup> Such views were held by sociologists such as Elton Mayo and Talcott Parsons, see the discussion in Rahim AM *Managing Conflict in Organizations* (Quorum Books, Westport, 2001).

<sup>691</sup> Darwin C *The Descent of Man, and Selection in Relation to Sex* (Modern Library, New York, 1871).

<sup>692</sup> Dewey J *Human Nature and Conduct* (Orig Publ 1922, Modern Library, New York, 1957).

<sup>693</sup> See Rahim, n690, above, for a brief expose on the work of sociologists as Mills, Dahrendorf and Bernard & Coser who hold this functional view of conflict. Also see Eisaguirre L, 1951- *The Power of a Good Fight : How to Embrace Conflict to Drive Productivity, Creativity and Innovation* / Lynne Eisaguirre (Alpha ; Prentice Hall,, Indianapolis, Ind. : Hemel Hempstead ;, 2002), who goes a step further and embraces conflict as a positive driving force, to be used purposively to achieve organisational goals.

<sup>694</sup> The following section of text is based on authors including: Coser L *The Functions of Social Conflict* (Free Press, New York, 1956); Folger JP, Poole MS and Stutman RK *Working through Conflict: Strategies for Relationships, Groups and Organizations* (Pearson, New York, 2005); Kriesberg L *Constructive Conflicts: From Escalation to Resolution* (Rowman & Littlefield Publishers, Lanham, MD, 1998); Lulofs RS *Conflict: From Theory to Action* (Gorsuch Scarisbrick, Scottsdale, 1994) and Rahim supra n690.



narrowly and in terms of positions, entitlements and ultimatums. Parties withdraw from communication and involve advocates and supporters. Procedure and communication are formalised and censored. Destructive outcomes include:

- Stress, burnout and dissatisfaction
- Communication between conflicting individuals and the groups they belong to will be reduced
- A climate of distrust and suspicion develops
- Relationships are damaged; performance comes under pressure
- Conflict interferes with development and innovation
- Costs are made to sustain conflict and to force a 'victory' from the opponent
- The parties focus on the conflict dynamics and lose sight of the effect the conflict has on relevant third parties or even on the substance of the conflict

In dysfunctional conflicts, winning becomes a goal in itself, directly related to self-consciousness and deep-seated emotions, and regardless of rational benefits or disadvantages.

### *The role of dispute resolution systems*

The evaluation of functional and dysfunctional effects of a conflict will depend on the perspective of the observer. While a conflict may be highly dysfunctional for the participants, it may be productive for society as a whole, for instance as a result of re-distribution of resources, reinforcement of substantive or procedural justice, or re-assessment of perceived values. A successful society will therefore seek to create systems to manage conflict and its excesses, in order to have the benefit of the functional outcomes, while reducing the costs of the dysfunctional outcomes. The more diverse a society is, and the more complex its organisation, the more chance there is that conflict will develop. In fact, conflict is inevitable, and may develop between parties with fundamentally different beliefs and morals. Conflict resolution processes provide a way to manage conflict by accepting fundamental disagreement on substantive issues, as long as there is agreement on authority, rules, and procedures. The emphasis shifts from the issues themselves to the efficiency and fairness of the available resolution processes. Justice thus takes a procedural, rather than a substantive format and this is increasingly the case where the issues become more finely balanced in factual terms or are subject to fundamentally different value systems between the opponents.

### *PHP and the functional / dysfunctional conflict distinction*

Presumably, few people enter into relationships and decide to have children without anticipating a long term commitment, i.e. they undertake a substantial emotional investment. Termination of the relationship destroys the emotional investment, which understandably causes a period with a level of conflict. When the matter settles down, the conflict phase will have provided an opportunity to express past and present grievances, to come to terms with the background and reasons for the separation, to work through practical issues, and to deal with restructuring care arrangements and wider social and economic relationships. This period of conflict may be termed functional or productive if it allows the parties to negotiate an entirely new set of relationship parameters. This takes place in an environment that reflects the change from decision making as a couple –where most objectives are joint and common– to one of ex-partners with mostly individual and sometimes even competing objectives. A well managed conflict process can act as a transition between the two different relationship structures, and it assists in understanding and accepting the changes, for both the children and the parents. By contrast, sustained

and ongoing serious conflict between parents is virtually always detrimental for the well-being of the children and the parents.<sup>695</sup> Ongoing serious conflict is resistant to non-adjudicative interventions. If there is limited access to efficient formal adjudication and/or a lack of appropriate normative rules, these conflicts will continue to escalate for substantial periods and thus be highly dysfunctional at a micro-level. Deeply entrenched parties are generally unable to cooperate and adjudicated outcomes that require cooperation will lead to repeat litigation, appeals and use of all other avenues to engage the judicial system and/or protest against it. In the context of limited adjudicative resources, these disputes will quickly deplete the available resources, resulting in delays and capacity problems, and leading to substandard social outcomes for all users of the justice system. The serious and intractable cases are therefore highly dysfunctional from a macro perspective as well.

If it is accepted that policy objectives (at both micro and macro level) may be implemented through state directed dispute resolution interventions, a sensible resolution/adjudication system should ideally contain a mechanism that is capable of distinguishing between the cases that can be managed as “functional” conflicts and those that must be approached as “dysfunctional” conflicts, and provide for different interventions. The first category may be best served by providing services that range from education through to counselling and mediation, while the second category would be best served with an optimal process for adjudication, possibly including some option for tightly controlled settlement conferences. The contrast with the current system is clear: it assumes that all cases are amenable to the entire range of interventions, and seeks to apply these in sequence without considering whether the different interventions are suitable or not. A system that adjusts its intervention to the case at hand (a form of triage) can only be established if the logistics of the process are firmly under the control of the dispute resolution system. This system will require at least one feedback loop, by which the outcome of the chosen intervention can be evaluated against the relevant policy objective. If necessary, this feedback loop can return the case to the pre-intervention analysis for additional rounds of resolution/determination efforts. The resulting process may be represented by the process flow diagram in Figure 7.

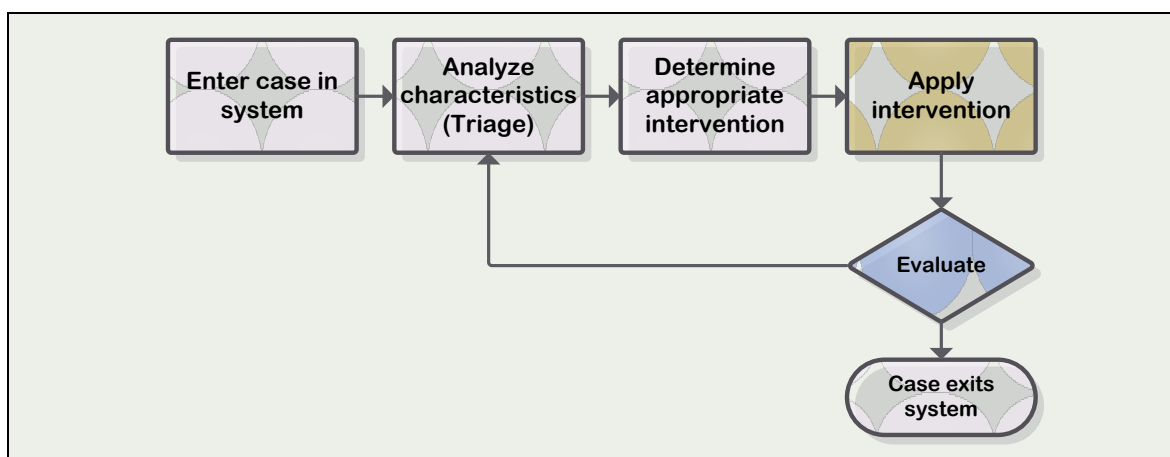


Figure 7 Flow Diagram for Differential Case Management

<sup>695</sup> See also Weinstein and Weinstein *supra* n117, at 370 and the sources quoted there, as well as the discussion in chapter 5.

By applying the theoretical understanding of the social role of conflict and the distinction between functional and dysfunctional conflict the requirements for a dispute resolution system can be extracted so that it complies with the policy objectives surrounding parenting disputes. These requirements include: strict and overarching case management, the availability of different interventions, rules and norms for triage, and an evaluation system to test intervention outcomes and the operation of the process as a whole. When considering the PHP process (in the context of the entire Family Court system), it appears that these requirements are not met. Although the PHP introduces stricter case management, this is restricted to the PHP intervention only and not integrated into the entire Family Court process.<sup>696</sup> The system as a whole is therefore internally inconsistent with the opportunities offered by the PHP process: it only applies its possibilities to tailor interventions to a specific case at a time where it is likely that the matter requires the strictest possible (adjudicative) intervention, but it then introduces an additional semi-consensual process.

Within the entire Family Court system there is now a range of interventions available, but there is no triage system or a structured understanding of the distinctive characteristics of serious and intractable conflicts. There is no systematic system to evaluate outcomes with a sufficient level of detail. The system does not contain any up-to-date means of recording, storing, categorizing or evaluating data in respect of its own operation; the system contains no means whereby it can evolve on the basis of the empirical data that it could generate. In conclusion, the PHP represents an additional intervention alternative, but its introduction does not fit within a holistic consideration of the entire court process and its social function and relevance. The opportunity has not been seized to align the new process with the theoretical understanding of the distinction between functional and dysfunctional conflicts and their social context.

## **THE CORE ELEMENTS OF CONFLICT THEORY**

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### *Conflict, a definition*

Definitions of conflict abound, and they tend to be tailored to the purposes of their creators. The word conflict itself has no rigid definition; it may describe a social situation or activity, a psychological phenomenon, a type of behaviour, or a matter of fact. It has static and dynamic connotations. The word is also indeterminably vague as to the seriousness of the event. It may describe a simple quarrel between individuals or a war between nations. For the current purposes a definition will be used which is based on studies into interpersonal conflict:<sup>697</sup>

*Conflict is an expressed struggle between two parties with perceived interdependent goals.*

The core elements in this definition are captured in the words “expressed”, “struggle”, “perceived”, and “interdependent”. These main elements are found in most conflict definitions, often accompanied by further components describing specific types of conflict.<sup>698</sup> In this thesis conflict is an active

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<sup>696</sup> Currently this integration is provided only through the role of counselling coordinator and the extremely limited feedback from counselling processes, which is of no value in practice.

<sup>697</sup> Wilmot WW and Hocker JL *Interpersonal Conflict* (McGraw Hill, Boston, 1998).

<sup>698</sup> Different conflict types can be classified by a typology of their outcome, the source of the conflict, the parties to it, or the environment in which it takes place, to name but a few possible approaches. This thesis does not consider the theoretical classification of conflict.

phenomenon; it describes a process, with form, structure and dynamics. This can be captured in a diagram, such as that in Figure 8.

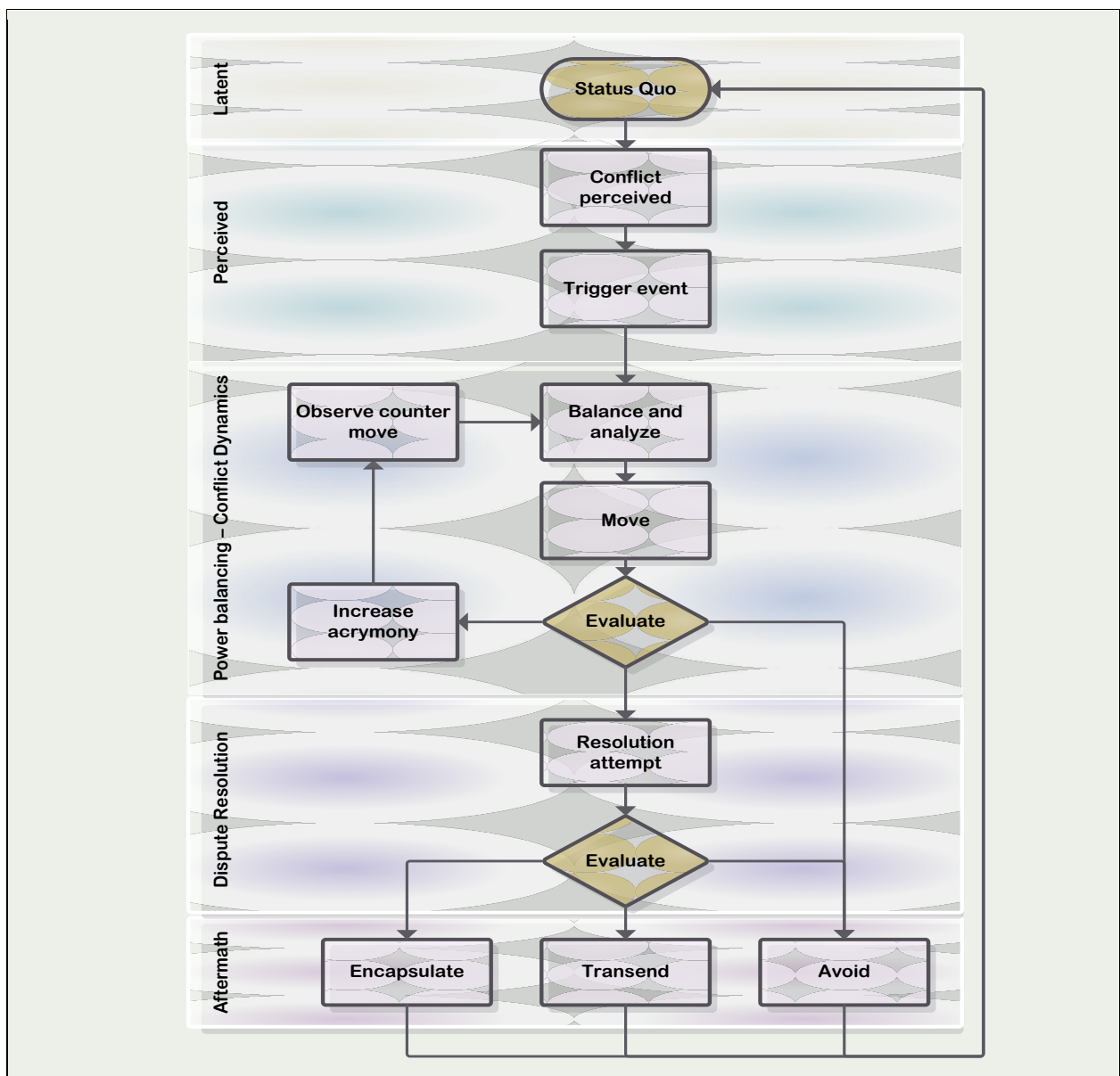


Figure 8 A Dynamic Model of Conflict

### *The structure of conflict*

Parties continuously monitor and analyse their conflict and the impact of their behaviour on it. They evaluate and describe the conflict in relation to their own goals, values and beliefs, and adjust their behaviour accordingly. Subsequent conflict behaviour and communication is thus aimed at influencing the situation in the direction of their own goals.<sup>699</sup> The parties' conflict activities may bring about changes to the objects in dispute, to the relationship parameters between the parties, or to the conflict

<sup>699</sup> These goals can change as the conflict develops, and they are hardly ever communicated with the other party to any level of detail.

environment.<sup>700</sup> Any changes (or their consequences) are observed by the other party, and analysed for their direct effect and their (perceived) information exchange component. Conflict activity thus contains a complicated mixture of action and information exchange. It is a form of communication, an instance of interactive behaviour. Interactive behaviour normally takes place in the context of cooperation, and the information exchange focuses on achieving collaborative goals: the substantive issues of the parties' common enterprise. In conflict communication, this emphasis shifts to communication about relationship and procedural issues, while the importance of the emotional content increases. The situation can quickly deteriorate from a cooperative to a competitive effort. This typically produces the following effects that almost invariably result in entrenchment and communication breakdown:

- The communication between conflicting parties becomes unreliable and impoverished
- Available communication channels and opportunities are not utilised or they are used in an attempt to mislead or intimidate the opponent
- Little confidence is placed in information that is obtained from the opponent, espionage and other circuitous means of obtaining information are relied upon
- The poor communication enhances the possibility of error and misinformation, while the little information available will be interpreted to confirm bias and prejudice<sup>701</sup>

The competitive nature of conflict activity, together with the necessity to evaluate the other party's conflict activities before undertaking responsive action, creates an asynchronous pattern. As a result, conflict activity takes place in "moves", whereby each move is made partly in response to the opponent's action, and partly in pursuit of the own objectives. Where the substantive matter in conflict cannot be resolved, the information exchange will increasingly emphasize relationship issues and procedural parameters of the communication environment. This will of course not assist in actually resolving the dispute, and more, and probably "stronger", communication is deemed necessary, while more issues are introduced to enforce and improve relative positions. As a result conflict escalates. It increases in severity, scope and animosity while the efforts aimed at communicating about the relevant substantive issues are reduced. These factors form the background of a conflict's move/countermove character, and its "vortex" effect: conflict has a spiralling rather than a circular structure, it is dynamic, not static.

Albeit not explicitly stated, the features of the PHP innovation indicate a clear appreciation of these characteristics of conflict interaction. The PHP process is obviously aimed at interrupting the escalating spiral of conflict, and it seeks to do so by advancing strict time limits, by increasing the opportunity for early judicial intervention, and by limiting the parties' opportunities to engage in conflict communication through court documents, or to use the court process to harass the opponent. The PHP attempts to intervene in conflict dynamics by increasing the judges' involvement in procedural issues, and it thus represents a departure from the approach where such interventions were mostly left to other actors.<sup>702</sup>

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<sup>700</sup> The conflict environment includes communication protocols and procedure, technology, and formality.

<sup>701</sup> Deutsch "Conflicts: Productive and Destructive" *J Soc Issues* (1969) 25, 7-41, 12, as quoted by Moore CW *The Mediation Process* (Jossey Bass, San Fransisco, 2003), 169.

<sup>702</sup> Mainly the parties' lawyers, and to some extent the counsellors engaged by the court. One could argue that the judicial mediation conference represented a first step in that direction, although that intervention is aimed at trying to reach a compromise based on the positions already taken by the parties, rather than an early attempt at halting further escalation of the conflict.

### *Expression and threshold theory*

A conflict is not recognised as such until it has been expressed. This involves two distinct aspects. The first acknowledges that many disputes go unexpressed for considerable time. The second relates to what has been described as a “threshold level of intensity”.<sup>703</sup> This proposes that the emotional aspect of conflict forms the distinction between conflict and ordinary communication or rational negotiation,<sup>704</sup> and that a level of emotional intensity is required before the matter can be properly categorized as a conflict.<sup>705</sup> Taken together, these aspects have the effect that by the time a conflict is expressed as such, it may have already matured to an extent that prevents simple resolution. I suggest that parenting disputes may end up in court because there was no communication mechanism available between the parties to express the conflict before the unavoidable spiral of escalation had reached its threshold intensity level. The statistical evidence which shows that in New Zealand –as virtually everywhere else– many parenting disputes are settled in the conciliatory arm of the Family Court strongly supports this assertion. It also supports the view that it is only during these relatively late stages of their conflict that the parties become fully aware of all relevant information. That relevant information includes not only the exact position of the opponent, but more importantly the understanding that the conflict will not be concluded on the issues that parties consider to be in dispute, but on the welfare principle. These conclusions emphasize the importance of early intervention and early diagnosis.

The PHP provides for early intervention for the urgent cases track, and this could prove a useful innovation. It does not have that effect for the intractable cases track, where the PHP only becomes available after the other interventions have failed. In that respect the PHP demonstrates a lack of understanding of conflict theory.

### *Struggle, the power component*

The use of the word “struggle” indicates that coercion (power) is used in attempting to achieve objectives that are not only aimed at the substantive issues in dispute, but also at the other party and the relationship between the parties. Some definitions of conflict express that specifically, for instance by stating that “*conflict is a struggle over values and claims to scarce status, power, and resources, a struggle in which the aims of the opponents are to neutralise, injure, or eliminate rivals*”.<sup>706</sup> Although perhaps extreme, this expresses accurately that in a developing conflict the emphasis tends to shift rapidly from resolving the issues to damaging the opponent. The associated sentiments drive the conflict and frustrate a resolution. To a certain extent, these sentiments are based on a primeval survival mechanism. Although it is perhaps counter-intuitive, these direct and instinctive aspects of emotions have been put forward as the basis of rational thought as well. A conflict emotion is a first and instinctive response to a situation that is perceived as threatening, which is then rationalized on the basis of semi-

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<sup>703</sup> Baron RA “Conflict in Organizations” In: Murphy KR (ed) *Psychology in Organizations: Integrating Science and Practice* (Erlbaum, Hillsdale, NJ, 1990).

<sup>704</sup> Note that the economic definition of conflict (as for instance used in game theory) does not recognise this distinction, but considers any situation where parties are faced with incompatible objectives a “conflict”.

<sup>705</sup> This threshold theory also allows for the fact-specific nature of conflict analysis: there can be vast differences between the emotional content of regular communication between parties. What would be classified as an intense conflict for some may be the ordinary way of communicating for others.

<sup>706</sup> Coser *supra* n694.

objective information and analysis.<sup>707</sup>

The PHP is aimed at a type of cases that include serious allegations or that have been resistant to non-adjudicative interventions. The effect of the power component and the resistance to it is thus the main reason that a dispute reaches the PHP intervention. From that perspective it is difficult to see how an additional consensual process can provide durable outcomes.

### *Perceptions, not facts determine conflict behaviour*

The words “perception” and “interdependent” in the above definition must be read in conjunction. Parties to cooperation or competition have individual goals in mind, which may be interdependent or incompatible.<sup>708</sup> Therefore they must negotiate about optimal goal satisfaction. In ongoing collaborative relationships this process is continuous because personal circumstances and external factors change. Conflict results where the negotiation process stalls in an unbalanced situation or where one or both parties seek to use coercive power to achieve individual objectives. It is important to recognise that goal incompatibility or interdependence is often of a perceived nature, as a result of the parties’ formulating their goals in terms of aspired outcomes rather than in terms of the needs and desires they seek to satisfy.<sup>709</sup> It must be noted that perceptions also play a role in formulating objectives, i.e. by framing issues in a certain way a party constructs an outcome objective which is perceived as providing both substantive and emotional satisfaction. The most important connotation of perception in a conflict situation however, relates to the escalating force that results from perceived motives behind the other party’s actions. As communication breaks down, parties use unrelated, and often unreliable, information to draw conclusions about the reasons and background of the other party’s actions. Perception thus extends not only to what is actually observed, but also to the underlying motives. As a result, each party creates a mental image of the characteristics, objectives and intentions of the other party, and uses this image to explain and understand the other’s actions. Such attributions have a remarkably strong and lasting influence.<sup>710</sup> To make matters worse, the perceived intentions overflow from substantive to relationship objectives. As an example, a party may perceive a substantive goal statement by the other party as aimed at an underlying, but undisclosed, relationship objective. The statement “I want you to fix that sink, and I want it done tomorrow”, may well be aimed more at a power and relationship objective (I am the boss), than at the (substantive) urgent need for the sink to be repaired. The party spoken to will interpret the statement differently depending on existing relationship and emotional parameters.

It may be thought that information exchange about the perceptions involved in the parties’ reasoning can be a helpful instrument in assisting parties to resolve emotional issues, where these frustrate a resolution of substantive issues (i.e. a counselling approach). The problem is that parties in conflict have many

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<sup>707</sup> For a detailed treatment of this process see Damasio supra n194, and Damasio supra n194. This author is quoted in an extensive article that discusses the emotional aspects of family disputes, see Weinstein and Weinstein supra n117.

<sup>708</sup> “Interdependent” describes the situation where one party cannot achieve its goals without cooperation by the other party. “Non-congruent” is the situation where it is impossible that both parties achieve their goals simultaneously, for instance as a result of limited resources. If not achieving an objective is defined as a conscious activity, it will be seen that “interdependent” and “non-congruent” can be interchanged.

<sup>709</sup> Or in positions, rather than in interests: Fisher R, Ury WL and Patton B *Getting to Yes: Negotiating Agreement without Giving In* (Houghton Mifflin, Boston, 1991). This is the process commonly referred to as “framing”: Lewicki RJ, Saunders DM and Minton JW *Essentials of Negotiation* (McGraw Hill Irwin, New York, 2001), 25-32.

<sup>710</sup> For a detailed discussion of the operation of attributions, see Folger, Poole and Stutman supra n694.

psychological obstacles to discussing and resolving emotional issues. They will deny that emotional or irrational considerations colour their opinions, and they will not admit that emotions based on perceived objectives of the other party have played a role.<sup>711</sup> The closer the issues are interwoven, the more difficult it is to talk about the reasons behind positions and statements. Particularly in conflicts that have a limited amount of objectively assessable substantive issues but a large emotional content (parenting issues are a prime example) perceptions about secondary (relationship) and tertiary (communication procedure) objectives of the opponent will completely overshadow any information exchange.<sup>712</sup> In such situations a necessary precursor to conflict resolution involves separating emotional and substantive issues.<sup>713</sup> The advantage of going even further –and separating the emotional matters from the substantive at the level of individual issues– is that communication about emotional matters can be restricted to a limited number of issues, and only to the extent necessary to resolve those issues. The important and frustrating role of incorrect perceptions can thus be exposed gradually and with minimum “loss of face”, while continuously re-evaluating the conflict situation, until an option for resolution is reached. This will assist in changing conflict behaviour towards a more integrative style.

Time plays a very important role in the harmful operation of perceptions in conflict development. On the one hand, early intervention may prevent or arrest the development of complicated constellations of facts and perceptions about a party’s own and the opponent’s objectives. On the other hand, it may take time for an individual to be able to distance him or herself enough from the matter to be able to sufficiently separate emotional and substantive parameters of the dispute in order to be able to think in terms of resolution rather than in terms of conflict. Some individuals –particularly those plagued by personality disorders– are simply unable to achieve this mental feat.<sup>714</sup>

The PHP attempts to influence behaviour by forcing parties to focus on the paramount welfare principle. The process allows the judge to refuse to deal with issues he or she considers irrelevant to the welfare principle, and to generally reframe the parties’ issues to fit within substantive boundaries that align with that principle. The same applies to procedural aspects, where the court obtains powers to restrict or extend the provision of evidence in order to adjust the supply of information to what it considers relevant to the paramount principle. The PHP process thereby completely ignores the effects that perceptions have on conflict behaviour. Conflict theory suggests that the result will be that parties will attempt to re-frame non-parenting issues into matters that can be argued under that heading, that they will attach perceptions about other matters onto parenting issues, or that they will create parenting issues where none existed in order to at least have a forum to address emotional grievances. This problem is aggravated where one or both parties are suffering from personality disorders. No dispute resolution process is capable of providing treatment for such disorders, or for dealing with the severe cognitive dissonances that result from deeply ingrained perceptions about the other party or their motives. It is

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<sup>711</sup> They may even be unaware of the connection between their observations and perceptions, as a result of “moral heuristics” that unconsciously provide conclusions through an instinctive process, see for instance Sunstein CR “Moral Heuristics” *Behav Brain Sci* (2005) 28, 531-573.

<sup>712</sup> See for instance Weinstein and Weinstein *supra* n117, 371 and sources quoted there.

<sup>713</sup> Or, as Ury and Fisher (*supra* n709), call it: “separate the people from the problem”.

<sup>714</sup> It has been suggested that in 60% of intractable parenting disputes the high levels of ongoing conflict are in fact caused by personality disorders, see Neff and Cooper *supra* n262, at 100, and the sources quoted there.



inconceivable that a dispute resolution process can be successful, where it does not address those problems, but nevertheless produces an outcome that establishes a framework for childcare requiring cooperation.

In conclusion, the PHP process sets itself goals of behaviour modification that it cannot possibly achieve. Amongst the cases that will reach the PHP intervention there is a very high probability that one or both parties to the case will have some mental health issue, substance dependency, or vulnerability to detrimental social circumstances. The process does not, and cannot, address those issues. Instead it ignores and denies them. Consequently, theory would predict that there is a very high probability that cases will return to court or that one party will simply disengage. In numerical terms, and based on the reported occurrence of mental health issues and an assessment of the fraction of parties who will display “avoidance” behavior (see below), it may be expected that as much as half of PHP cases will return to court on one or more occasions before the children reach an age that puts the matter beyond the jurisdiction of the Family Court.<sup>715</sup>

### *Interdependent goals and the intensity of conflict*

The word “interdependent” expresses that the parties’ incompatible objectives will have a relationship, whereby optimal goal satisfaction for both parties from the available resources is perceived to be impossible. “Resources” must be seen in its broadest meaning and may include emotional or relationship resources or social or even psychological resources such as social status, self-perception, or acknowledgment. Essential to the understanding of “interdependent” is the notion that the actions of one party have an impact on the way the other party is able to achieve their goals. Consequently, conflict can only arise between parties who are or have been in some form of relationship, whether that was an intended long-term relationship such as a contract or a personal relationship, a relationship that is created by unintended external circumstances, such as a relationship arising out of a tort, or a relationship that arises only out of the parties’ shared competition for a scarce resource. Unsurprisingly, closer and more emotionally involved relationships (i.e. relationships with many emotional parameters prior to the dispute) tend to result in conflicts with more emotional aspects. The absolute level of interdependency in goal satisfaction is a further indicator for the potential severity of the conflict. Conflicts involving scarce resources for which parties have combined demands that exceed the supply are a good example.<sup>716</sup> Where the resource in contest is highly valuable to the parties (i.e. has been assigned a strong emotional connotation), or is by its nature non-divisible,<sup>717</sup> the situation is aggravated and the emotional intensity of the dispute is likely to increase. It will be noted that childcare disputes typically contain all of the above characteristics and have few (if any) objectively determinable parameters. These disputes are virtually completely made up of emotional issues. Parenting disputes also provide an interesting example of the importance of perception: the opponents consider that the conflict has a zero sum character, because the resource (perceived as time with the child, or control over the child) is limited

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<sup>715</sup> This prediction can of course only be verified after the process has run for a number of years.

<sup>716</sup> Such conflicts are referred to as “zero sum” conflicts: a resolution will necessarily involve some manner of dividing the entire resource, one party’s gain equates to the other party’s loss.

<sup>717</sup> An extreme variant of the zero-sum conflict, the pure win-loose antagonism.

and the dispute is therefore about obtaining as large a share as possible. When reframing the issue from care frequency and duration to the child's love and affection, and focusing on optimizing this aspect, it can be shown that the resource is in fact unlimited, but that a competitive approach to such a dispute actually reduces rather than distributes this resource.<sup>718</sup>

Parenting disputes provide a scenario for conflict with extremely complicated goal interdependence, because the substance of the dispute is about relationship parameters, and not about objectively determinable rights or entitlements. From a policy perspective, the desired outcome is an ongoing, but modified, relationship between the parents. The relationship before the separation/conflict is primarily focused on the inter-parent emotional relationship with an associated subset of strongly connected and joined objectives related to parenthood. The transformed relationship is an enterprise for childcare with limited emotional parameters between the adults, albeit with sufficient empathy to sustain that common enterprise through parenting crises and changes of circumstances. A parenting dispute involves the restructuring of at least three relationships, often many more.<sup>719</sup> Case law shows that each of these individual relationships has the potential to drive and escalate a conflict that will affect the entire constellation of relationships.<sup>720</sup>

Relatively simple conflicts, for instance about physical resources, contain goal objectives that can be described relatively unambiguously by using parameters that can be assessed objectively and that are amenable to some form of distributive determination. That is not the case for relationship objectives. These are by nature multi-faceted, ambiguous, and not amenable to judicial direction or government enforcement. While the court may be able to enforce an order that a parent shall not have contact, it cannot force a party to have contact, let alone to direct the emotional quality of that contact. Parties to the conflict understand this, and include this aspect in the frame by which they construct their position and behavior. Each facet of a relationship between two individuals will potentially affect aspects of all the other relationships in the entire constellation. When the influence of perception and the lack of information are added, it is obvious that parenting conflict is characterized by highly interdependent goals, many with strong emotional connotations. As a result, these conflicts tend to be intense and complicated, with many subtleties that are simply not understandable or appreciable for an outsider who receives just a fragment of relevant information, such as a judge. This conflict characteristic also explains why professionals can sometimes become too involved in the conflict, which may obscure their independence of opinion or the quality of their advocacy. I suggest this effect is the result of too much focus on the conflict dynamics as a result of increased understanding of the complicated relationship structures and the anticipated effects of changing them (i.e. the interdependency effect). The more effort the professional undertakes to understand the dynamics of the conflict, the less capable he or she will be

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<sup>718</sup> See the research quoted above: Neff and Cooper *supra* n262, 108.

<sup>719</sup> For instance, with one child and two parents, there are three direct relationships involved; where there are two children this increases to six, and where there are two children and two set of grandparents on both sides this number increases to fourteen. It can be seen that by increasing the number of individuals, the amount of relevant relationships grows exponentially. In addition, there can be indirect relationships that play a role as well, while at the same time many practical circumstances can be subject to changes that directly and/or indirectly impact on the quality and structure of relationships.

<sup>720</sup> An interesting example is *E (by her litigation guardian Hickman) v B* [2009] NZFLR 126, where the relationship between the maternal grandparents and one of the children completely upset the entire restructuring of family arrangements, and where there was no parenting dispute between the actual parents (father was a widower), and where the relationship that was deserving of being maintained was not between a parent and child, but between the children.

to deliver effective advice or advocacy.

Conflict theory thus explains why parenting disputes tend to be emotionally charged and intense. They are a result of the complicated, subjective, relationship-oriented and interdependent outcome objectives that the parties have. A short and summary process such as the PHP will never allow the decision maker to fully understand the relationship and conflict dynamics, let alone put the adjudicator in a position to establish that there are “non legal issues” that must be resolved before the conflict can be determined.<sup>721</sup> Again, the process is asked to do too much.

## THE ROLE OF POWER IN CONFLICT

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Power originates from, and exists only, in the context of a relationship. It is not an attribute or characteristic of an individual in a general sense. Power can be described as the ability of one party to influence directly or indirectly,<sup>722</sup> the behaviour or emotions of the other party, the capability of the other party to achieve their goals, or the other party's freedom to maintain their attitudes, beliefs and values. Differences between the relative powers that individuals or groups can exercise are a logical and accepted result of the organisation and structure of society, and are part of the context of any transaction, negotiation or collaborative effort. In two party relationships, both parties typically have a measure of power over each other, the extent of which is governed by the scope and type of their relationship. It is when a form of power is used to achieve objectives against the other party's interests, or outside of the negotiated or established arrangement, that conflict arises.<sup>723</sup> Another way to understand this is that conflict arises at the point where one party concludes that not the objects of the corporation or competition must be changed to achieve its goals, but some characteristic of the other party.<sup>724</sup> This can only be achieved by persuasion, reward or force. In a conflict situation the first two have obviously failed (they are within the sphere of substantive parameters of cooperation or substantive relationship parameters), and only force (power) remains as a tool to achieve the desired result. The use of power to achieve goals does not necessarily arise in a negative context, it may well be that a collaboration is structured by using explicit power differences as the basis for decision making, because the type of cooperation requires this (e.g. army, fire brigade), or that consensual decision making is not worth the effort.<sup>725</sup> Nevertheless, in most situations, the use of relationship power signifies that cooperation or constructive competition has given way to conflict.

Emotional issues will come into existence when one party perceives that the other party is using power characteristics inherent in the relationship for ulterior (win versus loose) purposes.<sup>726</sup> The resulting emotions provide the motivation for (escalating) conflict behaviour, aimed at restoring what is perceived as a balance. That balance can be obtained by adjusting substantive, relationship, or contextual (social)

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<sup>721</sup> The PHP is supposed to be able to achieve this type of intervention, which is expressly included in the judges' role.

<sup>722</sup> Additionally the terms “virtual” power (using power by displaying potential use), or “hidden power” (power to exclude issues, which therefore never emerge), are sometimes used: see for instance Folger, Poole and Stutman supra n694.

<sup>723</sup> Blau PM *Exchange and Power in Social Life* (J. Wiley, New York, 1964).

<sup>724</sup> Kriesberg supra n694.

<sup>725</sup> As for instance argued in: Kotter JP *Power and Influence* (The Free Press, New York, 1985).

<sup>726</sup> Fisher EA and Sharp SW *The Art of Managing Everyday Conflict: Understanding Emotions and Power Struggles* (Praeger, Westport: Conn, 2004).

parameters. As a conflict goes through its moves and countermoves in an escalating spiral, the parties use the various resources they have in an attempt to exert power over the other party. Obviously, if one party is in a position to exercise substantially more power than the other, a situation arises where the less powerful party may have to accept whatever the more powerful party is seeking to achieve. Because power can be based on many different aspects of a relationship (directly and indirectly) it is not often that one party has enough power to simply ignore the other completely, and pursue their objectives independently. It is therefore important to consider the various power dimensions as they relate to each of the issues in conflict. It is not exceptional that parties have substantial misunderstandings about the other's perception or intended use of power in relation to specific issues. Lack of information on this aspect is thus often substituted by assumptions based on perceptions and opinions. Unsurprisingly, such assumptions in turn help to further inflame a situation and escalate a conflict. Use of power is often overt or by implication, and only very rarely the subject of explicit information exchange or negotiation. Additionally, since power is based on aspects of relationships, and since parties change their relationship in the course of a conflict, the sources and use of power change as the conflict continues.

When parties enter a dispute resolution environment, they experience an increase in formality and the sources of power become restricted to generally accepted concepts such as legal entitlements, economic power, association with individuals with powerful social standing etc. In that environment, a determination of relative power becomes relevant, and the skill with which formalised power is exercised attains more importance. The role and use of procedure thus becomes an important aspect in the conflict process. The way by which power differences are used has a strong social and cultural context. The influence of peer groups and value and belief systems (culture) play a role. Large differences between parties in this respect can result in continuation of conflict where both parties fail to understand why the other party does not terminate the conflict situation. Conflict is then continued by default as an institutionalised pattern of behaviour. Dispute resolution cannot be undertaken without addressing the power component. The use of power and the reaction to it explain conflict behaviour.

## **CONFLICT BEHAVIOUR**

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The study of conflict behaviour in interpersonal disputes started with one dimensional models capturing cooperative versus competitive behaviour or conflict engagement versus conflict avoidance behaviour. Over time more characteristics were added and two-dimensional models were introduced.<sup>727</sup> Researchers developed questionnaires based on increasingly sophisticated models, which were extensively tested for statistical consistency.<sup>728</sup> Although these models are mainly aimed at conflict management within organisations, they provide a reliable basis for the determination of more general conflict behaviour. A

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<sup>727</sup> See Blake RR and Mouton JS *The Managerial Grid: Key Orientations for Achieving Production through People* (Gulf Pub Co, Houston, 1964); Pruitt DG "Strategic Choice in Negotiation" *American Behavioral Scientist* (1983) 27, 167-194; Pruitt DG and Rubin JZ *Social Conflict: Escalation, Stalemate, Settlement* (Random House, New York, 1986); Rahim AM "A Measure of Styles of Handling Interpersonal Conflict" *Acad Manage J* (1983) 26, 368-376; Rahim supra n690.

<sup>728</sup> These questionnaires are called the "Rahim Organisational Inventory I and II instruments" and have been used in hundreds of studies and consequent papers and articles. See <http://members.aol.com/mgt2000/roci-bib.htm/> for a list.

conflict behaviour model is represented in the diagram in Figure 9.<sup>729</sup> Besides the commonly used dimensions of concern for self and concern for others, the diagram also includes the “integrative” and “distributive” dimensions used by some authors.<sup>730</sup> These are drawn as diagonals representing the integrative to avoiding styles (the integrative dimension), and from the dominating to the obliging style (the distributive dimension). This analytical tool can assist to conceptualize conflict behaviour generally and at the level of individual issues.

This model is primarily aimed at conflict behaviour between the parties. In addition there is conflict behaviour that is not aimed at the other party, but may be aimed at the environment at large, at other agents, such as other dispute resolution participants, unrelated or related third parties, or even aimed at the party itself. Conflict behaviour does not arise in a social vacuum, but takes place within existing social structures that are governed by values, norms and practices, i.e. by

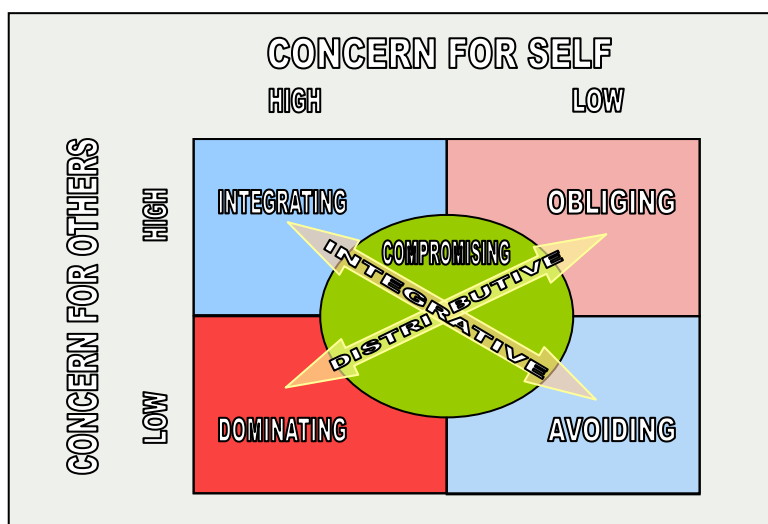


Figure 9 A Conflict Behaviour Model

culture. These external influences operate on different levels and dimensions.<sup>731</sup> If a conflict takes place within a relatively small social unit (e.g. a family), one may expect more commonalities in social norms between the parties than would be the case in a conflict between previously unrelated parties. In order to correctly place a conflict in the context of these influences, one would have to consider the smallest social unit in which the conflict takes place, and analyse behaviours accordingly. The next steps would be to consider behaviours in the context of sets of norms that are increasingly external to the parties, until one reaches the level of formalised social rules (i.e. law).

The specific set of social norms, values and practices within a specific social unit has been described as “climate”. It may be defined as the relatively enduring quality of a social unit as experienced in common by its members and it arises from, and influences, their interaction and behaviour.<sup>732</sup> When studying the effects of conflict behaviour in the context of family disputes, it was found that it is not so much the existence or even the frequency of conflict that makes fighting destructive in a relationship, but the compatibility of the parents’ arguing styles (conflict behaviour), and the outcome of their fights in terms of post-conflict behaviour (do they make up, resolve the conflict or let it simmer).<sup>733</sup> Hetherington found (and was surprised) that frequent conflict is not a good predictor of marital break-up. It was again how people fought that was reliable. In line with the previous discussion about positive and negative (or

<sup>729</sup> I created this model by integrating different theories that provided comparable approaches, but used slightly different ways of graphically expressing them.

<sup>730</sup> For instance Lewicki, Saunders and Minton supra n709.

<sup>731</sup> One could visualize that by considering that a conflict is nested within different cultural or social spheres.

<sup>732</sup> Folger, Poole and Stutman supra n694.

<sup>733</sup> Hetherington and Kelly supra n188.

constructive and dysfunctional) conflicts, she found that disagreement is in fact often constructive and associated with egalitarianism in the marriage and with the partners' need to express their emotional expectations. In that context, conflict is a form of negotiation, which can be about basic routines of family life, but also about the role distribution in emotional nurturing.<sup>734</sup> Climate is therefore family specific, and what may appear to some as a less functional climate, may be well suited for someone else. Because conflict behaviour aligns with characteristics of the climate in which it operates, it may be difficult or meaningless to analyse or evaluate conflict behavior outside the context of the individual family dynamics. This is where all formalized dispute resolution systems that rely on generalized normative standards become unstuck, and lose relevance to the parties' reality.

Conflict behaviour theory can be usefully applied to parenting disputes. The collaborative post-separation parenting model requires at least a reasonable concern for the other party, i.e. the empathy that is required to come to sufficiently flexible arrangements and to maintain a situation where one parent is not constantly undermining the other's parenting efforts. The concern for the children should ideally be high, even to the extent that their interests (including a reasonable relationship with the opponent) must prevail over the concern for self. The policy objective seeks involvement from both parents and would therefore discourage avoiding behaviour (where one parent simply terminates all contact). The relevant area of the diagram is therefore located on the medium to high values along both dimensions. The associated conflict behaviour as envisaged in the current family court process is of an integrating or compromising character. However –given the pre-conditions for entry into the PHP– cases that reach that process will display behaviour that is firmly located in the “dominating” quadrant of the conflict behaviour diagram. The PHP process is promoted as aimed at behaviour modification. Given the different locations of desired and present behaviour characteristics in PHP cases, its therapeutic influence must therefore necessarily include a transformation of behaviour on the “concern for others” dimension in an upward direction, from “low” to “high”. Clearly this is a requirement that runs exactly opposite to what the parties have actually experienced in respect of their former partner. The separation itself and the emotional aspects of conflict escalation, particularly where the dispute is about relationships, create a very strong incentive to lower concern for the other, not to raise it. The PHP intervention thus attempts to reverse a strong emotional and deeply embedded psychological trend. In order to be successful, the PHP process would need to contain very strong and effective methods for behaviour modification.

Above, I discussed the PHP attempt at behaviour modification from the perspective of focusing the parties on rational instead of emotional issues and concluded that that objective is difficult to achieve. The same applies when considering the dimensions of conflict behaviour. It is unclear how the desired behaviour modification may be achieved by the PHP process. Using the focus on the paramount welfare principle to increase the concern for the opponent (which is necessary to change the conflict behaviour), requires an appeal to logic that is inconsistent with the fact that the parties have made it to the PHP

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<sup>734</sup> Ibid, 268.

process in the first place.<sup>735</sup> In other words, conflict theory shows that there are substantial odds against practical success for the therapeutic aspect of the PHP intervention.

### THE ROLE OF INFORMATION EXCHANGE IN CONFLICT

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People rely on information to make decisions. In conflict situations much of that information is directly or indirectly obtained from the opponent. Information is always subject to perception, and it may be incomplete or incorrect. This increases the chance that conflict escalates and resolution is prevented. Unsurprisingly therefore, all conflict resolution processes have a more or less formal information exchange phase. Many conflicts can be resolved and are in fact resolved as soon as more (or better) information becomes available.<sup>736</sup> The reason that information exchange was frustrated can be found in the perceived advantages of incomplete information exchange, combined with emotional competitive factors. Each party tends to avoid providing the opponent with what they perceive as “ammunition”. At the same time there is an urgent need to express emotions. The easiest way to engage in conflict interaction is therefore not to exchange information on the subject matter, but to provide opinions on the characteristics of the opponent, to exchange information aimed at influencing the relationship, or by trying to change the procedural environment. The result is an increase in the number and severity of the emotional links that are created. This causes further frustration of relevant information exchange, and the conflict escalates further. No conflict is started or escalated without information exchange, and none is resolved without it either. Formal resolution processes thus have extensive information exchange rules. Recent procedural innovations in Common Law jurisdictions bring the exchange of information forward. This approach has always been a part of procedure in Civil Law jurisdictions,<sup>737</sup> where the role of obtaining information is a function of the adjudicator, and not left to the parties. This inquisitorial aspect has a further advantage, it prevents the formal exchange of evidential information being a part of the communication process between the parties, for instance by the use of affidavits, the introduction of increasingly argumentative briefs of evidence, or procedural tactics such as issuing discovery notices or subpoenas to individuals related to the opponent.

The PHP process seeks to structure information exchange, and brings its scope and volume under the control of the judge. It does not go quite as far as the Australian LAT, with its structured questionnaires. Despite its otherwise innovative character, the PHP does not introduce any use of contemporary technology, which could arguably provide dramatic improvements. Given the importance of information exchange and the potential to use controlling that exchange to manage the emotional parameters of a conflict, the PHP could have contained procedural designs to achieve optimal effect. In its current design, the PHP does not address that issue in any meaningful way. It is therefore doubtful that the PHP will provide structural improvements, although it must be recognized that the extended discretion will be

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<sup>735</sup> Or as one judge expressed: “*The Family Court at the end of the day makes rules and draws lines. It regulates where children will be on specific days or specific weeks or specific months. It cannot do what many parents expect it to do, which is to wave the magic wand and to suddenly create an environment of co-operation and collaboration.*” *VJM vGAC* Family Court Rotorua, 5 July 2006, Judge Geoghehan, FAM-2005-063-154, [17].

<sup>736</sup> Game-theory experiments demonstrate that bargaining impasse arises as a result of a lack of information, albeit confounded by self serving bias, i.e. the effect of perceptions, see for instance Babcock L and Loewenstein G “Explaining Bargaining Impasse: The Role of Self-Serving Biases” *J Econ Perspect* (1997) 11, 109-126.

<sup>737</sup> As a general principle. There are of course many differences and variations between different civil systems.

helpful to a judge who is capable of applying the intervention successfully. Any success must therefore be attributed to the skills of the judge, and not to the features of the process.

### CONFLICT – MICRO PERSPECTIVE

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Cooperation can take shape in a number of alternative configurations, which will have different results in terms of distribution of efforts and benefits. Economic theory requires that each party will seek to achieve the cooperation alternative that provides for maximisation of the received benefits, while minimising the expanded efforts. As a result, the cooperation alternative to be used must be established by means of a negotiation process. At the conclusion of their negotiation the parties will have obtained a substantive and relationship configuration that reflects their cooperation parameters. In theory, the outcome is balanced and rational in relation to the parties' expectations.<sup>738</sup> When one party uses any form of power or coercion that results in a (perceived) unbalanced outcome, the other party will accrue a level of frustration. This is the point where emotional links are created that attach to the substantive and relationship components of the negotiated cooperation. When the equilibrium between the relative strength of these emotions and the perceived continued value of the cooperation is disturbed, conflict arises. Consequently, the presence of conflict requires, by definition, a compounded situation where disagreement about substantive issues is complicated with relationship and emotional issues.<sup>739</sup>

At some point in the development and escalation of conflict, its costs will outweigh the benefits of the underlying cooperation. Perfectly rational disputants would terminate the conflict (and possibly the cooperation) when that point is reached. Often however, the emotional aspects prevent the parties from acting rationally. This explains why a conflicting relationship is often continued well past the point where strict economic rationale would require a termination of the parties' engagement altogether. Parties feel compelled to continue a dispute, against better judgement. This results in large costs, not only in economic, but also in emotional and social terms. The conclusion is therefore that any utilitarian function of conflict is fully eroded when disputing parties continue the conflict beyond the rational point of termination. The resulting perception of conflict is a negative one: the emotional parameters of conflict can be seen as "friction costs"; in the absence of which rational or Coasean bargaining could exist.<sup>740</sup> In the context of divorce (property distribution) negotiations, it has been suggested that a capacity for rational bargaining about emotional parameters might actually lead to a reconciliation of

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<sup>738</sup> Economic theory implies a "rational actor" model, which is particularly flawed for relationships and disputes with emotional content. The emotional component can be viewed from different perspectives, considering for instance biological, behavioural or gender influences. For an example of the first see Weinstein and Weinstein *supra* n117, for an example of the latter see: Carbone J and Cahn NR "Behavioral Biology, the Rational Actor Model, and the New Feminist Agenda" *Research In Law and Economics*, Available at SSRN: <http://ssrn.com/abstract=98448> (2007). I do not make these distinctions in this thesis, but simply recognise the presence of emotional factors and how they develop in the conflict situation.

<sup>739</sup> This effect is of course severely confounded where the cooperation itself largely consists of interdependent relationship parameters with strong emotional content. A (perceived) imbalance and use of inappropriate coercion in such a constellation can rapidly destroy the entire structure, and will create very strong emotional links with a reversed polarity. This explains why previously intense emotional relationships have the capacity to turn into the most severe conflicts.

<sup>740</sup> See n126 and the associated text. The Coase theorem holds that in the absence of transaction friction, continued bargaining will achieve an outcome that is commensurate with respective legal entitlements.



marriages that would otherwise be discontinued.<sup>741</sup>

This aspect of conflict theory assists in understanding the difference and distinction between rational and emotional conflict behavior. Civil procedure has always attempted to separate rational and emotional aspects in order to exclude the second. It has done so by various means, such as requiring professional representation, using strict formality, creating a distinct court culture and associated complex rule systems. Traditional civil procedure has never attempted to address emotional conflict parameters. Yet parenting disputes contain few rational elements and an abundance of intense emotional relationship issues. It is impossible to conceive a dispute resolution system that can ascertain and evaluate this subjective complexity and the effects of relationship variations imposed on it. Any attempt to create more or less objective external criteria (e.g. the paramount welfare principle), necessarily involves applying a considerable level of abstraction to the perceived realities of the parties. That approach can only be successful if the parties fundamentally agree to, and accept, this process of abstraction and its motive. They must also be prepared to set aside their own opinions, accept the fairness of the resolution system and the authority of the person applying it. The chance of success for such an attempt at a fundamental change of the mindset of the opponents will strongly decrease with the escalation of the conflict, and should therefore be undertaken as early as possible.

The PHP process does not seek to engage in an analysis of complex relationship constellations. It recognizes that this is impossible and it declares that the objective is to focus the parties on the abstract principles it applies. This requires that the parties understand that the process will ignore that part of the dispute that they may well consider the most important, and that it will seek to introduce a rather abstract criterion to evaluate their relative positions. Unsurprisingly, therefore, there is explicit reference to the importance of educating the parties and the “buy-in” of the professionals involved, particularly the lawyers. All of this is necessary to create an environment that is capable of providing a context for the intervention that is contemplated. Parties who reach the PHP process are well past the rational stage of interest-based negotiation and are typically well advanced to strictly emotional conflict territory. There will be allegations of violence or abuse, or the conflict has proven resistant to interventions that specifically address emotional dispute parameters, which are conducted by professionals who are trained and experienced in applying emotion affecting interventions. Nevertheless, the PHP process, conducted by a judge, includes another explicit attempt at behaviour modification. It thus represents a significant departure from traditional court process, even from the amended version that is in use in the Family Court. While behaviour modification has been part of the arsenal of interventions available in the Family Court process since its inception, it has never made it into the actual activities of the judge during a formal hearing.

The PHP process includes powers to restrict evidence and argument and it allows for the judge’s determination of the issues that are in his or her opinion relevant to the abstract determinations that must be made. A secondary objective of removing or suppressing extraneous material is to remove its

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<sup>741</sup> Smith I "Property Division on Divorce with Inequity Aversion" *International Review of Law and Economics* (2007) 27, 111-128. Interesting research about the effect of emotional parameters (the assignment of ‘fault’) on the assessment of negotiation proposals can be found in Wilkinson-Ryan and Baron *supra* n117.

capacity for arousing strong sentiments. These interventions are said to be aimed at assisting the parents to focus on what is (objectively) important, the paramount welfare principle. The main differences between the PHP (court) setting and the non-adjudicative therapeutic interventions to which the parties have proven resistant is the formal setting of the process and the institutional authority of the judge and the court, together with additional resources and structures to force compliance with at least the superficial aspects of the process.<sup>742</sup> Although this will no doubt assist the court to focus on the issues it considers important without being distracted by what the parties consider relevant, it is not a guarantee that the subsequent separation between emotional and substantive material is understood, let alone accepted, by the parties. The only aspects of the PHP process that actually address behaviour modification are the compulsory DVD viewing, the non-specified ‘education’ of the parties in which the lawyers must engage (hence the necessity of their “buy-in”), the introductory address by the judge, and the opportunity for the parties and the judge to interact at the start of the preliminary hearing. It would appear that the actual behaviour modification is largely left to the lawyers, but there is no information on how they should achieve this. The PHP process provides no feedback on the effect of the attempts at behaviour modification. In that respect the judge operates in a vacuum, and can at best rely on the brief interaction with the parties or on the presentations by counsel. If the process actually manages to change behaviour, it will be unclear how it achieved that, what has changed and how persistent such changes may be. Any success of a PHP intervention can therefore not be easily attributed to characteristics of the process, as it could well be solely determined by the skills of the judge, by the skills of the lawyers and other professionals involved, by the specific factual situation of the case, by the passing of time, by external developments that are only known to the parties, or by the simple fact that one or both parties are simply exhausted by the process and disengage altogether. A problem with short-term behaviour modification such as that achieved for the purpose of the PHP hearing is that it may be outwardly obtained in the specific and persuasive circumstances of the hearing only, with the consequence that subsequent decisions are at best superficial.<sup>743</sup>

In conclusion, the PHP process is stated to be aimed at inducing behaviour modification in order to transform emotional to rational conflict behaviour in the short and long term, but it is unclear how that is to be achieved or evaluated. Conflict theory provides that such objectives will be very difficult, particularly with parties that have well transgressed the semi-rational phase of conflict behaviour. There are risks that resolutions obtained in this way are superficial and transitory.

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<sup>742</sup> The parties can be compelled to appear, speak only when spoken to, wait for their turn in waiting rooms with lawyers milling about, are required to stand when the judge enters, the judges will be gowned again in the Family Court, while the court rooms will be displaying the New Zealand coat of arms.

<sup>743</sup> This can perhaps be best explained by way of an example. There will be few people who have not at some point purchased what appeared to be a magnificent kitchen implement at a trade show, only to find that it never left the kitchen cabinet until sold at a school gala two years later. Under the pressure of the circumstances one agrees to a proposal that turns out to be less than useful. The PHP places the parties in a not dissimilar environment and there is a real risk that the results of the process will share the fate of the kitchen implement. The PHP process has an additional objective in that it seeks to achieve not only behaviour modification for the purpose of the PHP process itself, it seeks long term effects as well, as it wishes to teach parents a model to resolve difficulties in the future. This objective amplifies the problems with short term behaviour modification. The information about the PHP process does not provide how this long term effect is to be achieved.

## CONFLICT – MACRO PERSPECTIVE

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Parenting conflicts undoubtedly place an economic<sup>744</sup> burden on society. Parties engaged in lengthy and stressful conflicts will have a reduced economic productivity, potentially also affecting their extended social conglomerates. Legal costs are likely to come out of funds that would otherwise be destined for savings and therefore available to economic growth. Costs expended on conflicts between individuals are non-productive and detract from overall macro-economic output. In that context it has been argued that states with highly effective dispute resolution systems will have a strong economic advantage.<sup>745</sup> The provision of dispute resolution systems represents an economic cost to a society, including the court system and its associated agencies, legal aid, social work, psychologists, police interventions, legislative and policy development, and training of the professionals involved. The total economic cost of parenting dispute is difficult to quantify, but arguably large. The social cost of parenting dispute is undoubtedly large as well, but even more difficult to quantify. The most directly observable effects include: dysfunctional families, non-adapted children with ongoing emotional issues, inter-generational effects of children having grown up without appropriate parenting, increased criminality, increased welfare reliance, and increased reliance on public health interventions. Indirect effects include: increasing activism of interests groups that may disturb democratic processes, reduction of access to justice, and reduced confidence in the court system.<sup>746</sup> All of these social costs will undoubtedly have an economic aspect as well.

The macro effects of parenting conflict are in many ways the result of the amalgamated difficulties at micro level. By attempting to redefine family structures and associated norms and behavior, a type of conflict that originally fell outside the reach of legal process is now firmly part of that domain. As a result, family conflict behaviour has changed in nature at the level of individual disputes, with direct effects at an aggregated level. From something that hardly appeared on the radar of social policy and government intervention, parenting conflict is an increasing user of government resources. The development of the PHP programme must therefore also be seen in the context of that macro-economic parameter. As a process aimed at increasing efficiency in the hope of positive fiscal effects, it has objectives that are in sharp contrast with the reality of the complications of the disputes that it deals with. One cannot avoid the conclusion that the state had gone too far in directly intervening in family authority by reducing the relevance of the traditional concept of family, by effectively sponsoring marriage break up and ex-nuptial parenthood, by introducing external standards to address parenting conflict and by thinking that all could be resolved in a restructured Family Court. Now that has proven not to work and to be too expensive, other processes are instead introduced that seek to increase efficiency by lowering

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<sup>744</sup> Here “economic” is used in its narrower sense.

<sup>745</sup> See for instance Fix Fierro H *Courts, Justice, and Efficiency : A Socio-Legal Study of Economic Rationality in Adjudication* (Hart, Oxford, 2003). See also Shapiro M and Stone Sweet A *On Law, Politics, and Judicialisation* (Oxford University Press, Oxford, 2002), who argue that differential rates of national economic development are in large part explained by the relative effectiveness of legal systems in reducing the costs of exchange between strangers. The argument is not just that effective systems reduce the costs of conflict, but also that effective systems improve security and confidence in contractual relations.

<sup>746</sup> A failure to provide efficient and accessible conflict resolution systems is also detrimental to society and its structures. It will create increasing frustration with, and disrespect for, the justice system specifically and organs of the state generally. A lack of quality of conflict resolution systems will result in claims of bias and corruption. Where difficulties in this respect are lasting and deepening, individuals will create informal solutions, and there is a risk that the resulting vacuum will be filled by illegal or ideologically extreme organisations. The end result is social unrest or worse.

important standards, such as the right to natural justice and access to justice. In effect therefore, the introduction of the PHP is a symptom of a wider phenomenon: an increased desire to implement social policy development without considering the practical and economical long term effects. When these effects become apparent, the economic effects are traded off against the quality of the social intervention, with the ultimate result that traditional and well established social structures that may have required only limited repairs have been demolished and replaced by theoretical and ideological constructions that cannot be practically and economically maintained.

## 14 ADR: THEORY AND METHODOLOGY

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In this chapter I summarize and complete the points already made about the relationship between law and ADR, before addressing the theoretical basis of dispute resolution generally. After constructing this theoretical framework, I place the available interventions in the Family Court in it. When discussing the mediation intervention that is about to be added to the range of available ADR processes in the Family Court, I take the opportunity to address the issues that are often raised in the context of court-related mediation programmes.

### ALTERNATIVE DISPUTE RESOLUTION AND THE LAW

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Although ADR is often promulgated as a way of avoiding formal legal process, it is certainly not devoid of law. It takes place “in the shadow of the law”, because law is the final norm by which people assert and enforce their rights and they therefore use it to frame their troubles and formulate their claims.<sup>747</sup> The underlying assumption is that if all else fails, the courts will determine the dispute, and will do so based on law.<sup>748</sup> The correctness of this approach can certainly be challenged, and it has been suggested that contemporary court process in parenting matters is actually more akin to “*adjudication in the shadow of bargaining*”.<sup>749</sup> Although this reversed idea may be interesting when considering the matter from the perspective of process, it fails to recognize that negotiation positions also tend to be derived from legal propositions. It is in that context irrelevant whether the bargaining is positional (based on claimed entitlements) or interest based (based on underlying needs and desires) because in the latter case, the parties’ “BATNA’s”<sup>750</sup> will invariably take legal realities into account. Research into bargaining in divorce situations supports the idea that the impact of the law on the bargaining process depends largely on the way the parties initially framed their dispute,<sup>751</sup> and on their use of informal networks to obtain

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<sup>747</sup> As an example, the “shadow” of increasingly normative legislation about equitable property division, measurably changed the “economic efficiency” of divorce decisions and thus the negotiation dynamics between the parties: Smith *supra* n741.

<sup>748</sup> The often quoted “shadow of the law” phrase originated in the context of matrimonial dispute and appeared in the context of the statement: “*we see the primary function of contemporary law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities*”: Mnookin and Kornhauser *supra* n15, 950.

<sup>749</sup> Jacob H “The Elusive Shadow of the Law” *Law Soc Rev* (1992) 26, 565-590, 566.

<sup>750</sup> ‘BATNA’ stands for ‘Best Alternative to Negotiated Agreement’ an acronym invented in the context of principled bargaining, see Fisher et al *supra* n709. The BATNA is used as an instrument to assist decision making in negotiation situations, it sets a boundary under which a negotiated settlement becomes less beneficial than the best available alternative including all its transaction costs and including an allowance for probability.

<sup>751</sup> I.e. in legal or relational terms.

information about the divorce process and the surrounding legal constructs.<sup>752</sup> This research also found that clear legal norms significantly removed such issues from the negotiation table, thereby reducing their impact on the development of further conflict. The law has a clear and direct role in resolving dispute about matters that have a legal context, regardless whether parties use formal or alternative means of dispute resolution.

Another perspective from which the relationship between formal law and alternative dispute resolution can be approached is economic game theory. Its application comes to practically the same conclusion by another route. There the premise is that sustained rational negotiation in an environment without transaction friction ultimately leads to a compromise at the level of legal entitlements.<sup>753</sup> Again the law indirectly sets the standard.

A third perspective considers the procedural aspect. ADR invokes a procedure that ultimately leads to an outcome that is (directly or indirectly) enforceable, i.e. that is cast in a format that removes ambiguity of interpretation and that connects sanctions to non-compliance. Such sanctions typically rely on available formal structures or formal principles of state supported coercion and its associated rule systems. As a result, ADR is always influenced by formal rule systems, not only because its outcome must comply, but also because formal process creates a benchmark.<sup>754</sup>

The problems with these approaches may be apparent. The first two do not take fully into account that substantive law is often derived from (social) policy, which need not align with the motivations of the parties in a dispute or with what they consider to be the relevant issues. The second is based on a premise of rationality that is only theoretically correct. The third ignores that social policy is increasingly extending into procedural law. All three largely ignore the emotional aspects of conflict situations and thereby also the fact that conflict is a form of social behavior that may actually serve a purpose by and of itself.

Whatever approach one feels inclined to, dispute resolution processes involve rules and procedures and use some way of evaluating fact situations on their merits, both between the parties and in the context of external criteria. Those rules and criteria are part of what we refer to as law and ADR and law can therefore be distinguished, but never separated.

### **ADR, THEORETICAL BASIS**

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ADR terminology is notoriously ambiguous and unsettled. A discussion of its theoretical basis is best started from the term “dispute resolution” generally, i.e. without the prefix “alternative”.<sup>755</sup> That discussion must start with a definition of dispute. As was seen in the previous chapter, dispute typically arises in a situation with a perceived incompatibility of objectives. Where this cannot be resolved by way

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<sup>752</sup> See the research referred to in n749, above.

<sup>753</sup> This is the premise underlying “Coasean bargaining”. See the text in the section on conflict from a micro perspective (starting at pg 135), and the text associated with n126, *supra*.

<sup>754</sup> In extreme circumstances this can even lead to invalidity of the ADR process, or a means by which an ADR outcome may be challenged.

<sup>755</sup> For a helpful summary discussion in the New Zealand context see Spiller P *Dispute Resolution in New Zealand* (Auckland, Oxford University Press, 1999).

of existing contractual, social or cultural norms or by way of negotiation, a party may seek to apply some form of coercion that was inherent in the existing relationship or in the social or factual matrix of the circumstances. When this is resisted by the other party, a conflict may develop. Where the parties are incapable of resolving the situation, the involvement of an additional (neutral) participant may be required.

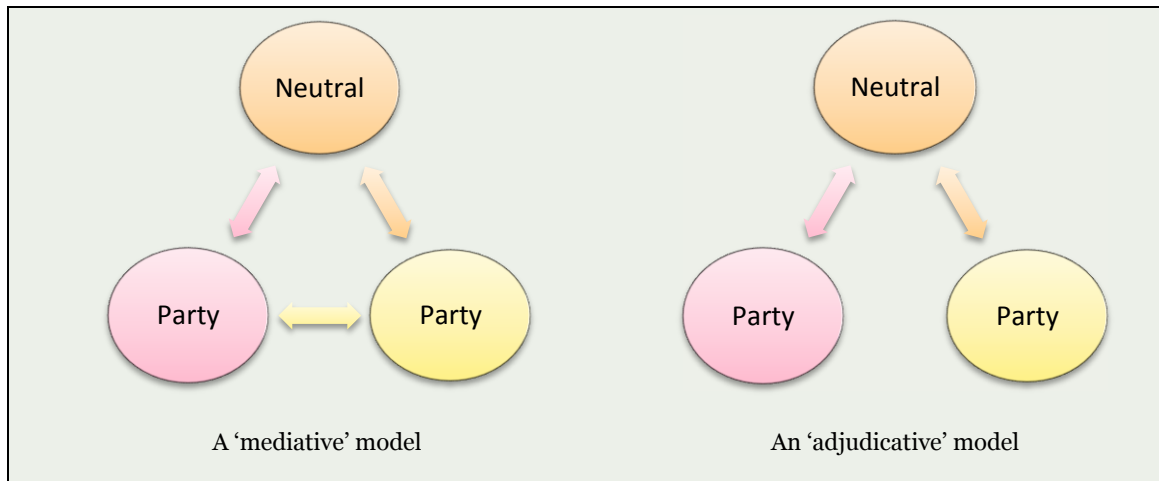


Figure 10 Dispute Resolution Communication Models

This “third party neutral” gets assigned the task to either assist the parties in their negotiation efforts or to determine the matter by ascertaining the facts of the situation and to evaluate these in the context of the social, cultural or legal prescriptions that apply to the fact scenario and the positions taken by the parties.

The objective of the assistance is to achieve an end-result that clarifies the parties’ mutual entitlements and obligations. The (often unmentioned, but always implied) basis for that objective is that (legal) entitlements ultimately warrant legitimate coercion by force. That type of coercion is monopolized by the state, and can only be obtained by using the structures for dispute resolution provided by the state, the judicial system. Dispute resolution procedures that do not involve agencies with direct coercive powers are termed “alternative” dispute resolution, although this seemingly strict and clear theoretical differentiation does not exist in practice. Regardless of the actual process used, or the formality of its status, dispute resolution is a form of information exchange; it always involves a communication process. The diagrams in Figure 10 express the two possible communication models involved in dispute resolution.

Some authors<sup>756</sup> describe the dispute resolution

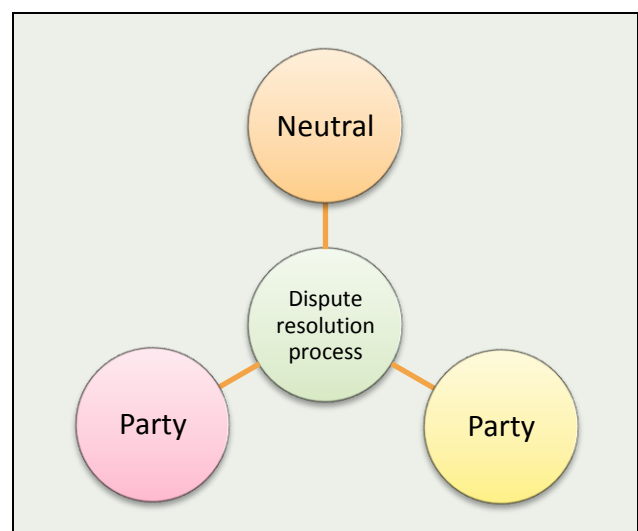


Figure 11 A Dispute Resolution Model

<sup>756</sup> See for instance Bol S *Mediation and Internet* (NDU Publishers, Amsterdam, 2007).

process itself as the “fourth party”, on which the “neutral third party” relies. That distinction is helpful because it emphasizes the distinction between the process and the participants, it distinguishes difficulties with a resolution system (systemic problems) from problems with its implementation (administrative or managerial problems), and it results in a conceptually and logically robust definition of the characteristics of each different dispute resolution process.<sup>757</sup> The resulting basic dispute resolution model involving a third party and a dispute resolution process can be expressed in a diagram as that in Figure 11.

## **PARAMETERS OF DISPUTE RESOLUTION PARADIGMS**

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In order to simplify the discussion in the remainder of this chapter, two terms need to be introduced. “Parameters” are the individual characteristics of a dispute resolution process, while each process will be referred to as a “paradigm”. A dispute resolution paradigm is therefore a specific dispute resolution process, completely defined by a unique set of parameters, which in turn can be grouped into four categories:

- Parameters that describe the role and characteristics of the neutral third party and the associated characteristics of the dispute resolution process
- Parameters relating to the organisation and content of the information exchange between the participants
- Parameters describing the outcome objectives of the process
- Miscellaneous process parameters

How the parameters describe a dispute resolution paradigm can be best explained by way of an example. Consider transformative therapeutic mediation, for instance as used in a restorative justice setting. There the information exchange focuses on impact statements and consequences of behavior. The neutral in that setting must have an appropriate background to undertake such work, and the objectives of the process are governed by policy that is external to the parties, while the outcome objective is not necessarily conciliatory, but therapeutic for both parties, who will often be accompanied by supporters, family, or whanau. The type of information exchange between the parties has a direct influence on the role and characteristics of the third party, whose role is also influenced by the outcome objectives of the process. As this example shows, by using sufficiently detailed parameters, a dispute resolution paradigm can be described to any required level of detail.<sup>758</sup> The categories of parameters can now be discussed.

### *THE ROLE AND CHARACTERISTICS OF THE NEUTRAL*

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Although commonly used, the term “third party” is unfortunate, while the addition “neutral” is not

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<sup>757</sup> I.e. the communication between the parties and the rules that govern that communication are seen as aspects of a dispute resolution process and are not determinative of its main characteristics.

<sup>758</sup> Another example is ‘straightforward’ arbitration in a construction dispute. In that case the outcome objective is a determination by the arbitrator (i.e. an award). This influences the information exchange between the participants and on the procedure for appointment of the neutral. The appointment must provide appropriate jurisdiction and the determinative character of the process requires that it must be organized to preserve natural justice. Part of the “natural justice” concept is that the procedure must include safeguards for impartiality of the third party neutral, which is implemented by procedural clauses to evaluate potential conflicts of interest before the arbitrator is appointed. Other procedural clauses must regulate that the appointment is achieved in a manner that creates formal jurisdiction and that confirms the necessary rule system that applies under that jurisdiction, including an assignment of relevant substantive and adjectival law, and the extent of discretionary powers.

always correct either, but brings the description closer to reality. The main problem with “third party” is that there are many disputes where there are in fact one or more other individuals or groups who have an interest in the outcome of the process, albeit that they are not a party to the actual dispute. In some circumstances the dispute is in fact about that third party, and the outcome may well be determined by its effect on that third party. A parenting dispute, with its paramount welfare principle, is a good example. I therefore use the term “neutral”. Generally, a neutral tends to be described in analogy with the process or vice versa. Mediation is thus chaired by a mediator, who mediates, while an arbitrator determines arbitration, by arbitrating. The circular character of these terms is unhelpful, but commonly encountered.<sup>759</sup> The role and characteristics of the neutral are thus defined by the process, while the process is normally regulated by prior agreement between the parties, by regulation or legislation, by convention, or even by the neutral under discretionary powers granted for that purpose. The neutral may be chosen by one or both parties, or can be assigned by way of a procedure that is part of the parties’ relationship, or that arises from legislative directions that govern a class of relationships. For instance, disputes between landlords and tenants, a class of relationship, are governed by legislation,<sup>760</sup> and are brought before a tenancy tribunal where the parties are first heard by a state appointed mediator, before being referred to (another) state-appointed arbitrator. The parties have some liberty to engage in the process or not, but once it is underway, regulation takes over. Something similar occurs in the disputes tribunals,<sup>761</sup> where a referee is appointed to a dispute. That referee seeks to act as a mediator at first instance, but the role changes to that of a state-sanctioned adjudicator if the attempt at consensual resolution fails. The characteristics of the process thus also influence the background- and skill requirements for the neutral. Some processes require specific knowledge, such as engineer’s determinations or property valuation procedures. Other processes seek to address some therapeutic need or objective, and there the neutral is chosen for his/her background in that respect. For instance conciliation processes in the Family Courts require counsellors with a background in the social sciences, while mediations in that same court require (at least at this point) a mediator with a legal/judicial background.

Two main strands of dispute resolution paradigms can be distinguished. In one the process is aimed at the parties reaching a compromise or settlement, with the neutral acting as a facilitator in that process. That supportive role can include assisting the parties in their communication, assigning issues and their relevance, brainstorming, finding and proposing solutions, testing and commenting on proposals, negotiating, documenting the discussions or the outcome, caucusing, and reality testing. This type of process is referred to as mediation, facilitation, conciliation, assisted bargaining and a range of similar terms. The second strand involves a neutral who decides the issues between the parties. This requires a process that involves the provision of information and argument to the neutral, who must be assigned with appropriate jurisdiction. This type of process is referred to as arbitration, adjudication, expert determination, mini-trial and other terms to that effect. Different rule systems can be used in each of the processes and the manner by which evidence and argument is presented and canvassed are adjustable

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<sup>759</sup> The Care of Children Act 2004 and its 2008 amendments provide a good example of this circular approach to definitions.

<sup>760</sup> Residential Tenancies Act 1986.

<sup>761</sup> Under the Disputes Tribunals Act 1980.



parameters of the process.<sup>762</sup> Aspects from the two strands can be combined into ‘hybrid’ processes that often consist of a mediation phase immediately followed by an arbitration phase (if the mediation fails or resolves only part of the issues). Such hybrid processes have advantages (such as efficiency, speed and lower costs) and disadvantages (open to abuse and natural justice issues).

It must further be noted that the neutral does not necessarily have to be one individual, but can take the form of a tribunal. Finally, a neutral need not be “neutral” at all; this may vary depending on the subject matter and on the parties’ wishes.

#### *ORGANISATION/CONTENT OF INFORMATION EXCHANGE*

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The parameters that regulate information exchange include timing, confidentiality, relevance to different stages of the resolution process, the extent by which information remains viable or useable when the dispute resolution paradigm changes, rules of evidence,<sup>763</sup> the way by which information is provided (technology and formality), the process whereby information is accepted as factual by both parties or contested, and the relevance of the information to the different issues in dispute. Different types of information can be recognized, such as: raw data, interpreted data, and data about data (meta-data), opinion, fact finding, and any combination of these. Not all information is available to all participants and partial disclosure may or may not be accepted as a procedural variable. Some paradigms require more disclosure than others, some purposefully restrict information exchange, and some make disclosure of certain information compulsory or even legally enforceable. There are differences in the way information is used. Exchange of written argument is an obvious mechanism, as is reliance on existing documents, whether these were compiled before or after a dispute arose. Many paradigms include oral information exchange in the format of joint sessions, negotiation, more or less formal oral evidence, interrogation and so on. Some paradigms exclude all but written information, others avoid documents and statements altogether and there are a small but increasing number of uses of modern information technology in dispute resolution. Specialized paradigms such as those used in commodity trading disputes can include physical evidence (e.g. grain or oil samples), and in such situations the neutral is often a person who has expertise in assessing the physical evidence. Site visits and demonstrations are another means of providing evidence that has a physical dimension. In many paradigms an assessment of factual information involves other “third parties” (yet another problem with that term), who provide their opinion as expert evidence.

Paradigms that include determination by the neutral must contain rules for evidence testing, for asserting the weight of evidence and for its practical use in the final determination. Information exchange is typically restricted in substance and timing, in order to avoid overly tactical use of partial disclosure. Many consensual paradigms are based on good faith bargaining, where disclosure is on the basis of both parties’ desire to resolve the conflict. Procedures that are closer to litigation tend to reduce the good faith

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<sup>762</sup> As an example, in arbitration, the parties can decide on the system of law that is to be applied. While the default position is the application of the law of the jurisdiction in which the seat of the tribunal is vested, there is nothing that prevents two New Zealand parties having their local dispute decided under German law if they were that way inclined.

<sup>763</sup> That is the relevance and significance of information and the impact of the person providing it on the value of information provided.

aspect and replace it with compulsory information exchange on the basis of discovery, interrogatories etc. Within the rule systems of formal litigation processes there is currently an important change toward increased openness and early information exchange.<sup>764</sup> There is a further trend toward introducing inquisitorial elements into adversarial rule systems to further improve information exchange and remove procedural skirmishes. Early and extensive information exchange reduces escalation of conflict and increases opportunities for resolution.<sup>765</sup>

#### OUTCOME OBJECTIVES

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Outcome objectives define a process in terms of what it seeks to achieve. The following perspectives can be used to consider the outcome objectives of dispute resolution paradigms.

##### *Negotiated v adjudicated outcomes*

This most obvious perspective is often (incorrectly) considered to be the main distinction between formal and “alternative” paradigms. It directly influences characteristics of the process, but also, and perhaps more importantly, the required state of mind of the participants. A process that aims at a negotiated outcome needs to contain mechanisms for compromise negotiation between the parties, i.e. ways by which various resolution matrices can be suggested and evaluated, including matrices that contain elements that do not comply with the parties’ stated positions. This necessarily requires that negotiation statements cannot be interpreted or used as concessions in later stages of the process. A negotiated outcome assumes conclusion of the dispute by contractual means, and therefore indirect enforcement. On the other side of this spectrum are adjudicative paradigms that lead to determination by the neutral, and a directly enforceable decision. An adjudicative character necessitates procedures that comply with concepts of natural justice and due process. The enforceable character of the decision requires assignment of jurisdiction to the neutral, which can arise in different ways, including: inherent in the authority of the neutral (e.g. High Court), following from legislation (e.g. Family Court), from specific contractual arrangement between the parties (e.g. arbitration), as a result of the parties’ relationship (e.g. a tenancy dispute), or as a consequence of the character of their dispute (e.g. a domain name dispute).

##### *The relationship between the parties after resolving the dispute*

This perspective looks at whether the process is concerned with the relationship between the parties after the dispute has been resolved. Some paradigms, for instance formal litigation, are not at all concerned with this aspect, while it may be vitally important for parties that have ongoing relationships, for instance joint venture disputes. A process can be designed in such a way that it is capable of resolving the dispute without irreparable damage to the relationship between parties.

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<sup>764</sup> See the 1999 CPR rules system in the UK and the recent innovations in civil procedure in some Australian States and the recent reform of the District Court Rules in New Zealand.

<sup>765</sup> And this is in fact one of the main propositions used to underpin the values of the PHP process.

### *The process is intended to affect parties' behaviour*

A third perspective considers the process in terms of its objectives for modifying the parties' behaviour, knowledge, experience, or mindset. This is often termed a therapeutic approach to dispute resolution: the process has an additional dimension, namely to teach the parties something, help them deal with emotional issues, or to change their behaviour, i.e. to transform them in some way. While learning is of course an integral part of every experience, transformative or therapeutic processes have specific outcome objectives in that respect. By increasing therapeutic objectives the process shifts from dispute resolution to counselling or even psychiatric intervention. The boundaries between these fundamentally different processes are unfortunately difficult to draw, while it may be apparent that very different qualifications for the neutral and characteristics for the process are required. Behaviour change has an additional specific requirement, namely that it generally can only be achieved when the individuals involved recognize that their behaviour is the cause of their inability to resolve the conflict, and that they are willing to address that issue and attempt a change. It is therefore necessary that the objectives of the process are clear from the outset, and that the parties consent to being subjected to a therapeutic intervention.

### *Policy objectives*

A fourth perspective considers whether the process takes place in the context of policy objectives: is there a requirement that the outcome aligns with criteria that are external to the parties? Irrespective of the type of process, the neutral in such circumstances will use their influence or jurisdiction to guide the process to an outcome that complies with the external objective. Parenting disputes are a good example where the neutral is in effect directed to act in compliance with a paramount welfare principle and a policy model of collaborative post separation parenting that may be external to the issues that the parties themselves consider to be central to their conflict.

### *MISCELLANEOUS PROCESS PARAMETERS*

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Each paradigm must have parameters from each of the three categories above. In addition, a large number of further parameters can be recognized that need not necessarily be included in each paradigm, and which may be grouped in this miscellaneous category:

### *The consensual or compulsory nature of entry to the process*

It is often assumed that all forms of "alternative" dispute resolution are consensual, i.e. based on the parties' agreement to participate. This aspect is then often also used to support claims that the outcomes thus achieved are more likely to be complied with, because the parties "own" the process and the outcome. Truly consensual participation can probably only be found in ADR undertaken within the private sector, as there is an increase in regulation and legislation that prescribes ADR or that provides barriers to litigation where no prior attempts at ADR have been made. There are therefore an increasing number of ADR instances that are in effect compulsory in nature, and/or that take place in close

proximity to formal legal proceedings. Research indicates that the success rate of ADR decreases when the process is entered under compulsion.<sup>766</sup> Parenting disputes under the Care of Children Act 2004 involve virtual compulsion to participate in a number of ADR interventions before the litigation option becomes available. Other examples can be found in the accident compensation system, employment law, consumer disputes under various specific processes, or the Disputes Tribunals. The new District Court Rules for New Zealand<sup>767</sup> provide another example of ADR options within formal litigation rules.

### *The rigidity of rule systems*

Some dispute resolution paradigms exist by virtue of very strict and rigid rule systems,<sup>768</sup> while others allow almost unlimited flexibility. A secondary aspect to this parameter considers whether the parties or the neutral can vary the rules and what the effect of exercising that opportunity is.

### *Choice of the neutral*

Particularly in entirely consensual paradigms the parties are responsible for the choice of the neutral, and they can make this decision before or after the occurrence of the actual dispute. Sometimes the choice is deferred to a third party, often an institution that exists for that purpose, and which is designated in contractual arrangements between the parties. The paradigms that include compulsory participation tend to restrict the freedom to choose a neutral. At the extreme end of the scale, the parties have no say whatsoever in the choice of neutral, although there is a residual set of rules relating to natural justice.<sup>769</sup>

### *The process deals with emotional/psychological aspects of the dispute*

This is related to the therapeutic outcome parameter discussed above. While each form of conflict and conflict resolution can have a variety of emotional effects, many processes do not deal with that aspect and sometimes specifically ignore it.<sup>770</sup> Particularly where the emotional aspects of a dispute strongly overshadow the “objective” components of the subject matter (as is typically the case in parenting dispute), it is very difficult to maintain a style of intervention that separates objective and emotional aspects of the issues. Dealing with emotional aspects of a dispute and therapeutic intervention should not be confused. The latter seeks to change experiences and behaviour and thus involves an outcome objective; the first merely acknowledges the emotional aspects of the conflict and allows for those to be expressed.<sup>771</sup>

### *The cultural dimension*

Formal dispute resolution processes are seldom aligned to the parties’ cultural reality, and in fact often

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<sup>766</sup> See for instance Bingham LB, Nabatchi T, Senger JM and Jackman MS “Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes” Paper presented at the 3rd Annual Conference on Empirical Legal Studies Papers, 2008.

<sup>767</sup> Which came into force in November 2009, see District Court Rules 2009.

<sup>768</sup> Typically those that arise in the context of legislation aimed at specific and specialized areas, and awarding limited jurisdiction, e.g. the Construction Contracts Act 2002.

<sup>769</sup> This tends to focus on the “nemo iudex in causa sua” aspect, the impartiality of the neutral.

<sup>770</sup> This is a characteristic of civil litigation, which is designed to exclude anything but “objective” criteria. Because this is virtually impossible this is one of the main fallacies of civil litigation paradigms.

<sup>771</sup> Whereby it is clear that this may already have some therapeutic effect, albeit that this is not specifically intended.

seek to exclude cultural aspects by defining a separate dispute resolution culture.<sup>772</sup> By contrast, “alternative” forms of dispute resolution offer opportunities to resolve conflict in a setting and context that can be adjusted to culturally relevant parameters of the parties and/or the dispute and by using culturally appropriate rules and norms. This parameter can be designed so that processes recognize and integrate a cultural dimension. The ways in which that can be organized are practically limitless and only constrained by the wishes of the parties and the creativity of the neutral, of course depending on the opportunities provided by the rigidity of the rule system parameter.

#### *The financial parameter*

Where a professional or institutional neutral is involved, costs arise. There may be further costs as well, such as representation, costs for experts, and costs for the dispute resolution infrastructure. The parameters of the paradigm include rules for assignment and distribution of costs. Some processes are promoted by a form of government subsidy.

#### *Accountability and openness*

Non-alternative, formal processes (typically litigation) generally tend to involve “open” proceedings, i.e. the general population or at least the media have some access to the proceedings and results may be published and will be available in some way. The argument for such openness is that justice must not only be done, it must be seen to be done. Resolution of individual disputes has an educational component and an effect on the development of the general law. Practically all “alternative” processes take place behind closed doors because of the positive effects of privacy on efficiency, the advantages to the parties of confidentiality and the avoidance of precedent.

#### *Appeal provisions*

Dispute resolution paradigms can include provisions which provide for appeals or reviews, or they can expressly exclude such opportunities. Appeal processes can have procedural systems that vary substantially from the first instance process from which they arise. Important aspects of appeal systems include what information is carried over into the appeal process, whether an entirely different neutral becomes involved, whether the appeal process involves a “de novo” interpretation of information and whether the grounds for appeal are in some way restricted.

#### *The presence of directive policy objectives*

Especially “alternative” paradigms introduced by regulatory or legislative effort tend to involve neutrals who are under policy directions to achieve some ulterior objective that is not part of the parties’ own brief or objective. In such situations the process can be used in a transformative or therapeutic sense that aligns with policy objectives, or its outcome is limited to policy related boundaries. The process is in effect “hi-jacked” by authorities to achieve some social objective or to restrict outcome variables. The

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<sup>772</sup> The manner of proceeding in court, particularly the higher and appellate courts provide a very good example of a separate culture including a different language, different symbols and ceremonies, separate classes of initiated members and so on.

second group was discussed above, under outcome objectives. Parenting dispute processes in the Family court are an example of the first group. The procedural effect of the resolution paradigm is dominated by policy objectives rather than being aimed at resolving the dispute as perceived by the parties. Parties who respond to the education efforts in ways that align with the stated policy objectives thus have a greater chance of being awarded decisions that align with their preferences, as opposed to parties who prove resistant to complying with state-formulated prototype behaviour. A paradigm can be distorted by such policy objectives, or it may even develop a structural bias.

#### *The availability of negotiation algorithms or processes*

Paradigms that ultimately turn on bargaining or negotiation can include specific bargaining scenarios or techniques.<sup>773</sup> Disputes that ultimately turn on monetary outcomes tend to be suitable for this type of interventions. There is an increasing use of automated techniques for such bargaining processes, which can relieve much of the stress of the “horse trading” that they replace.<sup>774</sup> However, as is the case with virtually all procedural solutions, they can be manipulated, and only have effect if there remains the possibility of an ultimate rights-based adjudicative determination.

#### *The availability of resolution matrices*

An extension of the previous parameter can be found where the resolution of a certain kind of dispute is always constrained to a limited number of variables, but where the end result is more complex than, for instance, a determination that party A must pay an amount to part B (i.e. an outcome about amount and liability). Examples are contact arrangements between separating parents, property division following divorce, domain name disputes, fishing quota allocations, and share milking disputes. The dispute resolution paradigm for such disputes can contain certain standardized procedures, but also a “resolution matrix” that can be used to negotiate towards the outcome. The matrix can act as a “common document” that records agreement on individual issues. This matrix can also serve as a template for proposals by each party, or for determination by the neutral, in which case the template is primarily a communication/explanation device. Given the relative simplicity of parenting dispute outcomes, it is surprising that family courts have not developed automated tools for this purpose.

#### *The legal standing and format of the outcome*

This parameter refers to the way the outcome is documented and how that outcome will be implemented and/or enforced. On one side of the spectrum are paradigms that lead to what can at best be described as a statement of intent. On the other side are internationally enforceable arbitration awards that are arguably stronger than domestic court judgments. The format of outcomes varies greatly as well, with enforceable outcomes (both based on agreement and determination) tending to be more formal and comprehensive. A dispute resolution paradigm must include a clear description of the form and format of its outcome, and this must be explicitly clear before the process commences, as otherwise there will

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<sup>773</sup> For instance the structural mediation method, which assumes rationally negotiating parties, see Coogler OJ *Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators* (Lexington Books, Lexington, 1978).

<sup>774</sup> For a successful and widely used examples see <http://www.squaretrade.com>.

invariably be discontent with the process.

## THE PARADIGMS CURRENTLY USED IN PARENTING MATTERS

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In order to demonstrate how the above theoretical framework can be used, the available interventions in parenting cases can be placed in it. I take the opportunity to also comment briefly on the nature of the recent amendments to the available processes.

### *PRIVATELY ORGANIZED ASSISTED NEGOTIATION*

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A range of professionals and community organisations provide services to assist parties in private negotiations. There is no comprehensive data about the use of such services, the numbers and characteristics of providers and the success rates of these interventions.<sup>775</sup> There is little information about the processes that are used by these providers, the qualifications of the individuals that undertake these services and any philosophical basis of their services.<sup>776</sup> Lawyers are a first port of call when a conflict intensifies, where advice is sought on legal principles or on ways to future proof any private agreement. Lawyers will suggest that it is preferable to resolve matters privately, and they may engage with the lawyer for the other party in order to assist in arriving at such an arrangement.<sup>777</sup> Many lawyers will refer to the Family Court for the subsidized counselling that it makes available. Some lawyers subscribe to principles of collaborative law and thereby assist their clients to reach a compromise based on legal principles and sound procedures, but without actually litigating the matter. Even when not subscribing to principles of collaborative law, lawyers tend to be instrumental in advising their clients to undertake an attempt at mediation, and many have trained to undertake that role. Private mediation in parenting disputes is often connected to resolving all issues arising from a separation, i.e. including property related matters. The paradigm that is typically used for the parenting aspect of the dispute is that of compromise based mediation. The information exchange is primarily between the parties directly, while the (neutral and independent) mediator typically relies on oral information and discussion during the process. It is uncommon for statements to be provided to the neutral prior to the actual mediation. Parties engaging in private mediation will typically have decided to resolve their dispute by this means and will therefore understand the necessity to maintain at least some relationship post-separation, albeit solely in order to provide appropriate parent-child relationships for both parties. As a result, the therapeutic aspects of the process are limited, and it is not aimed at affecting behavior, although the mediator must be able to deal with any emotional matters that may come up, but without attempting to resolve these.<sup>778</sup> Any cultural dimension or specific requirements for the mediator are typically covered by the selection process, which will involve advice from the parties' lawyers. The process is consensual, confidential and without prejudice. There are no fixed rules and the procedure is

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<sup>775</sup> In 2008 the New Zealand Families Commission conducted a very limited qualitative study that also briefly addressed this and concluded that there was very little research and information: Robertson, Pryor and Moss *supra* n235.

<sup>776</sup> As an example, it may be expected that community based interventions that are organized through church organisations will take a different approach to community interventions that originate from a women's centre or a citizen advice bureau.

<sup>777</sup> The lawyers' obligation to promote conciliation is generally well observed, see Adams J "Family Court Processes" Internal Memorandum to the Principal Family Court Judge, 20 November 2008.

<sup>778</sup> This is typically addressed by recognizing and acknowledging emotional aspects and by providing some possibility to express emotions, without letting them dominate the process.

normally determined by the mediator, but will invariably involve an introduction by the mediator followed by an opportunity for each party to state their position and objectives, followed by a negotiation process in which alternative resolution scenarios are canvassed.

#### *DISPUTE RESOLUTION PARADIGMS IN THE FAMILY COURT*

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Until a string of recent amendments come fully into force, the legislative and regulatory terminology referring to the dispute resolution methods on offer in the Family Court is at best ambiguous.<sup>779</sup> Nevertheless, alternative dispute resolution is described as being central to the Family Court processes as a result of the focus on a conciliatory approach. The core method is referred to as conciliation, and the Court (in its adjudicative function), is available as a last resort for those who cannot come to agreement, or for cases that are urgent or unsuitable for conciliatory intervention.<sup>780</sup> The four main processes are described as: counselling, mediation, settlement conference and hearing, whereby the first three of these are broadly grouped under the term conciliation, i.e. being part of the conciliatory arm of the court. There are no further descriptions of the actual processes. Recent amendments (not yet in force) attempt to streamline procedural regulations for parenting disputes, by bringing these within the core legislation.<sup>781</sup> The amendments introduce a heading “counselling and mediation to resolve disputes”, under which a number of references to dispute resolution processes or objectives are included: reconciliation, conciliation, counselling, mediation, and a mediation conference. The adjudicative (litigation) methodology remains largely as governed by procedural regulations outside the Care of Children Act 2004. These different interventions can be considered in more detail below. In what follows the recent amendments are included as if they had come into force.

#### *Reconciliation and conciliation (Counselling)*

These terms are not further specified, but the lawyers, the Court and counsellors all have a duty under the Act<sup>782</sup> to promote the facilities for, or the achievement of, reconciliation and conciliation. It would seem that these terms therefore refer to outcome objectives rather than to the processes by which these outcomes are to be achieved. Although not defined in the Act, the first of these terms involves resuming the relationship,<sup>783</sup> while the second refers to a consensual outcome in which the parties agree to arrangements governing childcare or at least develop a mindset that assists them to come to such arrangements. Lawyers have a further duty to certify on any formal application to the Court that they have executed this promotional duty.<sup>784</sup> The Court must consider the possibilities for reconciliation and

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<sup>779</sup> For a commentary on the various processes and an early discussion of the 1993 Boshier report, see Bridge C “Conciliation and the New Zealand Family Court: Lessons for English Law Reformers” LS (1996) 16, 298-324.

<sup>780</sup> Boshier PF “Family Court Matters Bill - How the Family Court can improve its approach to resolving disputes of those that come before it” Paper presented at the LEADR Conference - Dispute Resolution in the Family Court, September 2007, Auckland.

<sup>781</sup> Note that the meaning of the words counsellor and mediator in the Care of Children Act 2004 remain as defined by the Family Proceedings Act 1980, by s5 of the Care of Children Amendment Act 2008. In the Family proceedings Act these definitions will be amended

<sup>782</sup> In what follows, “the Act” refers to the Care of Children Act 2004 (including amendments not yet in force). The relevant new sections are 46D (lawyers), 46E (court) and 46U (counsellors). Mediators have no such duty, but “*must make every endeavour*” to perform their tasks: s46Y.

<sup>783</sup> Webb PRH and Treadwell PJ *Family law in New Zealand* (12th ed, LexisNexis, Wellington, N.Z., 2005), at 2.5.

<sup>784</sup> S46D(2) Care of Children Act 2004 (as to be amended).



conciliation before it takes steps to promote these objectives.<sup>785</sup> The process by which conciliation is to be achieved is that of counselling, to be executed by a counsellor, who has a duty to “*attempt to promote conciliation*”.<sup>786</sup> Interestingly, reconciliation is no longer mentioned in the duties of the counsellor under the recent amendments.<sup>787</sup> There was no further description of the counselling process under the previous legislation, other than the elliptical obligation that the counsellor must arrange for, or request, meetings with one or both parties “*for the purpose of counselling*”.<sup>788</sup> The recent amendments will add that the counsellor may meet with one or both parties in order to clarify the main issues and gather information relevant to the conduct of counselling, which of course still does not explain what will actually happen during that activity. A further innovation is the introduction of the possibility of involving the children in the counselling process,<sup>789</sup> or providing separate counselling for the child.<sup>790</sup> Counselling that is organized by the Court will be paid from public funds, and regulations determine the number of counselling sessions.

In the ADR literature, conciliation is often understood to be a form of mediation that takes place in the context of regulatory or legislative policy objectives.<sup>791</sup> Described in terms of dispute resolution parameters, conciliation is a non-determinative process that involves a not strictly neutral third party, who actively seeks to guide the negotiation based dispute resolution process to an outcome that is in line with policy objectives. In the case of parenting disputes that policy objective would be the paramount welfare principle and the collaborative post-separation parenting model. As mentioned, however, the legislation does not appear to refer to conciliation as a process, but as an outcome.<sup>792</sup> The process itself is referred to as counselling and undertaken by a counsellor. In ADR literature, counselling is understood to be a form of therapeutic intervention in which the disputants are assisted in dealing with their personal and interpersonal emotional conflicts. Counselling seeks to adjust behaviour with a view to improved functioning of the relationship between the parties, while it deals with emotions and the cause for emotions. Counselling thus allows for reflection on the past and guided learning from such reflections. Given that the legislation refers to “*the facilities that exist for promoting reconciliation and conciliation*” in the context of a process that involves counselling, it would seem that the resolution process that is contemplated involves parameters that combine those of counselling and conciliation as

<sup>785</sup> S46E Care of Children Act 2004 (as to be amended).

<sup>786</sup> S46U Care of Children Act 2004 (as to be amended).

<sup>787</sup> Compare s12 Family Proceedings Act 1980 with new section 46U. This change is no doubt reflective of the assumption that disputes about childcare arrangements invariably result from situations that are well past reconciliation or perhaps that reconciliation and the preservation of marriages is no longer seen as a worthwhile government objective.

<sup>788</sup> S11 Family Proceedings Act 1980, now continued in s46T (as to be amended).

<sup>789</sup> S46T(3) (as to be amended). Individual counselling for the child is governed by the new s46P and applies only where the Court makes an order and considers that the child is in exceptional need of assistance.

<sup>790</sup> Albeit that this appears only available through the mediation option, s46ZA (as to be amended), but there is nothing to suggest that the counsellor could not also counsel the child while attending “*1 or more*” counselling sessions under s46T. See also Moran K “Counselling for children” Lawtalk (2009) Issue 740, 9.

<sup>791</sup> See for instance Spiller, n above, at 58. Also see Boule L and Nesic M *Mediation : principles, process, practice* (UK ed, Butterworths, London, 2001).

<sup>792</sup> Although that matter remains somewhat confused, with the Principal Family Court Judge recently referring to counselling and conciliation as processes, see Boshier PF “New Trends in the Family Court - How Psychologists can best help children” Speech to the New Zealand Psychological Society Annual Conference, 25 August 2007, 5. His Honour refers to the former as ‘*essentially therapeutic*’, and the latter as “*essentially agreement forming*”. Also, in 2004 His Honour opined that: “*counselling as it is presently labelled should be renamed conciliation and should be more focussed on the actual issues between the parents. Counselling should be seen for what it is and that is a therapeutic process that the parties respectively may need to go through in order to ready themselves for dispute resolution*”, Boshier supra n566, 4-5, and the same statement was made in: Boshier supra n563, 4.

understood in the ADR literature. Added to that must be some specific features that are the result of it being implemented through legislation in the context of applications made to a court, i.e. an environment that ultimately includes an adjudicative jurisdiction. This environment undoubtedly creates some compulsion to partake in processes that are normally understood to be entered into voluntarily, a compulsion that is further enforced by the fact that the interventions are coordinated by, provided through, and financed by the state, which has created powers to force parties to attend under summons.<sup>793</sup> Expressed in terms of the dispute resolution parameters, the counselling process under the Act has the following characteristics.

The neutral assists the parties in their efforts to achieve conciliation in the role of a counsellor and in the context of a policy objective that places the best interests of the children paramount.<sup>794</sup> The counsellor is not strictly neutral and will seek to direct any resolution towards achieving the policy objectives. The intervention is directed at dealing with emotional issues and seeks to influence behaviour in order for that behaviour to better align with the policy objectives. The counsellor is chosen and engaged by the executive branch of government, which determines the extent of the intervention, and pays for it. Selection of counsellors, their background, skills and qualifications are not strictly described, but also indirectly governed by the executive. In practice, the coordination of counselling activities is in the hands of specific functionaries within the court registry, while the actual counselling is sub-contracted to specialist counsellors (often through dedicated organisations<sup>795</sup>). Entry into the process is theoretically voluntary, but there is a strong compulsion to participate through surrounding regulation once a referral has been made. The process involved is not prescribed and is left to the individual counsellors. The available information<sup>796</sup> about the actual counselling process refers to listening and asking questions, acting out situations or conversations, drawing, writing a journal, writing letters to one self, drawing charts etc. Information exchange between the parties –and between the parties and the neutral– is thus highly unregulated and informal, without any procedural or evidential rules, and can be adjusted to the parties, to the characteristics of the dispute and to any cultural parameters. The process can include negotiation, but is not that of principled mediation.<sup>797</sup> There is a clear outcome objective, that of conciliation, i.e. finding a matrix of arrangements for post-separation parenting that represents a compromise between the parties and that complies with the paramount principle and the collaborative model. The process is private, confidential, and privileged, with the exception of (limited) feedback from the counsellor to the registry. Any resulting agreement can be verified and formalized by the court, following which enforceability is achieved. A consensual and subsequently formalized outcome cannot be appealed in principle, but a fresh application can be made. There are no standardized negotiation protocols, algorithms, negotiation instruments or resolution matrices in use.

As mentioned, counselling is available for free through the Family Court in a range of circumstances. It is

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<sup>793</sup> S17 Family proceedings Act 1980 and new S46ZE (as to be amended).

<sup>794</sup> The counselling process arguably falls under the umbrella of s4 of the Act (the paramount principle), while the policy preference of the collaborative model will also act as an outcome objective.

<sup>795</sup> For example Relationship Services.

<sup>796</sup> For instance from the Relationship Services website at <http://relate.virtuozzo.co.nz/>.

<sup>797</sup> A term that describes a process that seeks parties' underlying interests and motivations, rather than working from their stated positions. The seminal work on this approach is Fisher et al supra n709.

used frequently, with some 13,000 requests for counselling annually.<sup>798</sup> There is no conclusive data about the success rate of counselling in parenting cases, other than that 68% of parenting applications are resolved by consent, but this would also include private ADR, agreement between the parties and the judicial mediation process that is available.<sup>799</sup>

### *Mediation*

The 2008 amendments to the Care of Children Act<sup>800</sup> introduce the opportunity for referral to a professional mediator; in much the same way as the referral to a counsellor is organized. The legislation provides limited details about the mediation process. The mediator must arrange for, or request, meetings for the purpose of mediation. The mediator can meet with the parties prior to the mediation to assess whether mediation is appropriate, to clarify the main issues, to determine who should attend and how to proceed, and to gather further information.<sup>801</sup> The mediator has a duty to identify matters in issue, to facilitate negotiations, and to assist the parties to reach agreement. The mediator must report to the Court, indicating whether the dispute has been resolved. This report may include specific matters, such as the details of any resolution, details of matters on which no resolution was reached and (non binding) recommendations as to next steps by the parties. Copies of the report are to be provided to the parties.<sup>802</sup> The mediation is to be held in private (and it is privileged). The mediator may allow attendance of the children and a support person for the parties.<sup>803</sup> Interestingly, the wording of the legislation suggests that the mediator can prevent attendance by the lawyer of a party, while there is no provision to review such a decision.<sup>804</sup> If a child attends the mediation, the mediator must discuss with the child whether he or she wishes to attend counselling for the purpose of clarifying his or her views on the matter. If that is the case, the Court will organize counselling.<sup>805</sup> The mediator may adjourn the mediation from time to time, but the duration of the process is ultimately subject to regulations or the direction of the Court. The mediation fees and expenses will be paid for out of public funds. As with counselling, the legislation provides for powers to force participation. Expressed in terms of the dispute resolution parameters, the mediation process has the following characteristics.

The neutral assists the parties in their negotiation in the role of a mediator, but in the context of policy objectives including the collaborative model and the paramount principle.<sup>806</sup> The mediator is therefore not strictly neutral. The intervention is directed at identifying issues and facilitating negotiation with a view to reaching agreement. Although not specifically stated, the type of intervention that is sought is probably that of principled mediation.<sup>807</sup> The mediators will be independent professionals, selected and

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<sup>798</sup> Wyatt and Ong *supra* n1.

<sup>799</sup> *Ibid*, 30. These numbers are confusing, as other statistics show that requests for counselling and parenting applications only overlap for 10% of all cases (Wyatt & Ong, at 80). It is also difficult to correlate this percentage with the often quoted figure of 95% of cases been resolved in the conciliatory arm of the Family Court.

<sup>800</sup> This part of the amending legislation has not yet been brought into effect.

<sup>801</sup> S46X (as to be amended).

<sup>802</sup> S46Y (as to be amended).

<sup>803</sup> S46Z (as to be amended).

<sup>804</sup> S46Z (b) (as to be amended).

<sup>805</sup> S46ZA (as to be amended). The actual counselling process involved and any required format for reporting the child's views thus assessed is not provided in the legislation.

<sup>806</sup> The mediation process arguably falls under the umbrella of s4 of the Act.

<sup>807</sup> A form of mediation where the parties' respective positions are analysed in terms of underlying interests and where emotional issues are acknowledged but excluded in attempting to find a resolution matrix with a win-win character. The parties are assumed

engaged by the executive branch through the administration of the court, which determines the extent of the intervention, and which pays for it. Selection of mediators, their background, skills and qualifications are not strictly prescribed,<sup>808</sup> but are indirectly governed by the executive branch, either through regulations or through the court functionaries that practically engage the mediators. The parties have no role in the selection process. Entry into the process is theoretically voluntary, but there is a strong compulsion to participate through surrounding regulations once the referral has been made. There is a clear outcome objective; that of negotiated agreement, complying with external objectives. The process is private, confidential, and privileged with the exception of (limited) feedback from the mediator to the registry, and this may include suggestions from the mediator for the next steps in the process. Any resulting agreement can be verified and formalized by the court, following which a level of enforceability is achieved. There are no standardized negotiation protocols, algorithms, negotiation instruments or resolution matrices. There are provisions in respect of involving the children and how their views may be obtained.

While mediation is enthusiastically promoted by many, and does indeed provide advantages, it also presents some drawbacks, which can be conveniently discussed at this point, noting that they also apply to the mediative components of the mediation conference and the PHP process.

The counter-movement comes from an academic<sup>809</sup> and a feminist<sup>810</sup> perspective. The main argument against mediation is that it allows power inequalities to continue, thereby making mediation in fact less empowering than litigation.<sup>811</sup> A similar problem involves the inequity that can arise from the parties being in different stages of coping with the separation. This argument presupposes that this emotional inequity is sufficiently mitigated in a litigation setting, while it can have a severe impact on the way parties behave in a mediation context. This point extends to behaviour generally: the party who maintains the least emotional and most “reasonable” approach can dominate the process, or at least tends to find a more receptive ear from the mediator, who may be inclined to reward behaviour that appears to support early settlement. This aspect also brings into focus another disadvantage of mediation, the impact of the personalities of the parties on the process, and the unconscious affection between parties and the mediator that may arise in the intense communication of a mediation setting as opposed to a court hearing. The disadvantages of inequalities or personality and power differences are further exacerbated by the private and confidential character of the mediation process.

Therapeutic counselling and mediation processes treat the parties as patients rather than as rights-holders. This then raises the question whether that is an appropriate role for a process undertaken

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to act rational and to evaluate resolution proposals against a “best alternative to a negotiated agreement”. This approach is based on the assumption that there is an overlap between the parties’ minimum and maximum outcome objectives in which a resolution can be found. This process is assisted by focusing the parties on objective criteria by which to describe and analyse their interests, and by broadening the scope of those interests to generate more possible resolution matrices.

<sup>808</sup> A course for mediators was recently announced, which includes the following topics: family systems theories, child development, effects of separation and breakdown on families, impact of culture etc. See [www.aminz.org.nz](http://www.aminz.org.nz).

<sup>809</sup> See for instance Henaghan *supra* n100, p280-292.

<sup>810</sup> See for instance Fineman *supra* n3; Comerford L “Power and Resistance in U.S. Child Custody Mediation” *Atlantic Journal of Communication* (2006) 14, 173-190. The feminist objections to mediation extend to all “alternative” processes. The main argument is that “alternative” settings allow for power imbalances to continue, because the assisting third party has no means to recognize or address such imbalances, or that the process in effect magnifies imbalances.

<sup>811</sup> Interestingly, the activist men’s rights groups typically strongly favour mediation, thereby perhaps providing a somewhat perverse acknowledgment of the feminist perspective.

within the court system, and more importantly, where the standards for healthy versus pathological behaviour are set, and where the authority arises that underpins any diagnosis and the implementation of the subsequent treatment. To frame this in its extreme form: where does the authority arise to decide that individuals who come to a court for a determination of their dispute (i.e. their respective rights and obligations) can be “treated” in a process that forces them to come to consensual decisions, which they have not been able (and were not willing) to achieve autonomously.

Mediation processes restrict parties in obtaining information about their legal entitlements. They are directed to settle matters without properly asserting what their relative negotiation positions are. This aspect can be seriously skewed by inequalities between the parties, or by flaws in the mediation process.<sup>812</sup> A further problem with court-related<sup>813</sup> consensual processes is that they are not truly consensual, but are entered into (and conducted) under strenuous circumstances that cast a hesitant party in a negative light; as a person who is unable or unwilling to approach his/her difficulties in a mature and sensible manner. Once caught in that perception, it is difficult for a party to escape from it,<sup>814</sup> while the emotional mindset and context that may be (or are likely to be) underlying his/her hesitancy are very probably the same that will create some inequality in the subsequent process as well. To leave a party with such handicaps in the hands of a therapeutic counsellor or mediator with a legislative and professional objective to come to efficient settlement seems highly inappropriate on that basis alone.

A further problem with consensual process as compared to litigation may be that it may fail to provide adequately for cultural differences where these are present. The court system contains safeguards by forcing both parties to adopt a (more or less) neutral culture, that of the court, while it also has procedures in place for translators and even cultural experts. This is much less likely to be the case for alternative processes.<sup>815</sup> A further problem relates to the economies that are expected from alternative processes. They are without exception promoted as being less costly and more efficient.<sup>816</sup> Yet it is undoubtedly the case that proper canvassing of all the issues between the parties before attempting settlement would take considerably more time than is currently expended, thus clearly indicating that the mediating third party exerts settlement directed pressure.<sup>817</sup> This is not to criticize consensual processes, but merely to indicate that two important advantages that are often promoted jointly (efficiency and thorough dealing with the issues without restrictions of formality), in fact exclude each other. The

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<sup>812</sup> *Jones v Borrin* [1990] NZFLR 1, provides an example of a “negotiated” settlement that deviated substantially from legal entitlements, and which was achieved because of a lack of knowledge of those entitlements, as well as a flawed process (the case is not a parenting matter). It must be noted that the Law Commission specifically recommended that parties should obtain legal advice prior to mediation and before ratifying any agreement reached in a mediation process. The Commission apparently recognised this potential problem, which was elegantly covered in the 1993 Boshier Committee suggestions, by providing independent legal advice within the suggested conciliation service.

<sup>813</sup> For a further discussion of the problems with court directed mediation see Zondag B “Let’s Not Get Mediation into Our Courts at All” NZLawyer (2009) 120, 12-13.

<sup>814</sup> A phenomenon referred to as “sequence reality” and “risk aversion” which can influence neutral facilitators as well as adjudicative decision makers. See above, starting at pg 79.

<sup>815</sup> The evaluation of the Family Court mediation pilot commented that –although there had been budget available– there had been no requests for translators or cultural advisors. Barwick and Gray supra n491, 44.

<sup>816</sup> It is virtually impossible to provide objective empirical evidence of the cost factor, because the mediation and litigation processes and/or their outcomes are very difficult to compare, and any comparison is further hampered by the effect of selective government funding and the impact of not-directly related funding programmes (such as provisions for legal aid for legal work surrounding mediation).

<sup>817</sup> As is indeed expected of them through policy, legislation, practical directions, and economic- and professional objectives.

limiting<sup>818</sup> government budgets<sup>819</sup> typically available for consensual processes (based on the assumption that they are much more efficient), are a further incentive for the counsellor or mediator to focus on settlement rather than on properly canvassing the issues and constructing a robust resolution. Research shows that (in parenting disputes) mediated outcomes generally do not have better or longer lasting outcomes than litigated outcomes.<sup>820</sup>

Mediation carries the risk that it imposes the values of the mediator on the parties, especially if the mediator is a person of authority.<sup>821</sup> The problem that mediation and counselling will eventually create an ongoing dependency on the “helping professions” has been discussed above, together with the potential disadvantage that consensual processes in fact provide an environment for unwanted and unconstitutional state intrusion in private affairs.<sup>822</sup> A further problem with consensual processes lies in the involvement of lawyers.<sup>823</sup> While they can play a positive role, they can also easily abuse the process by the way they frame the issues on the parties’ behalf. The result may well be that even in a consensual dispute resolution process; ultimately the party with the better advocacy will end up with a relatively better outcome. In those circumstances, the mediation process can also easily be turned into a “fishing expedition” where alternative fact scenarios can be canvassed in preparation for a formal hearing, or where lawyers can observe and test future witnesses.

In conclusion, while alternative processes have characteristics that make them suitable to resolve dispute situations between parties who need to have ongoing relationships after the conclusion of the process, they also have disadvantages when used in severe conflict situations or with parties who are simply not amenable to the underlying assumptions of good-faith information exchange and negotiation.<sup>824</sup>

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<sup>818</sup> For instance in the mediation pilot, the budget was \$775 for a mediation including preliminary interviews or a pre-mediation session. This is simply insufficient to attract experienced professional mediators. (Although the evaluation largely avoided discussing this problem).

<sup>819</sup> Ultimately, the process of budgeting for such services may lead to increased executive involvement in selection of contractors and in the efficiencies of the process itself. As a result, professionals may develop a dependence on government provided work, and this can eventually lead to normative “target-setting” not only in quantitative, but also in qualitative terms. As an example, with the introduction of state-sponsored mediation by way of legislation, the actual details of the amount of mediation time and hourly rates will be set by regulation, i.e. through the executive branch. The result is no doubt that a tension will result that forces mediators to strive for quick settlement, in order to operate profitably, and ensure continued referrals. The consequence is mediation that is highly directive and focused on policy objectives that may be extrapolated from the way mediators are contracted. A following step may well be that the state employs mediators, or engages organisations with which it can engage in nation-wide contracts. Something similar operates in the ACC mediations. There an “independent” insurance company (the 100% state owned ACC) with only one customer, the state, engages an “independent” dispute resolution provider, which has only one customer, the ACC, to mediate disputes between ACC and its “clients”, who have of course no choice but to be its clients, and who have been legislated out of a right to seek personal redress against tortfeasors or the state. Although this is not the place to discuss the merits of the ACC scheme, it may be apparent that these types of “dispute resolution processes” are somewhat farcical. Eventually, independent professionalism is replaced by policy driven and normative bureaucracy. The outcome of these of developments is always the same: reduced quality, increased costs, and possibilities for the less scrupulous to abuse the system.

<sup>820</sup> Some studies find that there is no evidence that people who attended mediation had less conflict 4 years later, nor less resentment of the ex partner. Settlements do not stand the test of time. Mediation is a short-term goal oriented intervention, which will not make dramatic differences in peoples’ lives: Walker *supra* n228, 284.

<sup>821</sup> Such as the judge in mediation conferences or an external professional operating under the “constructive authority of the court”, as the Royal Commission framed it. Nevertheless, parties often perceive a somewhat authoritative mediator as helpful and record that they often wished the mediator had been more decisive when there was an impasse in the negotiations, see Henaghan *supra* n100 p288 who records that half of the participants in a mediation trial were unhappy with the mediation outcomes, but would undertake the process again.

<sup>822</sup> As a result of the possibilities inherent in the process to strongly direct the parties to complying behaviour and outcomes that align with policy objectives, see: Lande *supra* n391, 641; Reece *supra* n101, 174.

<sup>823</sup> There is an additional issue with court directed mediation in that respect, in that it is doubtful whether legal aid will be available for mediation. This may mean that parties have to forego legal assistance when participating in the new mediation alternative.

<sup>824</sup> Although proponents of court-related mediation suggest that the dispute resolution system can be designed to mitigate these disadvantages, see for instance: Lande J “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs” UCLA L Rev (2002) 50, 69-141, and Lande *supra* n391.

### *Mediation conference*

The mediation conference has been described as being more connected to the adjudicative function of the court than to the conciliatory aspect.<sup>825</sup> In that view, the better term for this intervention would be “settlement conference”, a type of intervention available in all civil matters in New Zealand courts. The legislative description of the process<sup>826</sup> appears similar to that of the new non-judicial mediation, but there are some critical differences. First, the procedure is described in terms of its objectives, rather than in terms of the neutral’s duties. The objectives are to identify matters in issue and to try to obtain agreement on them.<sup>827</sup> That direction is stronger than the private mediator’s duty to “make every endeavor”, “to facilitate negotiations” and “to assist to reach agreement”. Secondly, the chairperson in the mediation conference (a judge) has the power to make consent orders during the process,<sup>828</sup> which provides an opportunity for the use of powerful negotiation techniques.<sup>829</sup> The mediation conference chairperson’s task is not that of the mediator under the new mediation process. The judge is an authoritative figure with a mission to try to obtain a settlement between parties who have defined their positions, and the power to cast any intermediate agreement immediately in stone and, hopefully, the skills to get the parties to agree on as many issues as possible. In terms of dispute resolution parameters, this process is normally entered under some compulsion and involves a strongly directive neutral with a policy agenda for the process outcome. The power to make enforceable consent orders at any time introduces a hybrid dispute resolution element that is not available in the ordinary litigation process.<sup>830</sup> The parties have no influence on the choice of the neutral, and the neutral is not strictly prohibited from formally hearing the matter if the mediation is not conclusive.<sup>831</sup> Although the legislation states that the process is privileged, it is difficult to see how that is maintained where the chairperson continues to hear the case, particularly in situations where only a few issues remain unresolved. Parties may be represented at a mediation conference and can bring a support person, but this person can be removed by the chairperson.<sup>832</sup>

### *Hearing*

Despite being often portrayed as lumbered with the hallmark disadvantages of the traditional adversarial trial, a Family Court hearing is nothing of the kind. In fact, the Family Court process involves a number of features that clearly distinguish it from civil processes in other parts of the court system.<sup>833</sup> These features arise from the purposeful departure from formality and adversarialism that were introduced in the Family Courts Act 1980.<sup>834</sup> The informality of proceedings has recently been scrutinized and some

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<sup>825</sup> Boshier PF “Family Court Matters Bill - How the Family Court Can Improve Its Approach to Resolving Disputes of Those That Come before It” Paper presented at the LEADR Conference - Dispute Resolution in the Family Court, Auckland, September 2007.

<sup>826</sup> S46K-O (as to be amended).

<sup>827</sup> S46L (as to be amended).

<sup>828</sup> S46N (as to be amended).

<sup>829</sup> For instance “log-rolling” (negotiating sets of issues on the basis of the “exchange of value” involved) or “issue extension” (breaking larger issues up in smaller pieces and conclusively dealing with these one by one).

<sup>830</sup> Where the entire decision and subsequent orders are provided after both parties have been heard entirely.

<sup>831</sup> S46O of the 2008 (as to be amended).

<sup>832</sup> S46M of the 2008 (as to be amended).

<sup>833</sup> For an extensive discussion see Inglis *supra* n115, chapters 8 and 9.

<sup>834</sup> See the discussion in chapter 6, above.

formal elements will be re-introduced in an attempt to emphasize the authority of the court.<sup>835</sup> The departure from strict adversarial process is necessarily limited by rules of natural justice, albeit that this imperative is subject to the paramountcy principle in a limited range of situations.<sup>836</sup> The inquisitorial elements of the process are primarily found in the court's opportunity to engage in the examination of witnesses and the court's discretion to appoint expert report writers, lawyer for the child, or lawyers to assist the court. Other examples are amended rules of evidence,<sup>837</sup> court powers to call and examine witnesses on its own initiative, judicial interviewing of the children and the standard practice of taking affidavits and briefs of evidence as read. The Family Court registry is more involved with case management than is the case in the ordinary civil courts. Family Court judges have more powers for case management including discretion to impose limits on party autonomy, in sharp contrast with other civil proceedings.

A Family Court hearing proceeds in much the same way as other civil matters. The applicant is normally heard first and the parties' witnesses give evidence in chief followed by cross examination and re-examination.<sup>838</sup> Where a lawyer for the child is involved, he or she will also have an opportunity for cross examination of each witness. The court's decision is provided after both parties have had the opportunity to present their evidence and argue their respective case. Childcare matters proceed on application by one of the parties, followed by a preparatory phase involving an exchange of affidavits, the appointment of lawyer for the child, obtaining reports and such other preliminary matters. Cases that involve allegations of abuse may contain ex-parte applications for protection orders, which are customarily granted, thus distinctively changing the status quo between the parties ex ante. The unfortunate necessity for this blunt instrument is a good example of the special nature of the Family Law jurisdiction. Another example is the manner by which awards of costs are considered. In sharp contrast to ordinary civil matters, where costs follow the event, albeit circumscribed by a detailed cost regime, the Family Court maintains a high level of discretion, including consideration of the paramount welfare principle and the effect of cost awards on it. Access to justice is another argument against allowing a "winner takes all" attitude in the Family Courts.<sup>839</sup> Compliance with the court's procedural directions or with its orders can be enforced by way of an implied jurisdiction to punish for contempt.<sup>840</sup>

In terms of dispute resolution parameters, the litigation process in the Family Court involves an adjudicative neutral, not selected by the parties but by the state, who makes a determination based on formal evidence, which may be restricted in scope under the application of the paramount welfare principle, and brought under relaxed rules of evidence. The process is compulsory, and can be initiated by one party only. The information exchange procedure lies somewhere between strictly party-controlled

<sup>835</sup> Judges may again choose to wear gowns, see s10 Family Courts Act 1980, as amended in 2008, and the previous discussion in chapter 8.

<sup>836</sup> For instance the use of relaxed rules of evidence, or the frequent use of ex-parte orders.

<sup>837</sup> For instance Care of Children Act 2004 s128, which states: "*In all proceedings under this Act (other than criminal proceedings, but including appeals or any other proceedings), the Court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law*".

<sup>838</sup> Sometimes a different approach is adopted where all the main witnesses give evidence in chief first in order to extract the real issues, which are then subject to further examination in the traditional manner.

<sup>839</sup> For a detailed discussion see Inglis supra n115 at 8.7, and Webb and Treadwell supra n471, at 6.135.

<sup>840</sup> See generally, Inglis supra n115, at 8.8. The matter was recently specifically addressed and confirmed –albeit on the narrow basis of non-compliance with specific orders only– by way of a case stated to the High Court with intervention from the Solicitor General and the Attorney General: *KLP v RSF* (2009) 27 FRNZ 603.



adversarial- and an entirely court controlled inquisitorial process. The process is regulated by way of legislation and court rules. Although the process takes place in an environment that avoids “unnecessary formality”,<sup>841</sup> its objective is a binding decision by the neutral, not a negotiated or consensual outcome. Decisions are provided in writing, and must contain judicial reasoning and conclusions. The process does not address emotional needs and has no specific therapeutic objective. As with all lower court decisions, there is an inherent right of appeal to the High Court, a court of superior, but general, jurisdiction.<sup>842</sup>

### **A PHP HEARING**

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The features of the PHP process have been described above, and can now be considered in terms of the dispute resolution parameters. It may be readily appreciated that the PHP characteristics share commonalities with all other processes that are available in the Family Courts. The process is not consensual but part of the compulsory court process. The neutral is a state appointed judge, with the associated authority and decision making powers, but operating under the legislative direction of the paramount welfare principle, and therefore not truly neutral. The PHP intervention is therapeutic in nature, it expressly seeks to affect and redirect the parties’ attitudes. In that respect the objectives are more akin to the counselling interventions than to those of a mediation process. This may also be concluded from the fact that education is considered to be a vital aspect of the PHP process. In that respect the PHP goes beyond the legislative objectives of reconciliation and conciliation. The process and the information exchange involved in it is not regulated in any detail, but explicitly left to the discretion of the individual judge, who obtains extensive powers to limit evidence, to interfere with the giving of evidence, and even to determine the issues the parties will be allowed to place before the court. Especially during the preliminary hearing the provision of evidence is highly irregular as compared with the traditional process. Although the judge engages with the parties in a setting that appears informal and which sometimes resembles a mediation or mediation conference approach, the parties remain on oath and anything they say is taken as sworn evidence.<sup>843</sup> The role of the judge is flexible. The judge can choose to operate as a mediator or as an adjudicator, and can switch between those roles at his or her own discretion. In practice that approach is mostly restricted to the preliminary hearing. There are no provisions that regulate if and how a judge is to signal to the parties which role is being exercised. A judge can make consent orders in the course of the process and can adjourn the proceedings to allow the parties to negotiate on the entire matter or on individual issues in private. All of this makes the PHP a ‘hybrid’ process; it contains elements of mediative and adjudicative interventions and it has aspects of inquisitorial and of adversarial procedure. This raises a number of concerns, including uncertainty about the process characteristics, the tension between hybrid process and natural justice, the effect of consent orders and interim decisions, and the maintenance of natural justice in the context of intense judicial

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<sup>841</sup> S10 Family Courts Act 1980.

<sup>842</sup> As opposed to for instance the Australian context, where appeals from first instance decisions are to a specialized court of superior jurisdiction.

<sup>843</sup> An example of a risk resulting from such a chaotic environment can be found in *JHL v Secretary for Justice on behalf of DMR* (2007) 27 FRNZ 645; [2008] NZFLR 54. There the father alleged that the (unrepresented) mother not mentioning her rights under The Hague Convention in a preliminary PHP hearing meant that she acquiesced to the child staying in New Zealand.

intervention in evidential matters.

### *Uncertainty about the character of the process*

The general hazards which court-related ADR processes present from the litigant's standpoint have been well identified.<sup>844</sup> Alternative and informal procedures that are initiated under the authority of the court but which lack the procedural safeguards of litigation carry the risk of coercion and manipulation of weaker parties by stronger, and of both parties by the neutral. Attempts by courts to oversee and regulate hitherto private settlement-directed negotiations present the same dangers. These dangers flow from the nature of the authority of the court. Courts are places where state selected individuals, endorsed with the full gamut of state authoritative and compulsive powers instruct citizens what to do. By contrast, ADR processes provide an environment where the parties remain in control of their own fate and engage in voluntary negotiation. At the very least, there is a serious risk that meanings will become muddled in the minds of disputants if processes over which they supposedly retain control are conflated with those which are essentially directed towards the delivery of an imposed decision.<sup>845</sup> In this respect there does seem a crucial difference between allowing the looming prospect of a trial to encourage the parties to contemplate a negotiated settlement and active steps by a court to promote one. Once the court seeks to sponsor or direct attempts at settlement, the difference between the self-constructed, negotiated outcome and the imposed third-party decision becomes blurred. The character of adjudication is that the parties know what to expect, an imposed decision of an authoritative superior. That clarity is lost once courts begin to involve themselves in the sponsorship of settlement processes that have voluntary participation as a fundamental characteristic.

### *Hybrid process and natural justice*

One of the strengths of mediation is that compromise solutions can be constructed that contain elements that are not available to adjudicative determination. This may involve issues that are not part of the formal dispute because the parties did not include them in the litigation, or matters that are deemed irrelevant in law. A similar advantage of mediation is that parties are free to disclose information that they would not provide and would not be required to provide in an adjudicative setting. A third mediation advantage is that it offers the opportunity to canvas proposals without formalizing them, thus providing a possibility to check whether there is an overlap between the parties' minimum and maximum positions, in which a compromise may be located. A further advantage of mediation is that it can involve caucusing or other methodologies whereby the mediator unilaterally communicates with the parties in order to assess compromise positions. In all these situations the mediator becomes privy to information that would not be, and should not be, available to a subsequent adjudicator if the mediation fails. Ultimately these advantages of the mediation process turn on the parties' good faith attempts at reaching a solution, and their preparedness to divulge the additional information that is required. Effective mediation thus requires that the information exchange is protected and privileged. Formal protection is

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<sup>844</sup> See for instance: Auerbach supra n354, Ingleby supra n147.

<sup>845</sup> A problem that was signalled very shortly after the introduction of the Family Courts, see Barry N and Henaghan RM "Mediation in the Family Court" FLB (1986) 1, 84-89.

normally provided by way of a mediation agreement between the parties, and is therefore contractual in character. In family matters there is specific protection for judicial conferences, provided through the court rules.<sup>846</sup> The rules also contain the provision that a judge who has presided over a judicial conference must not preside over a subsequent hearing,<sup>847</sup> although it is not prohibited under the Family Proceedings Act 1980.<sup>848</sup> Information from a mediation conference is privileged.<sup>849</sup> Contrary to some other jurisdictions, New Zealand does not have a general statute to regulate and protect the mediation process,<sup>850</sup> but covers the matter in the rules of evidence.<sup>851</sup>

Although this constellation of rules seems somewhat complex, it contains the principle that no information from a mediation process should normally be allowed to find its way into an adjudicative process.<sup>852</sup> Even though a judge may theoretically be involved in both processes subsequently, that does not provide for the flexibility to iterate between the two. Although the legislation was certainly not drafted with the PHP in mind, the process does not fit within the current rules. From a practical perspective, the end result of the iterative process is simply that the judge will end up with information that he or she should not have or at least not without it being tested and without both parties having had the opportunity to be heard on it.<sup>853</sup> There is a real risk that such information, which is not admissible in principle, will influence the court and thereby create the possibility of bias, or the appearance of the possibility of bias. Justice must not only be done, it must be seen to be done. It is difficult to see how that is possible if the judge can seek information and/or compromise at ten o'clock while wearing the hat of a mediator, to then don the judge's wig at five minutes past ten and find facts and determine the matter as if that information had not been available. While it has been said that realism must temper the bias rule when a judge is executing the inquisitorial role as provided in the Family Court legislation,<sup>854</sup> this hybrid process is clearly of a very different nature.<sup>855</sup> The PHP process therefore carries a very high

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<sup>846</sup> Rule 178(4) holds that no evidence is admissible in respect of any information, statement or admission disclosed or made in a settlement conference, or of any matter arising out of such a conference. Note that this relates to judicial conferences, which are instigated by the court.

<sup>847</sup> Rule 180.

<sup>848</sup> S16 Family Proceedings Act 1980. This will also be the position once the Care of Children Act Amendment Act 2008 provisions relating to mediation conferences come into force, as these effectively transfer the relevant clauses from the Family Proceedings Act 1980 to the Care of Children Act 2004. The referrals to private mediators that will be included once the 2008 amendments come into force, contain a heading that mediations must be in private, but do not specify anything about privilege or confidentiality.

<sup>849</sup> S18 Family Proceedings Act 1980. This will be carried through in the 2008 amendments to the Care of Children Act 2004 (that part of the amendments was not yet in force at the time of writing).

<sup>850</sup> Which normally also covers liability for the mediator, protection for the mediator from being called to give evidence, and other circumstantial issues.

<sup>851</sup> S57 Evidence Act 2006, which includes a reference to privilege for communication made in the context of confidential settlement mediations. This stipulation is, however, based on admissibility rules, which appear abrogated by s164 of the Family Proceedings Act 1980. This conflict of rules was addressed in the context of the Guardianship Act 1968, the precursor of the Care of Children Act 2004, which contained in its s28 the same provision as s164, which is common to other family law statutes (e.g. s84 Domestic Violence Act 1995). In *Pallin v Department of Social Welfare* (1983) NZLR 266 it was held that the general rule for admissibility does not override specific statutory exclusions.

<sup>852</sup> See particularly R178.

<sup>853</sup> A particularly interesting situation arises when a judge chairs the mediation, is accosted with information that might point to violence issues, and then continues to hear the matter, where of course violence issues require special treatment. An example of a similar situation may be found in *W v H* (2008) 26 FRNZ 996, where the violence issues had been "overlooked" before the mediation.

<sup>854</sup> *Re Commission on Thomas Case* (1982) 1 NZLR 252 and *Mathews v Hunter* (1993) 2 NZLR 683, and see on this issue Jefferson supra n656, 24.

<sup>855</sup> The Law Commission recognized the problem in its report into the Family Court, where it suggested that "*one process must not bleed into the other*": New Zealand Law Commission supra n328, Para 41. The issue was recently addressed in a judicial speech, which noted that the position of a judge chairing a mediation process could lead to parties deferring rather than coming to consensus: Dadelszen von P "Alternative Dispute Resolution in the Family Court - Implementation, Issues and a General Overview" Speech to the Arbitrators' and Mediators' Institute of New Zealand Conference, Wellington, 7 August 2009, 5.

risk of breaching the principles of natural justice. This problem is confounded by the fact that the parties are sworn in at the start of the PHP hearing, and that there is an explicit rule that they will remain on oath throughout, and that everything they say may be used as evidence. That concept itself is incompatible with a mediation setting, which is characterized by increased openness and candour, which of necessity goes beyond the giving of formal evidence. It is also incomprehensible that the rules on the one hand state that anything said in mediation is confidential and privileged, while the parties are on formal oath while engaging in mediation attempts. By mixing the two processes, fundamental characteristics of each have been distorted beyond recognition, thus removing the integrity of each. Breaches of natural justice are always fact specific, and it must always be assumed that rule systems are constructed to avoid such breaches, and that judges will act judicially, i.e. do everything to assure that the principles of natural justice are complied with. Nevertheless, the conclusion must be that the PHP process will create an environment where only the highest quality of judicial work can prevent serious problems.<sup>856</sup> It remains to be seen whether that standard can be achieved in practice.

### *The effect of consent orders and decisions in the course of the process*

Judges can make consent orders in the course of a mediation conference,<sup>857</sup> and this possibility is extended into the PHP process. The judge will have the power to establish what the relevant issues are and to determine the process by which these are dealt with. The PHP briefing paper contemplates consent orders and decisions on individual issues at any time during the process. Because the process is a hybrid, the judge can play a highly coercive role towards a settlement on individual issues, which may appear consensual, but is in fact derived from the judge's opinion. As a result, the case can be broken down in fragments by the judge and each can be dealt with by mediation or determination. While this flexibility may be effective in terms of resolving the matter, it represents a significant departure from the traditional system, where the judge hears the entire case before making any decision. The first problem with this innovation is that it is open to coercion by the stronger party or the judge. By tactically dividing the issues a holistic view of justice in the entire case may be easily overlooked, particularly where the resolution of issues takes place in progression.<sup>858</sup> Consent orders are recorded in terms of outcome only and there is no recording of relevant fact finding or judicial reasoning. This would in fact be inappropriate under the confidentiality and privilege rules that attach to mediation. In the case of judicial determination, however, it would remain necessary that reasons be given.<sup>859</sup> The potential problems with cases that are partly decided and partly resolved by consent may be obvious, there is a real risk that the reported decision would be either useless or in breach of privilege. Although the PHP information material stipulates explicitly that the process is subject to appeal,<sup>860</sup> this is troublesome if the

<sup>856</sup> See for a discussion of appropriate process in the context of natural justice: *R v Taito* [2003] 3 NZLR 577 (PC), where the Judicial Committee castigated the New Zealand Court of Appeal for failure to abide by minimal standards of natural justice.

<sup>857</sup> S15 Family Proceedings Act 1980, which will be carried through in S46N of the Care of Children Act 2004 once the 2008 amendment comes into force.

<sup>858</sup> That is, one issue must be resolved or determined before the next can be dealt with, and so on. See the discussion about "sequence reality" starting at pg 79, above.)

<sup>859</sup> *Lewis v Wilson & Horton Ltd* (2000) 3 NZLR 546, Paras 74-87, holding that the giving of reasons follows as a requirement of open justice, a requirement for a valid appeal process, and a requirement for relevant judicial oversight.

<sup>860</sup> , but note that the brochure for lawyers Ministry of Justice *Parenting Hearings Programme; the New Process and the Role of Lawyers and Lawyers for the Child* (Brochure 084 issued by the Family Courts), or the briefing paper: Boshier and Udy supra n234, do not mention it.

outcome is entirely or partially based on consent orders, which are by their very nature not subject to appeal.<sup>861</sup> As a result, a decision that includes consented and decided issues and that is made in a hybrid process may effectively be beyond appeal. The PHP would thereby potentially remove a right that is fundamental to our justice system.

### *Natural justice and the judge's involvement in controlling issues and evidence*

While the Family Courts already have extensive powers to receive evidence, the PHP goes a step further and provides the court with powers to decide which issues are to be determined, to amend the issues that are brought forward by the parties,<sup>862</sup> and to consequently decide the evidence that is to be called and the way it is to be received. The judge can restrict evidence or require additional evidence. The judge can adopt any one of three approaches,<sup>863</sup> a combination of them, or shift between them. Through these principles, the judge can receive evidence in the format of “discussions” with the parties or witnesses. The traditional method of receiving evidence is reserved for “less complex, factual issues” whereby the judge can disallow cross examination or restrict it in time, format and content.<sup>864</sup> In other words, the PHP provides for a process where the judge plays a highly interactive and involved role, not as the observer of the process, but as its director and choreographer. The traditional method of receiving evidence is central and crucial to the adversarial process, and based on the principle that no evidence is admissible against a party without that party having had the opportunity to test its veracity.<sup>865</sup> An important aspect of cross examination is that it is controlled by the parties and it may be difficult for a judge to predict where a certain line of inquiry is going without it being completed. Existing rules of evidence already give the court the power to halt unduly protracted, harassing or scandalous cross examination. An additional aspect is the operation of the rule in *Browne v Dunn*.<sup>866</sup> This rule holds that if a court is asked to disbelieve a witness this should be put to the witness, in order to enable an explanation of the contradiction. The rule is designed to ensure fairness. Restricting cross examination has the potential to severely curtail these principles,<sup>867</sup> and the provisions of the PHP process are therefore clearly against standing practice, and potentially in breach of the right to natural justice. Under the rules of the traditional process there is some leeway for judicial intervention in cross examination, but that arguably does not extend to the level of interference that is contemplated by the PHP, particularly where the process also gives the judge discretion to rule on which issues will in fact be determined, or to

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<sup>861</sup> See for instance *Hildred v Strong* [2007] NZCA 475, a relationship property case, and *Arthur v Arthur* [1994] NZFLR 120, 124-125, which also refers to the alternatives, an application to the Family Court to set it aside or a review application to the High Court. The case also gives an interesting opinion on the role of the judge in consent orders, effectively determining that there was nothing consensual in the order, hence, it ought to be seen as an ordinary decision.

<sup>862</sup> The briefing paper (Boshier and Udy supra n234) provides that the judge can, upon hearing from the parties, decide what the “true” issues are, i.e. decide that there are other or additional matters that require determination than those perceived by the parties.

<sup>863</sup> Discussion and negotiation, traditional hearing with cross examination and assessment for future hearing, see briefing paper: *ibid*, 8.

<sup>864</sup> *Ibid*.

<sup>865</sup> See for this topic generally: Mathieson DL *Cross on Evidence* (Butterworths, Wellington, 2001), at 9.55.

<sup>866</sup> *Browne v Dunn* (1893) 6 R 57 (HC).

<sup>867</sup> Or as it has been put: “Suggestions that the right of an opposing party to cross examine be controlled and limited by the judge to what are perceived as essential issues can involve a denial of natural justice because it can be seen to impose an arbitrary or unprincipled restriction on the way in which the opposing party is entitled to develop and further his or her case.”: Inglis supra n115, 115.

add to them.<sup>868</sup> When considering a hybrid process in the context of natural justice, the circumstances of the individual case will determine whether natural justice has been breached. The PHP rules about restriction of issues and evidence are a feature of the process, not a matter of application of principles by an individual judge in an individual case, i.e. the breach of natural justice is systemic, rather than situational. The PHP process is *prima facie* flawed.

The argument is advanced that the restrictions on evidence and issues are part of a move from adversarial to inquisitorial process, but there are three problems with that assertion. First, true inquisitorial process as applied in civil law jurisdictions does not provide an authoritative precedent, as it doesn't actually allow that level of intervention. I will discuss this in some detail below. Secondly, in Civil Law jurisdictions, the inquisitorial powers of the judge are embedded in a system and structure that is designed to maintain natural justice, while allowing more judicial intervention in obtaining evidence. It is clearly inappropriate to provide that type of powers without the associated safeguards that are attached to it in a Civil Law system. Thirdly, there is authority from a two-judge High Court bench supporting the proposition that a change from adversarial to more inquisitorial procedures would require explicit legislative direction.<sup>869</sup>

In conclusion, the PHP process represents an innovation that mixes two fundamentally different dispute resolution paradigms, mediation and adjudication. Although that by itself is not unique, the combination is normally restricted to matters of little significance, and there are always provisions that separate the different interventions within the one process where they are applied. I am not aware of any other process where the neutral wears the different hats of a mediator and adjudicator intermittently, together with having extensive discretion to direct the relevance of issues, to restrict or enlarge the issues between the parties, to disallow evidence in substance and form and to request additional evidence. The PHP thus includes a truly hybrid process, promoted as combining the benefits of different methods, but likely to suffer from their combined disadvantages. My conclusion is that dispute resolution theory does not support the PHP innovation.

## 15 INQUISITORIAL PROCESS: DUTCH CIVIL PROCEDURE

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The PHP process is based on its Australian counterpart, which in turn was strongly influenced by Australian judges' observation of family law process in civil jurisdictions, notably Germany and France.<sup>870</sup> This continental influence may also have operated directly on the PHP development through observation by a New Zealand judge<sup>871</sup> and as part of the shift to more inquisitorial interventions that started with the

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<sup>868</sup> The possibility for the court to be involved in determining the relevant issues already exists, but is normally part of the pre-trial process. At that point there is also a possibility to control inadmissible or irrelevant evidence, see for instance *D v O* [2006] NZFLR 137; (2005) 24 FRNZ 894.

<sup>869</sup> *K v K* [2005] NZFLR 28; (2004) 23 FRNZ 534, Para 81.

<sup>870</sup> See chapter 11, above.

<sup>871</sup> See Carruthers *supra* n687.

introduction of the Family Court in 1981.<sup>872</sup>

Academic writing and case law in New Zealand is ambiguous in defining the term “inquisitorial”, and it does not seem to be well understood. This is not surprising, as the academic curriculum for lawyers in New Zealand includes only introductory material on the differences between Common Law and Civil Law procedure. The average family lawyer<sup>873</sup> will thus understand the term “inquisitorial process” from a very limited basis only, despite the regularity with which the term is used and the importance of the consequences of the changes that are associated with it. The PHP process involves substantial shifts in power and initiative to the judges, as part of the further introduction of inquisitorial techniques, and this is presumably based on the assumption that comparable powers in Civil Law jurisdictions have resulted in superior family law process.<sup>874</sup> It is therefore helpful to consider legal process in parenting matters in a Civil Law jurisdiction in more detail, together with the actual differences in outcomes, in order to assess the relevance and value of such assertions. The Civil Law system that I will use for this purpose is that of the Netherlands.<sup>875</sup>

## LEGAL SYSTEM

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While much smaller than New Zealand in terms of land area,<sup>876</sup> the Netherlands’ population is four times as large. About 20% of the population is not of Dutch origin, resulting in a comparable multi-cultural aspect. In economic terms the Dutch are better off, with a substantially higher GDP per capita.<sup>877</sup> Divorce statistics are comparable; problems with parenting following separation are similar with the same issues debated in the legal, psychological, sociological, and political context. The general political orientation of the Dutch governments of the last decades is similar to that of New Zealand’s, with a clear tendency to actively develop policy to regulate social behaviour.

The Dutch Civil Code dates from 1838, when it replaced the “Code Napoleon”, the unified French Civil Code, which had been in force during French rule.<sup>878</sup> Since its introduction, the code has undergone continuous change, including a total review following the Second World War. The Civil Code is divided

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<sup>872</sup> Whereby “inquisitorial” is understood as the pro-active role for the courts, which goes beyond adjudicating the dispute as presented by the parties. For judicial references that describe the operation of the Family Court in its childcare jurisdiction as “inquisitorial” in this context see for instance *P v K*, at Para 148 and *Skelton v Family Court at Hamilton* [2007] 3 NZLR 368, at Para 70-74. The latter case also deals with possible restrictions on that approach as a result of the application of natural justice and the Bill of Rights Act (Para 75-105).

<sup>873</sup> Including the Family Court judges.

<sup>874</sup> An article that proposes such superiority is: Langbein J “The German Advantages in Civil Procedure” U Chicago Law Rev (1985) 52, 823-866, who particularly argues for the advantages of judicial fact gathering, but notes that otherwise the procedure is just as adversarial.

<sup>875</sup> I have chosen the Dutch system because it is representative for a Civil Law jurisdiction, while I have the advantages of having studied Dutch law, albeit admittedly a long time ago, and well outside the family law field. A further advantage is speaking the language and thus being able to access the relevant materials directly. For a comparison between different other European jurisdictions in respect of family law, and the activities towards harmonization, see Boele Woelki K “The Principles of European Family Law: its Aims and Prospects” Utrecht Law Review (2005) 1, 160-168, and the references quoted in that article, particularly the CEFL website, which provides a wealth of comparative information: <http://www2.law.uu.nl/priv/cefl/> (last accessed May 2009).

<sup>876</sup> The total land area of the Netherlands is 12% of that of New Zealand.

<sup>877</sup> GDP per capita in the Netherlands is about 1.4 times that of New Zealand (both based on US\$ comparisons, source data 2005 statistics, accessed through [www.wolframalpha.com](http://www.wolframalpha.com), May 2009).

<sup>878</sup> Although the constitution (“Grondwet”) is from 1815. The Netherlands were annexed by Napoleon in 1811, after which French law was introduced. Before that, the Netherlands had a very complex legal system based on the myriad of regional and local authorities that comprised its structure of government. From the late 16<sup>th</sup> century (after the end of Spanish rule) there had been a more or less central ultimate appeal court, but this had never been recognized by all of the states.

into “books” dealing with specific areas of law. Each book has a structure that starts with general rules followed by more specific and detailed provisions. This structure is comparable with that of the German Civil Code, often seen as the prototype of a Civil Law system.<sup>879</sup> The remainder of the system of legislation is formed by the criminal code and a range of specific statutes, such as detailed commercial legislation, social welfare legislation, tax legislation etc. Some 140 pieces of legislation with about 25,000 clauses make up the entire codified system, including criminal and its procedural law, constitutional and administrative law, local government law and the laws that govern the structure of the judicial organisation. As a codified system, all law is legislative in character. Judicial decisions are used to assist in interpretation, but they do not have the power of law as recognized in a Common Law system. Nevertheless the force of judicial decisions –especially of the superior courts– is strong and legislation often follows developments that can be traced through case law.<sup>880</sup> Adjectival law is also legislated, by way of a Book of Civil Procedure that governs jurisdiction and procedural rules for all courts in which civil matters are heard. There are additional detailed practice rules for specific types of cases, which are covered in process rules, and which are maintained by national committees within the judicial apparatus. Annually, the Dutch courts deal with almost one million civil matters, of which some 350,000 are family law cases.<sup>881</sup>

## **ORGANISATION OF THE COURT SYSTEM**

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The Dutch system uses a strict separation of powers. The entire court system, including the office of public prosecutions is organized as a separate entity, governed by a “Council for the Judiciary”, which provides for the only interface with the executive branch, through the Ministry of Justice. The court system has its own administrative apparatus, buildings, information systems, court staff and even its own training institute which provides courses for all its employees. The court system has three main tiers. The first level consists of 19 regional District Courts, each including between two and four Kanton Courts that deal with minor offences and a range of smaller civil issues. The level above the District Courts is formed by five High Courts, which are appellate courts only, hearing appeals from the District and the Kanton courts. Appeals from first instance decisions are heard *de novo*, using and expanding on the factual findings of the first instance court. The highest level appeal court is the Supreme Court, which considers only issues of law.<sup>882</sup>

Judges are not normally<sup>883</sup> selected from the bar; becoming a judge is a career choice that is made immediately after completing a law degree. The aspiring judge enrolls with the judicial training

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<sup>879</sup> Berman *supra* n373. The German structure has been used as a basis for other Civil Law systems as well, such as Japan and Switzerland.

<sup>880</sup> An additional factor is the influence of European legislation and human rights based decisions from the Strasbourg Court, which are generally followed by the Dutch courts. For a discussion see Kirchner S “Foreign and International Influences on Family Law in the Netherlands: The Right to Family Life and Art.8 of the European Convention on Human Rights” Available from SSRN :<http://ssrn.com/abstract=1081583> (2002).

<sup>881</sup> Statistics from the “Raad voor de Rechtspraak”: <http://www.rechtspraak.nl/Gerechten/RvdR/De+Nederlandse+rechtspraak+in+cijfers.htm> , last accessed 1 May 2009.

<sup>882</sup> This brief description is not entirely accurate, but suffices for the purpose of this chapter.

<sup>883</sup> There is an opportunity for lawyers from private practice to apply to become judges; they must have at least six years of practice, and must follow a shorter version of the six-year judicial training programme.



institute<sup>884</sup> and works within the court organisation in a form of apprenticeship. A course of some six years is required before one can independently hear cases in the lower courts. Within the judicial training there are many opportunities to specialize in different areas of law, and cases are assigned accordingly, by having specialized judges operating in “sections” within each court. There are options to develop a specialized judicial career within the system and this is actively encouraged. Judicial salaries in the Netherlands are low compared to those in New Zealand.<sup>885</sup>

## DUTCH FAMILY LAW

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The law relating to natural persons and families is the first of the nine books that make up the Civil Code.<sup>886</sup> The jurisdiction of the Dutch courts over matters of marriage, “registered partnership” (civil union), divorce and matters governing custody and contact are governed by broad principles established in the first articles of the civil procedural code, and these are only restricted by European Conventions, while the “proximity” of the issues to the Dutch legal system determines matters of general jurisdiction.<sup>887</sup> The welfare and best interest principle that is found in New Zealand law is also present in Dutch law and is referred to in the substantive and procedural sections of the Civil Code.

Historical development of substantive law in respect of divorce was not dissimilar to that in New Zealand, with no fault divorce appearing in the 1970’s. Procedural law proved more difficult, and remained the subject of much study and legislative proposals.<sup>888</sup> The Netherlands did not develop a separate specialized Family Court, although the courts have family “sections” in which specialized judges operate. Judges specialize in family law through extensive additional training and practical experience.

Substantive law about post-separation childcare includes the collaborative post-separation parenting model and shared care as a presumption.<sup>889</sup> This was legislatively emphasized through a 2008 bill “promoting continued parenting and careful divorce”, which came into force in March 2009. It amended the Civil Code to create an obligation on separating couples<sup>890</sup> to submit a detailed parenting plan, without which their legal separation cannot be obtained.<sup>891</sup> This plan must contain details about how childcare is shared, child support arrangements, and arrangements for information exchange in respect of important decisions in respect of the child’s person and the child’s assets. The level of child support (alimony) is a matter between the parents, but can be submitted to the court in case of disagreement. The bill also removed the possibility of obtaining a very fast divorce<sup>892</sup> where children are involved. The amendments further included an obligation on separated parents to promote and support the child’s

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<sup>884</sup> See <http://www.ssr.nl/> last accessed 8 May 2009.

<sup>885</sup> Particularly when the differences in GDP/capita and relative price indexes are taken into account.

<sup>886</sup> Book two deals with “legal persons” and the first two books together thus define the legal entities to which the Civil Code applies. For a translation of the Dutch Civil Code in respect of family matters, see Curry-Sumner I and Warendorf H *Family Law Legislation of the Netherlands* (Intersentia, Antwerp, 2005).

<sup>887</sup> Articles 4, 5 civil procedure book 1, title 1, section 1.

<sup>888</sup> For a description see Chin A Fat supra n353, chapter 2.

<sup>889</sup> For a concise overview of parental responsibilities in the Netherlands: Boele Woelki K, Schrama W and Vonk M *National Report on Parental Responsibilities: The Netherlands* (Available from [www2.law.uu.nl/priv/cefl](http://www2.law.uu.nl/priv/cefl)) (Utrecht, Molengraaff Institute for Private Law, University of Utrecht, 2004).

<sup>890</sup> The law also applies to parents who had no legal relationship, but who had joint guardianship over their children.

<sup>891</sup> This was in fact a return to an earlier situation, albeit that the surrounding procedure had changed substantially.

<sup>892</sup> This was known as “flash divorce”. It could be obtained by first changing a marriage into a civil union and terminating that union.

contact with the other parent, an entitlement for each child to receive “equality in care” from both parents, and an obligation on the parents to make suitable arrangements if equal care is prohibited by practical circumstances arising from the separation, but only to the extent that such problems actually exist.<sup>893</sup> In specified exceptional circumstances, a court can assign custody to one parent,<sup>894</sup> and it can order that a non-custodial parent has an obligation of contact with the child. The Dutch legislation envisages that all children whose parents have separated are in some way covered by a formalized care arrangement. Disputes about parenting arrangements can be brought before the court, which is obliged to start dealing with the application within six weeks, and has the jurisdiction to compile detailed parenting arrangements.<sup>895</sup> The Dutch law includes a specific clause that gives a child a right to contact with both parents and other persons who have a close relationship, while there is also a right of contact for the non-custodial parent.<sup>896</sup> This right of contact can only be refused in specified exceptional circumstances relating to the child’s welfare, patent unsuitability of the parent seeking contact, or the child’s own objection if the child is older than 12 years of age.<sup>897</sup> Although joint care is thus promoted in legislation, the reality is that in highly contested cases one parent will end up as the main custodial parent, with a contact arrangement for the other, often of the “one weekend every fortnight” variety. The Netherlands generally retain a legal obligation for partner alimony (but this does not apply universally).

The Dutch substantive law governing childcare arrangements is thus similar to that in New Zealand. Some aspects have a slightly different emphasis, but generally the law assumes that the best interest of the child is served by meaningful contact with both parents, and that the details of the necessary arrangements can be best left to the parents. The Dutch law contains more detail about rights and obligations of the parents and children, and is perhaps slightly less averse to a conclusion that in severe conflict circumstances the best interest for the child may require a “traditional” custody scenario. Overall, the substantive law is sufficiently comparable to assume that any significant difference in outcomes between the jurisdictions would be explained by procedural differences.<sup>898</sup>

## **DIVORCE PROCEDURE AND PARENTING DISPUTE**

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Obtaining a legal separation or divorce requires a legal representative. This may be the same lawyer for both parents and many family lawyers have specialized as mediators or work with qualified mediators or psychologists, thus providing a “one stop shop” for separating couples. If the parents are able to come to

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<sup>893</sup> Burgerlijk Wetboek art 80, 247; Wetboek van Burgerlijke Rechtsvordering art 815.

<sup>894</sup> Burgerlijk Wetboek art 251a.

<sup>895</sup> Burgerlijk Wetboek art 253a.

<sup>896</sup> The first case where a mother was convicted in a criminal court for failing to abide by a parenting arrangement was concluded in February 2009. In that case the mother was sentenced to 100 hours community service. Given that the judgment was handed down by a criminal court, it did not have direct immediate repercussions for the actual compliance with the arrangement (the dispute had been ongoing since 2001). The case was brought on the basis of withdrawing a child from parental authority, art 279 Criminal Code. (See <http://peterbrons.punt.nl/> last visited 4 May 2009, judgment at LJN: BH2027 Rechtbank Leeuwarden). The case was brought within the criminal jurisdiction following an earlier 2006 judgment that convicted a father for being late in returning a child to its mother. Following this decision the number of complaints has dramatically increased (See <http://www.allesoverscheiding.nl>, last accessed 9 May 2009).

<sup>897</sup> Burgerlijk Wetboek art 377a.

<sup>898</sup> The statistics for marriage and divorce, and the number of separations that involve children are also similar. Annually some 33,000 formal separations are processed through the courts. Almost 60% involves children, on average 1.7 children/separation. (figures based on the 2006 statistics, see Centraal Bureau voor de Statistiek *Rechtspraak in Nederland 2005* (Den Haag, CBS, 2006).

consensual arrangements with such assistance, the matter proceeds by application on the documents, resulting in the divorce and enforceable court orders for the ancillary matters (normally within 4-6 weeks).<sup>899</sup> Where this mediative approach is not possible, both parties will have to involve separate lawyers and the matter must be prepared for hearing, which is always on application. The separation or divorce is the core procedure, to which the additional matters such as property distribution and childcare arrangements are attached.<sup>900</sup> The court may request a report from the “Council for Child Protection”, comparable with CYFS in New Zealand. Before the hearing, the court must invite children older than 12 for a judicial interview, but attendance is not compulsory. Younger children can also apply to be heard, or the judge can decide to invite them if he or she considers that the child may not have been sufficiently involved in making the parenting plan.<sup>901</sup> Interviews with children are conducted by specially trained judges, not necessarily the judge hearing the case. Instead of appearing at an interview, children can write to the court if desired. Once all required initial information has been obtained a first hearing is scheduled, in which both parties present their case in summary form. At this hearing (which is referred to as a “comparison” hearing), the parties themselves may speak with the judge if they wish,<sup>902</sup> and the judge will investigate whether the matter can be settled after indicating and clarifying the legal issues that will be relevant for a decision. It is not uncommon that another attempt at negotiation/mediation is initiated at that point, sometimes on the advice of the judge. In 2005 mediation was introduced as an additional procedure for all civil matters. It is undertaken by private mediators,<sup>903</sup> but can be organized by the court registries.<sup>904</sup> If such a referred mediation is successful, the resulting agreement can be adopted by the court as a court order, and if necessary, the court can be asked to decide any remaining issues that could not be concluded at mediation. Annually the courts now refer some 6,500 cases to mediation, of which about a third are family law matters. The success rate of mediation is about 60%.<sup>905</sup> If the matter is not resolved and remains to be determined by the court, further case management directions are made, which may include directions in respect of evidence or additional witnesses, the procedure at a next hearing, a request for written evidence only, or whatever further information is deemed necessary. It is possible that the judge indicates that there is enough material for a decision, which will often be reserved. As may be apparent, a contested procedure will last longer than its consensual counterpart, and for that reason interim orders may be obtained that will remain in force until a decision has been issued. Despite the popular ideas about inquisitorial process existing amongst New Zealand Common Law practitioners, the Dutch judges do not take an overly interventionist or investigative approach at all. They rely in first instance strictly on the case as presented by the parties,

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<sup>899</sup> The duration of the procedures depends on the area, in some areas it may take longer, but parents can choose to “reside” at the offices of a lawyer in a district that provides faster service. Several lawyers provide online services, where couples that are able to agree on all aspects can complete the entire process online, within 4 weeks and for a fixed sum of approximately NZ\$1,300.00. Legal aid may apply, and in that case the total cost for the divorce is about NZ\$500.00. Statistics for 2007 show that almost 60% of divorces are completed within 8 weeks, and 15% takes longer than 27 weeks. (Source Central Bureau for Statistics at [www.statline.cbs.nl](http://www.statline.cbs.nl), accessed May 2009).

<sup>900</sup> Although each can be brought separately as well, as are disputes about existing arrangements.

<sup>901</sup> The law requires that separating parents involve their children in making the parenting plan.

<sup>902</sup> Although they must have legal representation.

<sup>903</sup> There is a limited amount of government subsidy available for such mediations, which covers only part of the costs.

<sup>904</sup> This followed an experiment whereby various types of mediation were trialed in different court districts, and which was undertaken between 2000 and 2004.

<sup>905</sup> That is 60% of the cases that actually mediate, not of all matters that are potentially referred. Guiaux M and Tumewu M *Mediation Monitor 2008: Tussenrapportage* (Den Haag, Wetenschappelijk Onderzoek en Documentatiecentrum Justitie, 2008).

and will only go outside the issues as presented where it is obvious that the paramount welfare principle is overly subjected to the parties' differences. Given the requirement for legal representation, the excesses that in New Zealand typically seem to arise with self-represented litigants are avoided. The common law concept of natural justice may be recognized in the Dutch procedural principle of "equality of arms", which includes the familiar procedural safeguards,<sup>906</sup> and includes specific rules that apply to witnesses and expert witnesses. Experts are typically appointed by the court, rather than by the parties.<sup>907</sup> Where an expert is appointed, the parties can send comments and requests to the expert, and this must be dealt with in the expert report.<sup>908</sup> In family cases, this expert evidence procedure can be used to organize a therapeutic intervention, for instance a "forensic mediation", which can be used to assess and improve the communication between the parents, in order to achieve better co-parenting outcomes.<sup>909</sup> In such circumstances the matter is adjourned until the expert reports back to the court. Unsurprisingly, where the conflict has intractable characteristics, the argument before the court focuses on whether "forensic mediation" is appropriate to achieve better communication between the parties.<sup>910</sup>

Family proceedings are heard in closed court. If decisions are published, all names and identifying information are removed. A decision from the court in first instance can be appealed to the High Court, which will deal with the matter *de novo*, using the dossier that had been prepared in the court below. By using this mechanism, the entire case is evaluated by the appeal court, which thereby also exercises quality control over the work of the first instance court. The appeal court can request additional evidence. Further appeal to the Supreme Court is possible on matters of law only, and leave is required.

The procedural system produces barriers to separation and divorce where children are involved, but these barriers have been credited as being instrumental to ensuring more attention to the plight of children.<sup>911</sup> All divorces and separations require judicial determination, but in most that is a mere formality, once the parties have given sufficient attention to childcare arrangements. There are cases where this remains elusive, and in those instances the court can be asked to intervene. There appear to be no reliable statistics about separations that never reach a formal conclusion (i.e. the parents separate without formalizing the end of their marriage), or where the initial relationship was unregistered. That information is not available for New Zealand either. I have not been able to find Dutch statistics that can be directly compared with the 5% of parenting applications filed in New Zealand requiring a substantive hearing.<sup>912</sup> As parenting disputes in the Netherlands are connected to the separation procedure, it may be assumed that the procedures with attached childcare applications that take the longest may be compared with what in New Zealand would be termed intractable disputes. The percentage of such

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<sup>906</sup> Those related to judicial bias and the right to be heard.

<sup>907</sup> Although payment is ultimately for the parties to make. Note also that it is deemed inappropriate for counsel to discuss the case with experts and other witnesses. Briefing witnesses is not a common practice and frowned upon.

<sup>908</sup> For a detailed discussion of the obligations of expert witnesses in Dutch Courts see the "Practice direction for experts in Dutch civil law cases", available at [www.rechtspraak.nl](http://www.rechtspraak.nl), last accessed 9 May 2009.

<sup>909</sup> See for instance the appeal court decision in LJN:BC2039, available from [www.zoeken.rechtspraak.nl](http://www.zoeken.rechtspraak.nl). Note that the court directs that the parties are to pay for this intervention, whereby it orders the father to also pay the outstanding alimony at the time of this interim decision.

<sup>910</sup> See for instance LJN:AZ9635, where the court refused to order a 50/50 co-parenting arrangement on the basis that the communication between the parties was not sufficient to sustain this, while it could see no benefit in a forensic mediation.

<sup>911</sup> As reported in "de Pers", 29 April 2009. <http://www.debeurs.nl/binnenland/297794/Advocaten-druk-met-scheidingen.html> last accessed at 2 May 2009.

<sup>912</sup> It is noted again that this percentage varies between judicial presentations and statistics, with figures between 5% and 7% being recorded.

divorce cases that last longer than 40 weeks is 7.6%.<sup>913</sup> Although perhaps not describing exactly the same type of case, this statistic shows that the number of intractable cases in this typically inquisitorial jurisdiction is not fundamentally different from that in New Zealand. Recent statistical material shows that in New Zealand some 10% of parenting cases take longer than 18 months to dispose of, and it would seem that these represent the real ‘intractable’ cases.<sup>914</sup> I suggest that this statistic can be compared to the 7.6% from the Dutch data, to support the conclusion that the number of intractable cases is in fact similar. There may be an indication of greater efficiency in the Dutch courts, in that in New Zealand some 30% of cases take longer than a year.<sup>915</sup> This difference is probably due to higher case management efficiency, better screening of cases that are suitable for alternative intervention, compulsory representation, and the fact that counselling interventions do not take place within the court process.

This quantitative material suggesting similar levels of intractable cases is supported by qualitative information about dissatisfaction with the operation of the courts in parenting matters.<sup>916</sup> A reliable indicator may be found in the number of, and the topics discussed on, websites and web-based forums of men’s groups. These demonstrate a remarkable similarity.<sup>917</sup> Dutch men’s groups,<sup>918</sup> like their New Zealand counter- parts, complain about the courts’ bias towards women and the unfairness of the system for child-support, they discuss parental alienation syndrome, organize group sessions and information evenings, and advocate for stricter legislated presumptions of joined and shared care. Even the protests are similar, with fathers dressed in superman costumes climbing on roofs and chaining themselves to structures representing authority.<sup>919</sup> The same applies to discussion panels on women’s group’s websites, which are also similar to that type of communications in New Zealand.



Figure 12 Fathers’ Protest in the Netherlands and New Zealand

## THE WIDER CONTEXT OF FAMILY LAW IN THE NETHERLANDS

As in Australia, the Dutch government recognised the need for simplified availability of non-legal support for families. It started an initiative that is comparable with the Australian family centres in 2008. The difference with the Australian initiative is that the Dutch centres are attached at the organisational level of local authorities, as these are already responsible for a large part of the provision of social services (as is for instance the case in the UK). The new “youth and family centres” will act as a focal point for all

<sup>913</sup> Source: 2007 figures Central Bureau for Statistics online database [www.statline.cbs.nz](http://www.statline.cbs.nz), last accessed May 2009.

<sup>914</sup> See Wyatt and Ong supra n1, 28.

<sup>915</sup> Ibid, 29.

<sup>916</sup> Anecdotal evidence suggests that compulsory parenting plans and the shared care presumption have little effect in highly conflicting situations: Ter Schure I *"Kom Van Dat Dak Af!": Ouderschapsplan Donner Voorkomt Vechtscheidingen Niet"* (Meesterproef voor de mastersopleiding onderzoeksjournalistiek) (School voor journalistiek, Universiteit van Utrecht, 2005).

<sup>917</sup> And this is not restricted to the jurisdictions compared here, but seems to represent an almost global phenomenon.

<sup>918</sup> For some examples, see: <http://joepzander.nl/joep.htm> <http://www.dwazevaders.nl/>  
<http://www.ouderverstoting.nl/> [http://www.geocities.com/f4j\\_nl/](http://www.geocities.com/f4j_nl/)  
<http://www.sos-papa.com/>.

<sup>919</sup> This appears to be an international theme for fathers protesting against the family law and court system.

government and other social services that relate to youth and families. The centres will primarily act as a source of information, advice, referrals and some direct assistance, and will bring together those seeking assistance and information and those providing it. The emphasis of the centers is on referral to existing social/psychological/counselling services. The referral services are provided for free. Social services are state-sponsored or provided by the state, through the administration of local authorities. Psychological and counselling services are typically provided through the private sector, although there are subsidies available.

Another recent initiative (which started in 2003) involves “legal counters”, 30 local centres that provide an interface for those seeking and those providing legal and dispute resolution services, and for the provision of first-line legal advice.<sup>920</sup> This organisation is sponsored by, but independent from, the government, and its aim is to provide transparent and comprehensive legal information and referral to appropriate legal or alternative dispute resolution advice where required. Family law issues comprise about 16% of its work, the remainder including advice on legal questions relating to employment, social security, tenancy, criminal law, contract disputes, immigration etc. The advice provided can include assisting with writing letters, finding and completing appropriate forms (for instance for legal aid), referral to lawyers or government agencies, referral to subsidized mediation etc. The centres are accessible via telephone, email and the internet, and can be visited during office hours. The services provided at the centres are free of charge. One of the services offered is “pre-mediation” which consists of assisting one party with engaging the other party in a mediation process. The centre’s employees receive specific training to undertake this task, which is often seen as the bottleneck to resolving conflicts at an early stage. A recent report on the uptake of mediation shows that the legal counters suggest mediation in some 7,000 cases annually, of which about a third results in a referral to mediation.<sup>921</sup>

### **IS INQUISITORIAL INTERVENTION THE SOLUTION?**

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The Netherlands has an established inquisitorial system with a well trained and experienced judiciary, operating in a well resourced and professionally run court system. Family matters are being dealt with by specialized judges and there is a large specialized bar, trained in alternative interventions. The court system operates in a wider context of social services including counselling services aimed at families and children, and there is a substantial network of services that provide first-line legal assistance, including a system of subsidies for private mediation to which both first line services and the courts can refer. The Netherlands is more densely populated than New Zealand and all these services are therefore conveniently accessible at the local level.

If the adversarial paradigm was indeed the main cause of intractable and difficult parenting matters, for which an inquisitorial intervention would prove the panacea, then the Netherlands should logically not have any, or only few of the problems that are being encountered in New Zealand with intractable and serious parenting matters, especially given the obviously better quality and availability of services

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<sup>920</sup> See <http://www.hetjl.nl/hetjl/>. This organisation provides some 700,000 “customer contacts” annually, and operates on an annual budget of 25 million Euro’s, with some 250 staff. (Source: annual report 2007 and annual plan 2009, available from the cited website, last accessed May 2009).

<sup>921</sup> Guiaux and Tumewu *supra* n905.

surrounding the legal process, and a better organisation of the administration of justice generally.<sup>922</sup> However, this is not the case. In both qualitative and quantitative terms, the difficulties with parenting cases appear to be comparable.

It seems therefore that another explanation for the difficult cases must be sought. I propose that the difficulties do not arise as a consequence of the legal system or the type of intervention that it provides, but as a consequence of the characteristics of the difficult conflicts and/or the parties to them. Adversarial tendencies arise not because of the legal system, but because of the nature of the disputes. Parenting cases are probably at the summit of emotionally involved disputes, with virtually no objectively determinable substance matter, and with the additional problem that the only relevant criterion that may be used is external to the parties. Arguably, an inquisitorial system in its pure form may have a bit more control over the process than a purely adversarial system, but the difference is one of degree only. Family matters in the Dutch courts demonstrate strong adversarial tendencies and the associated stubbornness of the parties cannot be cured in the Dutch courts either.

In addition, even if the Dutch inquisitorial approach is marginally better,<sup>923</sup> there remains the question whether the PHP process in fact represents an approach that can be sufficiently compared with it to achieve its perceived benefits. A first problem with that must be the consistency of methodology throughout the family court system. It is noted that in promoting inquisitorial interventions, the effects of entire legal systems are compared, not just some aspects of the processes involved. In the Dutch inquisitorial environment there is a high consistency in judicial approach, which is carefully constructed through training, practice and experience. All aspects of the system, from court administration through to separation of powers and appeal structures are geared towards that objective. There is not even remotely that sort of situation present in New Zealand,<sup>924</sup> and it is therefore impossible to assert that the (perceived) systemic advantages of an inquisitorial system can be reliably transferred into the New Zealand jurisdiction by simply giving the judges some additional powers. Secondly, although Dutch judges have seemingly more procedural powers than their New Zealand counterparts, they are controlled by much stronger appeal procedures, closer collegial oversight, better administrative support, stricter obligations about procedure and recording of decisions, and always assisted by counsel for both parties. Appeals are *de novo*, and involve a continuation “on the file”. In other words the appeal court (sitting with three judges) completely revises all aspects of the case including all evidence. The Dutch first instance judge exercises a perhaps slightly wider interventionist jurisdiction, but within a system of much tighter controls. There could be a real risk in granting additional judicial powers without having the structures to control and ascertain the quality of the exercise of that power.

In conclusion, there is insufficient evidence that an inquisitorial system produces significant and

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<sup>922</sup> Interestingly, this is not apparent from the costs to run the justice system. In terms of financial resourcing, the Netherlands spend the equivalent of \$108 per capita on the administration of justice, or in total 0.16% of its GDP. For New Zealand those numbers are \$87 per capita and 0.21 % of its GDP. Sources: costs of justice in the Netherlands 2000-2007, Raad van Rechtspraak at <http://www.rechtspraak.nl/NR/rdonlyres/E273984C-BF69-41AD-BEDF-D21867A7AA8/o/factsheetkosten.pdf> (last accessed May 2009), and Ministry of Justice *supra* n532, total of ‘vote Courts’ (\$378 mio) divided by GDP and population figures from Statistics New Zealand.

<sup>923</sup> And for convenience forgetting that it may simply be administered better and more efficiently.

<sup>924</sup> And neither was there in Australia. As the practical evaluations of both the Australian CCP and the PHP show, one of the major concerns was the variability in approach by individual judges.

consistently better outcomes or strongly improved efficiencies.<sup>925</sup> And even if that was the case, the PHP intervention cannot be seriously compared with the effects of a truly inquisitorial system.

## 16 CONSTITUTIONAL CONSIDERATIONS: NATURAL JUSTICE

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In chapter 5 I briefly discussed the role of the state in parenting disputes and the relationship between that role and the implementation of social policy. I argued that the state can use the opportunity provided by its role as arbiter to impose behaviour on parties that resort to it for dispute resolution. This concept has a distinct constitutional component. The question is ultimately what the proper role of the state is vis-à-vis individual and family autonomy and how it uses the judicial system to execute policy. That question must be answered by considering fundamental principles that are ultimately encapsulated in such modest manifestations as the court rules that govern the way in which disputes are resolved or determined.<sup>926</sup> Although the importance of “principles of natural justice and procedural fairness” are being promoted as integral in the PHP, it must be seen whether the new procedures do indeed align with the way these concepts are being understood in New Zealand, and how they relate to the proper role of the state in disputes that are ultimately within what traditionally have always been seen as entirely private matters. This discussion will require some sidestepping onto jurisprudential and constitutional terrain and will require a brief venture into the philosophies behind the principles of natural justice and procedural fairness<sup>927</sup> and how these relate to larger constitutional principles.

Such a journey can helpfully depart in the United States, which has a rich constitutional jurisprudence,<sup>928</sup> together with an early development of a specialized family law jurisdiction. In the US, debate concerning the balance between state intervention and civil liberties and the applicability of that concept to family law is decades old. It has been approached through the idea that “continued history and tradition” informs the values to be juxtaposed.<sup>929</sup> Because of the lack of clear constitutional statements, the protection of family values and the freedom to define and pass on one’s own moral and social norms is ultimately brought under the doctrines of “substantive due process” and/or “penumbral privacy”.<sup>930</sup> It

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<sup>925</sup> An extended series of experiments sought to determine empirically the compared efficiencies of the systems in finding the truth through the evidential paradigms. It found that the efficiency of fact finding and the accuracy of a decision depended on whether the parties had available to them information that damaged the opponents case. Where that information was not available, the inquisitorial process was more efficient, while an adversarial process was more efficient in establishing the fact scenario where parties had an idea of the weaknesses of the opponent’s case: Block MK, Parker JS, Vyborna O and Dusek L “An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes” ALER (2000) 2, 170-194.

<sup>926</sup> The closest to a statement of constitutional principles in that respect is no doubt s27 of the New Zealand Bill of Rights Act: “*Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make any determination in respect of that person’s rights, obligations, or interests protected or recognized by law.*”

<sup>927</sup> In New Zealand natural justice is traditionally concerned with the right to be heard and the right to an unbiased decision maker. The concept of procedural fairness is a later development, which is now commonly added to the principle, see Rishworth P, Huscroft G and Optican S *The New Zealand Bill of Rights* (Oxford University Press, Auckland, N.Z., 2003), 755 fn15.

<sup>928</sup> And which is no doubt the reason that the leading text about the New Zealand Bill of Rights (see supra n927), for many of its discussions uses the USA constitution and Bill of Rights as a starting point.

<sup>929</sup> Cooper Davis supra n141, 1351-1362. She constructs a narrative starting with the pre-civil war position of slaves and the subsequent amendments to the US constitution, to explain family autonomy in terms of the “right to create moral and social meaning”. Ultimately this leads her to conclusions that show interesting parallels with Durkheim’s argument as mentioned in n140 above. The “natal alienation” principle of slavery may be compared with Durkheim’s vision of non-mitigated direct relationships between individuals and the state, which assumes the role of provider of moral standards, thereby denying its citizens moral autonomy.

<sup>930</sup> See for the development of those principles for instance *Washington v Glucksberg* 521 U.S. 702; *Griswold v Connecticut* 381 U.S. 479; *Roe v Wade* 410 U.S. 113.



can be argued that this approach has restricted the US Supreme Court in engaging fundamentally in balancing family autonomy and statist moral standard-setting, but a string of decisions demonstrate that *“the idea of civil freedom means more than the right to continue one’s genetic kind in private”*.<sup>931</sup> Civil freedom also entails a “right of family” that derives from the constitutionally explicit rights of intellectual and moral autonomy. This “right of family” includes the right of every adult to affect the culture and moral fabric of his/her offspring, and to advocate privately chosen values in that process. For children it means a right to grow to moral and social autonomy and independence. The necessary balancing between these principles takes place within a large, autonomous discretion on the part of the parents, who have a role of authority in the nuclear family structure. Hence, laws that compromise individual and family autonomy in order to influence value formation are arguably inconsistent with constitutional values.<sup>932</sup> At the same time, however, the state is given the task to maintain order i.e. to find the appropriate balance where liberties of one citizen interfere with those of another. The state is thus placed in the role of servant to diverse people, but moral master of none. This dichotomy comes to the fore in vivid microcosm in every case where the presumption of family autonomy is challenged by the dogmatic and prevailing best interests of the child.<sup>933</sup> As always, any intervention is mitigated and governed by notions of due process in their substantive and procedural manifestations.<sup>934</sup> The consequence is a test of the rule- and procedural system against the individual values and family autonomy expressed above. A simplified model can be constructed, where a judicial decision (which is informed by a myriad of findings of fact) must first be reduced to the question whether intervention is warranted. The constitutional due process issues can be approached in terms of systemic errors or bias and resolved in those terms. Difficult cases are those where it is unclear what the best interest of the child is, or how that can be best served. Any intervention may well be entirely counterproductive. Where there is no excessive violence, abuse or other obvious defect in parenting, the best arbiters to decide on any substantive question of best interests must be the parents, but only if they can manage to temporarily set aside or overlook their own differences, which may be played out as issues of children’s best interests. Where that capability is

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<sup>931</sup> Cooper Davis supra n141, 1369.

<sup>932</sup> The US Supreme Court considered this question in *Washington v Glucksberg* 521 US 702 at 720 where it held: *“Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the due process clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’, and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’.* Second, we have required in substantive due process cases a ‘careful description’ of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decision making,’ that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment ‘forbids the government to infringe ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest” (original references removed). In *Troxel v Granville* 530 US 57 the court held: *“... it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”* *“...First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in Parham: ‘Our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. ... The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.’* (Original references removed).

<sup>933</sup> Cooper Davis and Barua supra n141, 142.

<sup>934</sup> See also Rishworth, Huscroft and Optican supra n927, 756-761 for a discussion of the substantive effect of procedural justice as compared between the US and New Zealand jurisdictions.

lacking, the intervention determination can easily become an extracted dispute in itself, with overtones of substantive due process. Effectively, the courts recognize that such disputes lack a proper legal context and cannot therefore be properly adjudicated without the state stepping into a role that is *prima facie* one for the parties to resolve: courts are hesitant to assume that role. Apart from other legal and practical considerations,<sup>935</sup> the strong disposition towards consensual dispute resolution in custody matters in the US can therefore be traced directly to constitutional principles that inhibit the state from intruding into family matters.

In New Zealand, the constitutional perspective has a very different starting point. Not only do we lack a formal and discrete constitution, the basis of the state's authority is a different one. It is not "from the people for the people", but a derivative of monarchical sovereignty. Typically, individuals used to be viewed in the feudal context of "her Majesty's subjects".<sup>936</sup> This causes a paternalistic view where the monarch and the institutions related to the monarch also provide moral standards and guidance. The development of the *parens patriae* principle is another derivative of that mode of thinking.<sup>937</sup> Against that backdrop, civil rights are not placed at the foundation of government, but must be wrought from the monarch. The struggles that eventually led to the development of parliamentary democracy in England are witness to that fundamental difference. As a consequence, New Zealand's constitutional provisions are scattered across legislation, letters patent and traditions, and are at best of an ambivalent status. New Zealand lacks a formal constitution and an explicit recognition of the concept of separation of powers as that is for instance manifest in the Dutch or American constitutions.<sup>938</sup> Without engaging in a detailed constitutional debate, it is well accepted that New Zealand has a constitutional system that provides for ultimate parliamentary power, with a substantial overlap between parliamentary and executive powers. New Zealand's political and government structures allow substantial opportunities to implement political ideology through virtually all government activity. In contrast to the US (and most civil law jurisdictions), New Zealand has no constitutional court with superior powers to interfere with legislation, although its appellate courts have on occasion taken an independent and critical approach where legislative or executive efforts contrast too strongly with principles that should be common to a democratic, free and just society. Despite this sometimes critical stance of the courts and despite the formally organized judicial independence, the court system in New Zealand is closely attached to the executive through the Ministry of Justice. It is that Ministry that owns all assets relevant to the administration of justice and employs all individuals involved in it.<sup>939</sup> A separate Department for the

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<sup>935</sup> Other important factors are for instance the compulsory formal custody determination in all US states, and the much more frequent relocation issues. These latter are caused and compounded by the distances in the US, and the fact that moving to a different state will also involve entering another jurisdiction, to which different laws may apply.

<sup>936</sup> This remained particularly relevant as an aspect of the inherent wardship jurisdiction of the superior courts. Even after the passing of the Children, Young Persons and Their Families Act 1989 such a jurisdiction survived. Following the enactment of the Care of Children Act 2004, and the increased powers of the Family Courts, the High Court has retained its wardship jurisdiction, but this is now considered to be for exceptional situations only. See Brookers' Family Practice and Procedure (web source) chapter 2.8.

<sup>937</sup> See also the discussion in chapter VI. The *parens patriae* jurisdiction in respect of people of unsound mind is statutorily enshrined in s17 of the Judicature Act 1908. In respect of children the jurisdiction was confirmed as a residual sovereign power in *Pallin v Department of Social Welfare*, 272 per Cooke J.

<sup>938</sup> For a detailed discussion of the topic in the New Zealand context see Joseph PA *Constitutional and Administrative Law in New Zealand (2nd Ed)* (Brookers, Wellington, 2001), chapter 8.4. Joseph concludes that, although the principle has no formal role in New Zealand, it cannot be abandoned and is a necessary condition of the rule of law and limited government.

<sup>939</sup> And that includes the judges, although their employment and compensation levels are protected. Judicial appointment is independent of the Ministry.

Courts was amalgamated into the Ministry in 2003, and since that time all administrative and logistical work for the courts is executed by the Ministry. Even a High Court judge with extensive inherent judicial powers and on an annual salary of almost \$400,000 cannot order a box of paperclips without bureaucratic approval, and is similarly dependent on the Ministry for the execution of any and all procedural matters that result from the exercise of his or her judicial warrant. This administrative and practical influence is of course stronger for the inferior courts, where the judges have become something of an authoritative appendage to an otherwise largely bureaucratic process.<sup>940</sup> Legislation increasingly provides for procedural directions<sup>941</sup> and is increasingly normative at a minute level of detail. Legislation also increasingly provides that further regulations can effectively be made under executive powers,<sup>942</sup> and this extends to the rule system for the Family Courts,<sup>943</sup> which are strictly speaking but a division of an inferior court. When considering the role and place of the family jurisdiction in New Zealand, the conclusion must be that:

- Family Courts are not administratively independent from the executive branch
- The executive branch is not independent from the legislative branch
- Political ideology and policy development can permeate the operation of the executive
- Procedural developments that will affect judicial operation and therefore legal process (with “substantive due process” consequences) take place with very little democratic scrutiny
- Policy development and policy implementation are closely intertwined within the legislative and executive branches
- A clear development is underway to achieve policy implementation through the judicial process<sup>944</sup>

The question must therefore be raised whether such bureaucratic and executive involvement with the processes of the courts could ultimately, through the operation of “substantive due process”, affect the substantive rights of those who have to turn to the courts for a determination of their disputes. To reframe that question to its constitutional effect: would the New Zealand courts be able to reach the principles as developed in the US Supreme Court cases already referred to, would they be able to uphold such principles if developed, and is the disposition towards alternative processes in New Zealand a result of a constitutional consideration or is it driven by other motives? Is, in the area of family law in New Zealand, the doctrine of separation of powers still sufficiently present to guarantee the rule of law and the doctrine of limited government?

These questions must be answered in the negative. There is a clear ideological dogma present that uses

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<sup>940</sup> And this would of course provide an excellent explanation for the judges’ enthusiasm for procedural innovations such as the PHP, which markedly increase the judges’ powers and relevance.

<sup>941</sup> Recent amendments for instance take all procedural matters in respect of parenting dispute out of the Family Court Act 1980 and the Family Proceedings Act 1980 to bring these directly under the Care of Children Act 2004.

<sup>942</sup> As an example: by establishing the number of judges and thereby in effect controlling the capacity of the justice system. This effectively controls access to justice. Another example is the rules and regulations that will be necessary to implement the new mediation process and extended counselling provisions of the Care of Children Act 2004.

<sup>943</sup> This topic will be elaborated on below.

<sup>944</sup> In fact this objective has been explicitly stated as one of the expectations behind the merger of the Department for the Courts and the Ministry of Justice: Ministry of Justice *supra* n346, 157: “*The merger of the Ministry and the Department for Courts was effected on 1 October 2003, driving new expectations of the organisation in terms of the quality of overall service delivery, leadership of the justice sector and strengthening of connections between policy development and its operational implementation*”. While arguably policy will be implemented through judicial decisions that reflect the law, this is fundamentally different from implementing policy through the courts’ process.

the paramount welfare principle to develop normative procedural interventions.<sup>945</sup> The Family Courts have taken that dogma on board and have seemingly accepted a role that seeks to use the legal process (and its subsidiary consensual processes) to modify behavior in the direction of a prototype that is developed in the context of strong political ideology. This is not to say that there should not be a role for government to assist and support parents who have problems with parenting in the wider sense or with the specific problems that occur in post separation parenting. The point is that such an intervention should probably have its place in the social welfare system, and should not be connected to the most powerful of state interventions, the judicial process. It is vital that *“the paramountcy principle must not be permitted to become a loose cannon destroying all else around it”*.<sup>946</sup> The role of the courts and the state in family matters should remain constrained by a robust concept of family authority and responsibility and the principle of limited government. Currently, such a robust concept is not available; it has been replaced with the ambiguous welfare principle, which is used to extend the role and influence of the state. With a robust concept of family autonomy missing, the only remaining limitation on the state and its intrusion into family law process lies in civil liberties and fundamental rights, which in the court environment are encapsulated in the concept of natural justice.

The PHP process provides an example where a number of the strands discussed above come together. First, its implementation is not the result of legislative efforts or the consequence of any structured process by which regulations are promulgated. The PHP introduction is a combined initiative of the Ministry of Justice and the Principal Family Court Judge, and thus represents a concerted effort between executive and judicial branches. I will discuss the ramifications of this process in a separate chapter, for now it suffices to say that I will argue that creating and implementing such a fundamental innovation was not within the jurisdiction and discretion of the innovators.

Secondly, despite assertions to the contrary, the PHP contains elements that are arguably in contravention of the principals of natural justice and therefore in contravention of s27 of the Bill of Rights Act 1990. That Act provides for a specific evaluation where legislative efforts may have an impact on the rights protected by that Act. The PHP was introduced without legislative involvement, and a formal evaluation did not occur. An opinion from a senior family law practitioner prior to the implementation of the PHP<sup>947</sup> was critical of aspects of the process, despite the opinion covering a preliminary design that contemplated consensual entry. A later paper that contemplated the legality of the PHP intervention, did not investigate the potential conflict between natural justice and aspects of the PHP process.<sup>948</sup> To date, the issue has not been tested on appeal. In addition, R13 of the Family Courts Rules 2002 prohibits practices that are inconsistent with those rules. The PHP process arguably contains such practices. An example is the integration of mediative and adjudicative interventions, which also causes methodological problems as discussed previously. There is the additional problem that the rules

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<sup>945</sup> A case that briefly comments on the opposing approaches in the American and New Zealand legal context is *B v DSW* (1998) 16 FRNZ 522, which essentially holds that statute law prevents an argument that parental rights should be the starting position or a “procedural threshold” in respect of determining what is in the best interest of children.

<sup>946</sup> Per Lord Nicholls in *Re L (a minor)* (1997) AC 16.

<sup>947</sup> Jefferson *supra* n656.

<sup>948</sup> Illingworth G “Justice for Children” Paper presented at the NZLS Conference, Family Law - Flying High, Christchurch, November 2007

do provide for settlements conferences (i.e. the mediative part of the PHP preliminary hearing), but that any information flow between such conferences and the hearing is prohibited.<sup>949</sup> Similarly a judge who has presided over a settlement conference is not normally allowed to subsequently hear the matter.<sup>950</sup> The PHP process clearly breaches these regulations.

Thirdly, the PHP process involves a social science based therapeutic intervention. Such interventions are already present in the arsenal of the Family Court, and that arsenal is about to be extended with mediation. The PHP introduction does not provide any consideration of how it fits within the broader structure of the available therapeutic processes, and it is not clear how extending the judges' powers will increase their diagnostic and therapeutic skills. The court has a (limited) discretion to set its rules and a judge will have some leeway in interpreting and applying them. But it is doubtful whether that discretion extends to therapeutic interventions aimed at explicit behaviour modification. In the constitutional scheme of things, this is arguably not a role for government, let alone for the state's judicial officers.

Fourthly, the question must be asked whether the desire to increasingly create non judicial interventions does not represent a "rule against the rule of law".<sup>951</sup> While formal adjudication through the courts does obviously have disadvantages, this does not legitimize a development of institutionalized ADR. Formal adjudication derives its legitimacy from principles that are fundamental to the concept of rule of law, and these principles cannot be transparently upheld by creating "incorporated justice" in a range of bureaucratically controlled alternative processes. Compulsory mediation effectively creates a rule against the rule of law because it creates a habit of settlement, which can easily deteriorate into a rule in favour of dispute resolution through settlement in all circumstances, regardless of the absolute rights involved. Following such a development, individuals are no longer seen as bearers of rights, but as components of problems. The next step is the use of the alternative interventions to punish and/or re-educate without any significant judicial oversight, or even worse, within the confines of the justice system, which thus becomes complicit in structurally abrogating the rule of law. If it is the ultimately desired model to resolve all parenting cases through behaviour adjustment and non-adjudicative interventions, one must wonder why these matters should be undertaken by a court at all, and not simply organized through a social service agency, for instance with the Orwellian name, "department of re-education for separated parents".

In conclusion, I am not convinced that the PHP innovation can withstand constitutional scrutiny in terms of the process itself, the way it is implemented, the role it imposes on the judges, and the real risk that it may create a rule against the rule of law.

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<sup>949</sup> R178 Family Courts Rules 2002.

<sup>950</sup> R180 Family Courts Rules 2002, and see discussion in chapter 14, above.

<sup>951</sup> See also Ingleby *supra* n147, 450-451.

## 17 THE PHP AS A SYSTEM OF RULES

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The Family Court is a jurisdiction that presents a number of features that are not replicated in other parts of the court system, such as the regular use of without notice applications, the discretion to accept otherwise inadmissible evidence, special duties on the court and the lawyers operating in it, the paramountcy principle that introduces a third party as a central element in decision making, less formal trial methods, the dangers of stereotyping and generalities, special practices in respect of costs, rapidly and fundamentally changing substantive legislation, and the integration of therapeutic interventions into its process.<sup>952</sup> The rule system of the Family Court must provide for these features, as it must for procedural innovations such as the PHP. This chapter considers the PHP process in its manifestation as a rule system. This involves an investigation whether the relevant legislation and regulations provide for the jurisdiction to introduce the PHP process, as a pilot project or otherwise.

### *RELEVANT LEGISLATION AND REGULATIONS*

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The PHP process is a procedural innovation, i.e. a departure from the existing practice that governs the operation of the Family Court. The adjectival law for the Family Courts is provided in the following specific statutes and statutory regulations: the Family Courts Act 1980, the Family Proceedings Act 1980, the Inferior Courts Procedure Act 1909,<sup>953</sup> and the Family Court Rules 2002. As a division of the District Courts,<sup>954</sup> there is an arguable ‘residual’ effect of the District Courts Act 1947.<sup>955</sup> At a more fundamental level, the Bill of Rights Act 1990 applies to procedural matters as well; while there will also be residual application of the Judicature Act 1908 where the exercise or extent of jurisdiction would be contested. In addition, the acts providing the substantive family law with which the Family Courts are occupied contain procedural provisions. As a consequence, the Family Court Rules 2002 are separated in parts that cover rules applicable to all proceedings, and a part that provides rules to comply with these additional requirements. The number of acts for which the Family Courts exercise jurisdiction has steadily grown since the conception of the Family Courts in 1980. Most of those acts are not relevant for this thesis.<sup>956</sup> The cases that will come through the PHP process will also be governed by specific rules of the Care of Children Act 2004 and Domestic Violence Act 1995. New Zealand was a signatory to, and has ratified the United Nations Convention on the Rights of the Child. The Convention does not form part of domestic New Zealand law, but is referred to regularly. Its effect on domestic law for the purpose of this paper is most prominent in s4-5 Care of Children Act 2004.

The general principle for statutory interpretation that specific provisions override more general clauses, applies also to procedural rules. The rule system for hearing the type of cases that will be subjected to the

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<sup>952</sup> See above for a discussion of the effect of the paramountcy principle and the effect of the integration of therapeutic interventions, and see Inglis *supra* n115, at chapter 8, where the other features mentioned here are discussed in detail.

<sup>953</sup> The Family Courts are not specifically mentioned in s2 of that act, but are arguably included as “divisions of the District Court” (although that term is not elaborated), and as a result of the reference to ‘District Court Judge’ in s2(c), which includes Family Court Judges.

<sup>954</sup> S4 Family Courts Act 1980.

<sup>955</sup> The District Court Rules 1992 are explicitly excluded for proceedings to which the Family Court Rules 2002 apply, see s2 District Court Rules 1992. Note however that s16A Family Courts Act 1980 contemplates that Family Court rules can be directly derived from the District Courts Rules.

<sup>956</sup> For a complete list see Boshier *supra* n311.

PHP process can thus be visualized as a set of concentric circles, with at the core the procedural provisions of the Care of Children Act 2004<sup>957</sup> and the Domestic Violence Act 1995, together with the Family Court Rules 2002 and any judicial directions that remain in force. The core circle would also contain any registry-specific informal procedures. The second circle contains the Family Proceedings Act 1980 and the Family Courts Act 1980. The third layer would contain the District Courts Act 1992 and the District Court Rules 2002.<sup>958</sup> A fourth layer would consist of the Inferior Courts Procedure Act 1909 and the Judicature Act 1908. In this circle would also be found any residual common law rules and other archaic principles of procedure without statutory basis. Procedural effects from other general legislation or relevant international law would also be located in this most remote layer.

As may be seen, creating a new process, can potentially affect any aspect of this “onion” of potentially relevant rule systems. It is therefore apposite to have a closer look at how rules are made and where the jurisdiction to make and/or change rules originates.

#### *JURISDICTION TO MAKE RULES*

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The Family Courts are a division of the District Courts, but different processes are in place to govern their rule making. It is convenient to briefly consider procedure in the District Courts first, as this provides an example of a closely related rule system. The District Court Rules 1992 are issued and maintained under s122 of the District Courts Act 1947. They are formally issued by the Governor General by order in Council with the concurrence of the Chief District Court Judge and two members of the Rules Committee, a statutory body established by section 51B of the Judicature Act 1908. Two of its eleven members are legal practitioners, nominated by the Law Society; the other members represent the judiciary, the Ministry of Justice and the Government of the day. It has responsibility for procedural rules in the Supreme Court, the Court of Appeal, the High Court and District Courts.<sup>959</sup> To discharge its rule-making functions, the Committee may undertake ancillary activities such as consultation. It may promote statutory change where this is needed to co-ordinate procedural rules, it may annually review cost levels and update cost schedules, it can publicize proposed and enacted rule changes, and it assists with seminars about new rules. The Committee relies heavily on input from judges, practitioners, and other interested individuals and organisations.<sup>960</sup> The objectives of the Committee include: making rules that ensure just, speedy and inexpensive determination of proceedings, while objecting to the promulgation of procedural rules in statutes. The latter objective is aimed at avoiding anomalies between proceedings under different statutes, reducing difficulties that arise from inconsistent procedures, avoiding “freezing” of procedure as a result of the greater difficulty to amend legislation, and avoiding unfamiliarity.<sup>961</sup> Where the committee has a say in rule making it will actively pursue its objectives, and through its constitution in terms of legal position and the quality of its membership, has the authority to do so. The

<sup>957</sup> It is noted that the Care of Children Act 2004 is increasingly containing a specific rule system for parenting related hearings.

<sup>958</sup> It is noted that these have been revised from November 2009, resulting in a subset of High Court Rules being incorporated directly into the District Court Rules, i.e. those rules systems are partly synchronized.

<sup>959</sup> S51C Judicature Act 1908.

<sup>960</sup> See [http://www.courtsofnz.govt.nz/about/system/rules\\_committee/role\\_powers.html](http://www.courtsofnz.govt.nz/about/system/rules_committee/role_powers.html), last accessed May 2009.

<sup>961</sup> Although it appears from the large number of acts that contain procedural provisions that it is difficult for the legislature to adhere to this policy.

Rules Committee involves itself with procedural experiments and pilots. An example is the trial of early settlement conferences for civil matters in the District Court at Christchurch in which the committee was involved. Arguably, the scrutiny of the rule committee over such an experiment would be proportional to the effect of proposed rule changes that are trialed. The Rules Committee meets bi-monthly in Wellington, and the minutes of its meetings are published.<sup>962</sup> For proceedings in the District Courts where jurisdiction is derived from any statute other than the District Courts Act,<sup>963</sup> the Rule Committee has no formal powers to establish specific rules. The origin of the special rules governing such a proceeding then depend on whether the act under which the proceeding takes place prescribes specific rules or confers a specific power of rule making, or whether procedure is not specified at all. In other words, the origin of rules is related to the source of jurisdiction that provides the powers to determine the matter. In the first case this is often directly evident, but subject to the problems with rules embedded in substantive legislation. In the second case, s51D of the Judicature Act 1908 refers that delegated power to the Governor General in Council and two members of the Rules Committee.<sup>964</sup> In the third case the general rules of the court apply, which is clearly the preferred position, a separation of substantive and procedural law. All in all there is a reasonably well organized and transparent system for rule making in the general courts, but the matter becomes much more complicated where specific legislation contemplates specific procedural rules, whether these are included in that legislation or subjected to separate powers of rule making.

The Family Court Rules originate under s16A of the Family Courts Act 1980, which provides that: *"The Governor-General may from time to time, by Order in Council, make rules regulating the practice and procedure of Family Courts in proceedings that the Family Court has jurisdiction to hear and determine"*. There is however no provision elsewhere (such as in the Judicature Act 1908 in respect of the High and District Courts) that provides for a specific body responsible for making rules, consulting on these or otherwise. The Family Court is a division of the District Court,<sup>965</sup> and the District Court Rules apply in the Family Courts where there is no specific provision in the Family Court Rules.<sup>966</sup> It might be expected that the Rules Committee would impliedly be responsible for the Family Court Rules as well, or that it would be involved in the Family Court Rules through the operation of s51D of the Judicature Act 1908. However, that is not the case. The Principal Family Court Judge is not a statutory member of the Rules Committee, nor is there a representation on the Committee for the Family Courts or the specialized bar. The Rules Committee's minutes have a regular structure and frequency of publication, but the Family Courts do not feature in them, nor is there any mention of projects for the Family Courts on the committee's website.

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<sup>962</sup> See [http://www.courtsofnz.govt.nz/about/system/rules\\_committee/role\\_powers.html](http://www.courtsofnz.govt.nz/about/system/rules_committee/role_powers.html), last accessed 11 April 2007.

<sup>963</sup> S 122(1A), which provides that: *"The Governor-General may from time to time, by Order in Council, make rules regulating the practice and procedure of the court in relation to the exercise of jurisdiction conferred by other acts."* In those cases the effective governing body is the Ministry of Justice, assisted by consultative committees as required, but this is not specifically regulated. Note also s124, which governs the priority of specific rules over general rules.

<sup>964</sup> This is restricted to rules for civil proceedings only.

<sup>965</sup> S4 Family Courts Act 1980.

<sup>966</sup> S16 Family Courts Act 1980.



Rule making for the Family Courts thus takes place under the authority of the Executive Council,<sup>967</sup> but practically within the confines of the Ministry of Justice, which administers the Family Courts Rules 2002. The process of preparing the rules and amendments, and what persons or bodies are involved in consultation is not formally organized.<sup>968</sup> There is no statutory and semi-independent body such as the Rules Committee involved, and consequently there is a substantial and unmitigated concentration of executive power in the way the Family Courts operate. This is further compounded by the fact that the entire administrative apparatus, including all support staff and infrastructure for the judges, is controlled by the Ministry. Very recently notice was given that the Ministry of Justice had established a “Family Court Rules Advisory Committee”,<sup>969</sup> which *“has an advisory function and its purpose is to support the ministry in the administration of the rules by providing efficient and effective consideration of proposed amendments”*. This committee will consist of two Ministry employees, two members of the judiciary (presumably Family Court judges), an employee of the Parliamentary Counsel Office and a representative for the Family Law Section of the New Zealand Law Society (i.e. an experienced family lawyer). At the time of writing there was no further information available about this committee, its meeting schedules, its tasks and objectives or the manner by which it will seek input from the wider community and profession. In conclusion, the procedural system for the Family Courts is a highly bureaucratic affair in terms of developing the rules, as well as in terms of implementing them. Given that the substantive legislation that is relevant to the Family Court is also administered by the Ministry of Justice, and that this increasingly includes procedural provisions and alternative interventions, it would seem that this Ministry is executing its desire for integrated policy development and implementation through the substantive, therapeutic and procedural aspects of this part of the justice system.<sup>970</sup>

The Family Courts have no general or inherent jurisdiction, and any proceeding must originate by application under a family law act that provides for the appropriate jurisdiction.<sup>971</sup> All proceedings in the Family Courts must be dealt with either under the Family Court Rules 2002 or procedural provisions of the substantive acts under which they originate.<sup>972</sup> Judges are explicitly prohibited from using practices that deviate from the rules.<sup>973</sup> There is a very limited discretion that allows judges to deal with matters that have not been expressly provided for,<sup>974</sup> but it is limited to situations that are not similar to anything that is provided in the rules. While there is a general principle that inferior courts have the right to do what is necessary to enable the exercise of their statutory functions,<sup>975</sup> this provides only extremely limited discretion, arguably only to prevent abuse of the rules. The overall tenor of the legislation and regulations governing procedure in the Family Courts appear to have the objective of limiting any discretion to its minimum. Consequently there is arguably no sufficient residual power for Family Court

<sup>967</sup> Which is not a statutory, but a prerogative body established under Clause VII of the 1983 Letters Patent. See Joseph *supra* n938, 717. Also see s29 Acts Interpretation Act 1999.

<sup>968</sup> Although the Family Courts website notes that Practice Notes, which of course have less standing than the rules, are made in consultation with the Ministry of Justice and the Family Law Section of the New Zealand Law Society. See <http://www.justice.govt.nz/family/practice/notes/default.asp?inline=introduction.asp>, last accessed 16 April 2007.

<sup>969</sup> See Moran K "Family Court Rules Advisory Committee" Lawtalk (2009), Issue 722, available at [www.lawsociety.org.nz](http://www.lawsociety.org.nz)

<sup>970</sup> See also the comments in n531 and n944 in respect of the explicit policy behind this development.

<sup>971</sup> S19 Family Courts Rules 2002.

<sup>972</sup> S12 Family Courts Act 1980.

<sup>973</sup> R13 of the Family Court Rules 2002 states that *“a practice that is not consistent with these rules or a family law act must not be followed in any court”*.

<sup>974</sup> R15 Family Court Rules 2002.

<sup>975</sup> *Mcmenamin v Attorney General* [1985] 2 NZLR 274.

judges to significantly deviate from the rules or to amend or vary them. This then raises the question whether the PHP process represents a significant deviation from the rules.

#### *DOES THE PHP PROCESS FIT WITHIN EXISTING RULES?*

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The various promotional items refer to the PHP pilot as a “new process”, and extol its virtues. It cannot be denied that the PHP is introduced as an entirely new way of progressing through the Family Court system in parenting cases. The process does clearly deviate from the usual procedure. There has been no formal amendment of the Family Court rules or of any provisions in substantive legislation. That leaves two possible arguments<sup>976</sup> for the PHP introduction without rule amendments: no rule changes were necessary because the PHP was a pilot only, or the process does actually fit within the current system of rules. The first argument cannot possibly be valid, as it impliedly recognizes that the system is in fact outside the rules. That would place every PHP case in jeopardy as its proceeding would have been illegitimate under R13 of the Family Court Rules 2002. The argument would also be impossible to maintain in the light of the fact that it has already been announced that the PHP approach will be continued in the pilot courts and extended to other courts. This leaves only the second argument to be considered. In this approach the PHP would either fit within the current rules, or represent a deviation that is so minimal that it would fit within the very limited discretion of individual judges, or perhaps within the powers of the principal judge to issue practice notes. No practice note was in fact issued for the PHP process, while it is inconceivable to maintain that a separately designed process is a response to a situation where individual judges are resolving uncertainty in the rules. Therefore, the only possible justification for the validity of the PHP process is that it must fit within the existing rules.<sup>977</sup> It is noted that none of the introductory materials actually addresses the alleged jurisdiction on the basis of which the PHP rules could be introduced, or address the question whether the process fits within the existing rules. In addition, there is no statutory or regulatory jurisdiction to conduct procedural experiments on litigants. Such an experiment might be conducted when the entry into the programme is voluntary, but that is not the case.<sup>978</sup> The single question remains therefore whether the PHP process can fit within the existing rules, or rather whether the rules provide for sufficient jurisdictional “flexibility” to bring PHP hearings under the existing procedural structures. By following that argument the PHP would be a new process in a cosmetic sense only, because its structure can be supported by existing statute and regulations. It is obvious that the Family Courts Act 1980 envisaged an adjusted process, as compared

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<sup>976</sup> An argument that Family Court procedure is ultimately an executive, rather than a legislative issue (I.e. through S16A of the Family Courts Act 1980) and that therefore pilot programmes may be initiated under the auspices of the Ministry of Justice, would meet the hurdle that the Family Courts Act 1980 simply does not provide for that regulatory power.

<sup>977</sup> The Principal Judge discussed possible innovations based on the CCP in 2005 and remarked that “*some of the changes I am suggesting are a refinement of the Court process and can be introduced through Judge leadership and co-operation with the Family Court Bar*”, and contrasted that approach with changes that require legislative intervention. Boshier PF “Towards Making Our Family Court Process Better” Speech to the Auckland Family Courts Association, Auckland, August 2005, 9. While the PHP was later recognized as being very different, the suggestion that it remained within an adaptation that could be introduced by leadership and implied acceptance by the bar was repeated, when in a speech in 2007 His Honour remarked: “*The quite radically different Parenting Hearings Programme is clearly working and has been embraced by the Family Court Bar as a legitimate and helpful way forward.*” (my emphasis), see Boshier PF “The Principal Family Court Judge’s Vision for the Family Court Going Forward after the First 25 Years” Speech to the New Zealand Family Law Conference, Christchurch, 8 November 2007.

<sup>978</sup> It is noted that voluntary entry was considered vital for the Australian experiment, and the key consideration for the validity finding in the New Zealand opinion that was obtained, see Jefferson *supra* n656. It is noted that Illingworth *supra* n948, provides an argument to the contrary, but I consider that not well developed, while it makes the explicit proviso that it was made without any detailed knowledge of the Family Court rules.

with the approach to traditional civil matters and this has found its way into less formality and some relaxation of the rules of evidence. This has sometimes been described as a “semi-inquisitorial” process;<sup>979</sup> however, that term has never been defined accurately. Nowhere in the legislation and regulations, nor in the practical operation of the Family Court, can a precedent be found for the procedural innovations that comprise the PHP process. The “hybrid process” features clearly do not fit within the rules, nor does the system of placing both parties on oath and keeping them in that condition throughout mediative settlement interventions. The PHP is arguably a deviation from the rules that is outside the jurisdiction to apply the rules with some flexibility, and it was promulgated in breach of the provisions that govern the making of court rules. This is of course aggravated in respect of the rules contained in the Care of Children act 2004, which can only be changed by legislative amendment.

The only argument that can possibly be advanced to support the legitimacy for the current emergence of the PHP process as a procedural innovation is that such a process is now necessary to give proper effect to the paramountcy principle, and that this principle by its nature overrides any objection to extending the rules beyond their intended and well established bounds. As already mentioned, there is no authority for that proposition, quite the contrary.<sup>980</sup> The conclusion must be that introducing such a fundamental, far reaching, and extensive innovation is in breach of the limited residual rule making powers of the Court. Despite its official responsibility for the Family Court Rules, it was not open to the Ministry either to extend its powers into actually promulgating a new procedure without complying with the proper procedure for rule making.

The same conclusion can be reached via another route. The existing rules and procedures have obviously been drafted in the context of a long standing tradition of court procedure, and they do not therefore specifically consider matters that may be taken as well settled under general principles such as the right to natural justice. Existing rules do not, therefore, describe in any detail how the actual presentation of evidence is undertaken, where the precise boundaries of judicial intervention are located, who may interact with the judge at what time and in what way, the manner of examination and cross examination, how witnesses are to be sworn and what they can and cannot do while giving evidence etc. In other words: the traditions that have become known as the Common Law adversarial process. Problems that arise with them in individual cases are therefore normally dealt with under the formal court rules, the rules of evidence, the rules of natural justice, and/or s27 of the Bill of Rights Act 1990. This aspect has already been covered earlier and I reached the conclusion that the PHP is systematically in breach, although this has not yet been tested formally on appeal.

#### *Summary of Part IV*

This part presented different perspectives from which to consider the PHP innovation. I concluded that conflict theory provides little support for the PHP innovation. The conflict dynamics and individual conflict behavior in this “most difficult tranche” of disputes are likely to be inimical to the success of any coerced semi-consensual intervention that avoids the emotional drivers of the conflict, which are

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<sup>979</sup> See for instance *CL v CL* 3 NZFLR 455, 457-458.

<sup>980</sup> See *K v K*, as quoted in n869 and the associated text.

precisely the cause of the parties' inability to comply with the collaborative parenting model. Applied conflict theory also suggests that PHP outcomes will not be sustainable.

From the ADR perspective I concluded that the PHP presents a hybrid process that is troublesome in terms of natural justice and too dependent on the skills of the judges. It is likely to confuse the parties and to lead to resolutions that will have little long-term robustness.

The comparison with an inquisitorial system showed that fundamental differences between the systems will prove detrimental to the integrity of the PHP system as proposed. Additionally, real inquisitorial systems do not appear to be actually better at resolving parenting disputes.

I concluded that there are serious challenges to the validity of the PHP process in constitutional and 'natural justice' terms.

Finally, the PHP cannot be promoted as fitting within the constraints of the current Family Court rule system and the jurisdiction to amend those rules. A legal analysis of the characteristics of the process and the jurisdiction to make rules, led me to the conclusion that the PHP is not a valid process under the current rules that govern the operation of the Family Courts.

# PART V

## EVALUATION

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### *Introduction*

In the previous part, I discussed the PHP process from mostly theoretical perspectives. This part also uses empirical material, presented in the format of summary statistics and graphical representations of quantitative data,<sup>981</sup> as well as quotes from the comments provided by the lawyers that participated in the surveys.<sup>982</sup> This part begins by providing details about the practitioner surveys and the characteristics of the respondents. Next, the pilot project and the PHP process are considered separately. Chapter 19 contains a brief detour to construct criteria to evaluate pilot projects, to then consider the PHP pilot in their context. Chapter 20 extracts and discusses the objectives of the PHP process and evaluates these.

## 18 THE EMPIRICAL COMPONENT OF THIS EVALUATION

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### *Method*

In order to survey lawyers' opinions, I obtained addresses for practitioners specializing in family law.<sup>983</sup> For the 2007 survey this included 735 lawyers, which had reduced to 615 for the 2008 survey.<sup>984</sup> The response rate<sup>985</sup> was 21% for both surveys, a total of 286 responses. The lawyers were contacted via an email message containing a link to a survey website, where a questionnaire could be completed anonymously online.<sup>986</sup> The questionnaire was automated and organized in topical blocks, whereby some questions were only presented to respondents who indicated actual experience in PHP cases. Within each block, the questions were shown in random order to each participant to avoid "narrative biases", where a response may be influenced by the order in which the questioning proceeds. Most questions asked for a graded response to a number of statements by selecting items on a Likert-scale, thus providing a quantifiable result.<sup>987</sup> "Open" questions provided an option to enter text, and many respondents used this to express detailed opinions. Several questions involved demographic data. Responses were processed using the online tools within the Qualtrics survey application and were also

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<sup>981</sup> More detailed data can be found in tables to which I refer, and which are annexed and available online.

<sup>982</sup> The total collection of comments is also available in the online appendices at <http://www.phpthesis.webs.com>.

<sup>983</sup> By using the publicly accessible database maintained by the Family Law Section of the New Zealand Law Society.

<sup>984</sup> This reduction in numbers correlates with the decline in membership of the Family Law Section, see the reporting in the member section of the NZLS website at <http://www.familylaw.org.nz> (last accessed July 2009).

<sup>985</sup> This is calculated as the number of respondents completing the online survey in proportion to the total number of invitation emails that had been sent out.

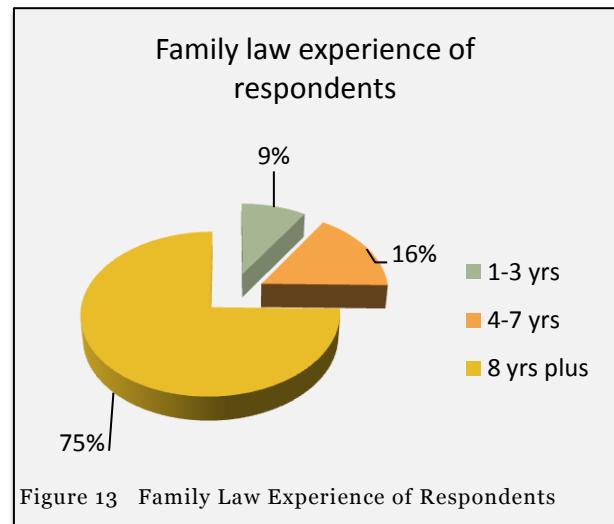
<sup>986</sup> Using a survey application and web service provided by Qualtrics, see <http://www.qualtrics.com>. Versions of the online questionnaires are available online at <http://www.phpthesis.webs.com>. That site also provides links to the survey questionnaires, which will be able to be used through to April 2010, although no data will be collected. The email also contained the required project information memorandum for respondents, while the first question of the survey sought the required permission to participate, in accordance with the University of Auckland ethics rules. The information memorandum is available on the thesis website.

<sup>987</sup> Using Likert scales places some restrictions on the data obtained and the appropriate use of statistical evaluations. I typically relied on Chi-Square analysis, given the categorical nature of the responses. In some cases I relied on t-tests, but in those cases I also performed non-parametric tests to see whether these produced significantly different findings. I used a  $\alpha$ -value of 0.05 for significance determination. My use of statistical methods was generally based on Coolican H *Research Methods and Statistics in Psychology* (Hodder & Stoughton, London, 2004), the statistical website of Vassar College at <http://faculty.vassar.edu/lowry/webtext.html>, and the statistical reference material included in the SPSS and Minitab software.

downloaded to my computer system, where they were statistically processed using SPSS and MINITAB software.<sup>988</sup>

### *Respondents*

I surveyed lawyers because it efficiently provided professional opinions about the PHP process and its pilot.<sup>989</sup> Lawyers are in an excellent position to assess the merits and disadvantages of the PHP from practical, legal and procedural perspectives, without being influenced by the success of the pilot or indeed the outcome of individual cases. Practitioners can also provide detailed opinions and conclusions that may be overlooked in bare statistics. A problem of basing an appraisal of a procedural experiment on surveying or interviewing the parties is that their opinions are likely to be coloured by the outcome of their particular case.<sup>990</sup> Parties also lack a basis to make comparisons with the traditional process or with other cases, and have fewer skills to see the process distinct from a specific fact situation. Parties are emotionally affected by the court process, which for them often represents an alien environment in which private and sensitive matters are discussed and decided. Anecdotal information indicates that some parties may not have realised they were involved in an experiment,<sup>991</sup> while this may have strongly affected others.<sup>992</sup> The respondents<sup>993</sup> were experienced lawyers, some indicating experience of over 25 years, see Figure 13.<sup>994</sup>



<sup>988</sup> These are industry standard software applications for statistical analysis.

<sup>989</sup> [It is noted that the official evaluation also largely relied on lawyers' opinions, obtained in a very similar way.]

<sup>990</sup> A phenomenon that was also observed in research about the use of ADR in other civil process: Saville-Smith *supra* n360.

<sup>991</sup> I observed this in a particular case where the parties had been involved in a string of previous "traditional" hearings, but had not seen the compulsory DVD before the PHP hearing started. After firmly reminding the lawyers about the importance of this in the new process, the judge adjourned the hearing and a television was brought in so that the parties could watch the DVD. When the hearing resumed, the judge gave the mandatory introduction and spent some considerable time explaining the new process and its benefits. Several weeks later, while having lunch in a shopping mall, I was recognized and approached by one of the extended families in the case, who tried to seek advice on what to do, as there were compliance issues with the court orders. While referring them to their lawyer, I asked whether they thought the new process was an improvement, to which they (to my great surprise) responded not having been aware that anything different had happened at all.

<sup>992</sup> It is a well known phenomenon of psychological experiments that awareness of participating in an experiment influences behaviour, even without knowing what the objectives of the experiment are, or where the boundary between experimental and real experiences is located. (The so called Hawthorne effect) See also the discussion on pilot methodology, below.

<sup>993</sup> In this chapter, reference is made to both the 2007 and 2008 surveys individually and combined. As the surveys were conducted anonymously, there is no means to establish how many respondents participated in both surveys and whether their responses changed between the 2007 and 2008 surveys. Where necessary, I therefore used statistical techniques to evaluate such changes.

<sup>994</sup> For further details, see Table 1.

More than half of the respondents reported spending more than half of their time dealing with parenting disputes, see Figure 14.<sup>995</sup> This supports the conclusion that the total economic costs of parenting disputes are very high.<sup>996</sup> There were no significant differences in the observed frequencies of the experience and workload categories across the two surveys.<sup>997</sup>

The surveys were distributed to Family Law practitioners throughout the country, not restricted to the areas where the PHP process was trialed. The purpose was to obtain views of those with and without actual PHP experience. Forty five per cent of the survey respondents<sup>998</sup> had acted in some 430 PHP cases.<sup>999</sup> The highest individual experience was 15 cases. On average, those with PHP experience had acted in four cases.<sup>1000</sup> The respondents' PHP experience is expressed in Figure 15.

The distribution of respondents with PHP experience over the pilot courts is expressed in Figure 17.<sup>1001</sup> When taking the number of cases in which the respondents acted into account, the distribution of the respondents' experience over the pilot sites<sup>1002</sup> is represented in Figure 16. As these graphs demonstrate, the respondents and their PHP experience were well distributed over the courts where the pilot took place. Eight respondents indicated they had acted in PHP cases in more than one court. Informal verification with the Family

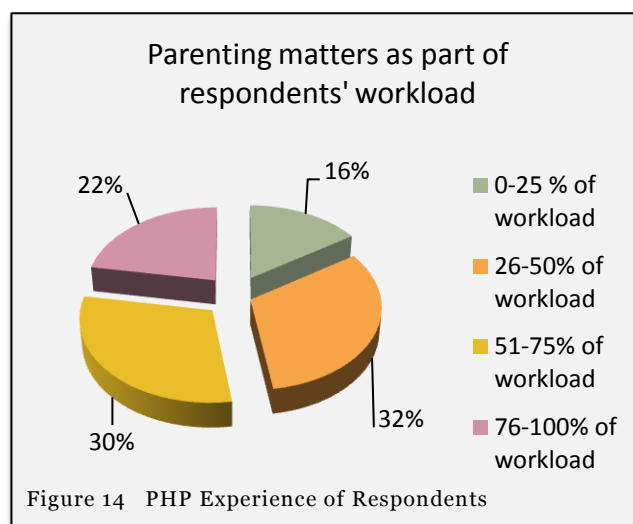


Figure 14 PHP Experience of Respondents

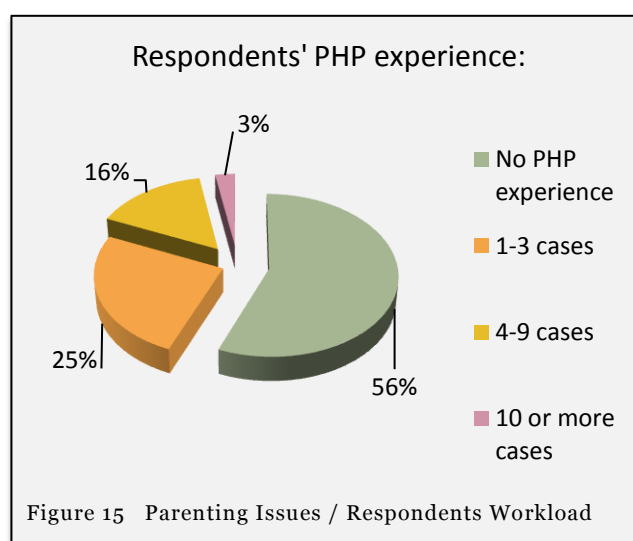


Figure 15 Parenting Issues / Respondents Workload

<sup>995</sup> For details see Table 2. An analysis of the differences between family law experience frequencies across the time spent on parenting dispute was insignificant (Pearson Chi-Square = 9.063, DF = 6, P-Value = 0.170), i.e. more experienced family lawyers do not significantly spend more or less time on parenting matters.

<sup>996</sup> If this is extrapolated over 700 family lawyers, on average charging an assumed annual fee level of \$150,000, then the total cost of lawyer's fees in parenting disputes would be \$52 million. Court statistics provide that by 2005 the costs for judge ordered services was some \$25 million (Ong supra n 1, 75), while it is certainly a conservative estimate that other court costs involve a similar amount. This would mean that the annual costs for only the legal aspect of parenting dispute is probably well over \$100 million.

<sup>997</sup> For experience vs survey year: Pearson Chi-Square = 2.596, DF = 2, P-Value = 0.273. For time spent on parenting matters vs survey year: Pearson Chi-Square = 0.279, DF = 3, P-Value = 0.964.

<sup>998</sup> This percentage was 44% for the 2007 survey and 46% for the 2008 survey.

<sup>999</sup> This does of course not mean 430 different cases; different respondents may have been acting in the same case, while there will be some double counting in these numbers for practitioners that participated in both surveys. Because of the anonymity of the survey, it is impossible to quantify this. The number of cases and cases/practitioner for the surveys was for 2007: 190 and 3.2 while these numbers were for 2008: 242 and 4.56.

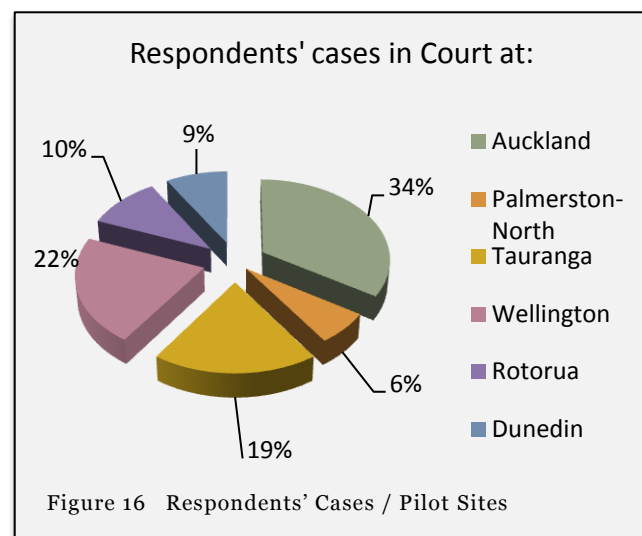
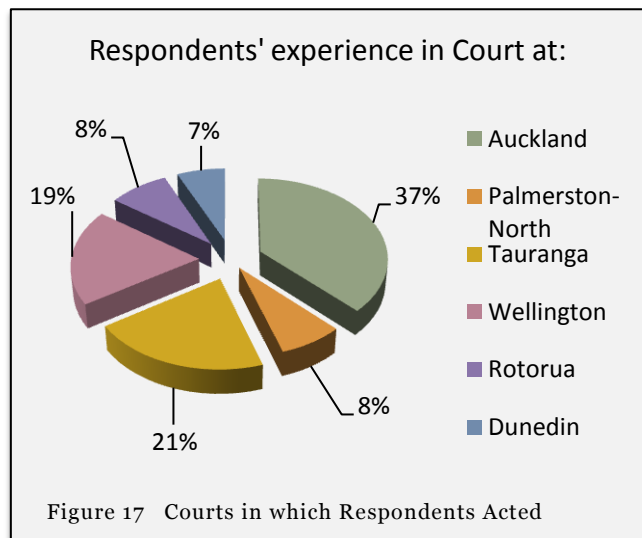
<sup>1000</sup> For further details see Table 7.

<sup>1001</sup> For further details see Table 9.

<sup>1002</sup> Because the respondents indicated in which courts they had acted and provided the number of cases they acted in, but without being asked to provide a distribution of cases over those courts, some assumptions have been made, based on the general distribution of all cases. Given the very small number of cases involved in this assumption, the possible distortion arising from this assumption is negligible.

Court indicated that the distribution reported in the surveys is not dissimilar to the distribution of the PHP case load over the pilot courts.<sup>1003</sup>

Respondents were asked about the role in which they typically acted in PHP cases: 23% mostly acted as lawyer for the child, almost 60% acted mostly for a party, while the remainder had more or less equally divided roles.<sup>1004</sup> The role of lawyer for the child is assigned by the court, and is reserved for lawyers with sufficient experience. As expected, respondents in the shortest experience category (three years or less) had not acted as lawyer for the child at all. It was, however, somewhat surprising to find that no respondents in the 4-7 year category had acted mainly in that role, while in fact only one respondent in that category had some experience as lawyer for the child in the combined category. It appears that appointments as lawyer for the child are restricted to those with at least eight years experience.<sup>1005</sup>



The respondents provided information about their knowledge of the PHP process.<sup>1006</sup> Practically all respondents knew of the PHP innovation, but some 10% indicated that this knowledge was only cursory, while a further 32% acknowledged having to obtain further information if confronted with a PHP case. Almost 60% said they were acquainted with the process, while only five practitioners (2%) considered they had expert knowledge. This distribution of knowledge about the process is not surprising, given that it was piloted in a limited number of Family Courts.<sup>1007</sup> As expected, the respondents with experience of the process indicated significantly higher levels of knowledge. Respondents with PHP experience also indicated having used a much larger number of different sources of information, from which it may be concluded that a family lawyer confronted with the new process will actively research to obtain more

<sup>1003</sup> [When it became available the official evaluation showed less prominence of Auckland (20%), and a higher case load in Dunedin (18%), with the other courts proportionally similar.]

<sup>1004</sup> For further details see Table 8.

<sup>1005</sup> Within the group with at least 8 years experience, the role distribution was 32% (mostly child), 40% (mostly party) and 28% (mixed).

<sup>1006</sup> For further details see Table 3.

<sup>1007</sup> The six courts in which the PHP was trialled cover 38% of the total caseload in parenting cases: Ong supra n1, table 1.2.



information. The majority of respondents who indicated confident knowledge<sup>1008</sup> of the process had experienced it, while practically none of those without experience considered themselves sufficiently knowledgeable.<sup>1009</sup> This would indicate that experience in acting in PHP cases is considered a vital part of obtaining knowledge about it. The reason for this may be related to the innovative character of the process or the lack of information about it from other sources. In conclusion, the empirical data on which this part of my thesis relies has been obtained from a large number of highly experienced family lawyers,<sup>1010</sup> with substantial knowledge of, and practical experience in, the PHP process, well spread over the different pilot courts. Collecting data about the operation of the PHP process through the intermediary of specialized legal professionals, and the representative size of the sample, enhanced the validity and reliability of this component of my evaluation.

## 19 EVALUATION OF THE PHP PILOT

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Trialing a procedural innovation is not new in the Family Court, and the rationale for such experiments was well formulated by survey respondents:

*We need to be able to adapt our process to suit client's needs. It is better to run a pilot scheme to check if it suits than to implement a (difficult) legislative change without being certain it will be successful.*

*How else are we to know what is best if we do not trial it. This needs to be done in a variety of Courts all with a different mix of "clients" socially, economically and racially.*

*We always need to look at different ways of improving access to justice. We constantly need to examine ourselves and the system that we are working under. It is very important to bring all the stakeholders along with any new system, but there will always be detractors. Lawyers on the whole are very conservative but we are interested in justice and it is crucial to society that justice is accessible. But any new scheme must be openly debated; views of stakeholders listened to and principles of natural justice adhered to. Importantly, independent evaluation must be carried out from the inception of any new system. In NZ there is virtually none of this.*

Practitioners clearly accept<sup>1011</sup> the need for continuous improvement of court process; they understand the restraints and restrictions that apply to trialing legal procedure. There was, however, skepticism about the way the PHP pilot was conducted.

*THIS IS NOT A PILOT - there must be monitoring set up first to watch how a pilot is going – [Judge] Boshier is intent on introducing this system no matter what - there are all sorts of breaches of natural justice left right and centre on this and legal aid and costs means it is very hard to fight against - the judges take any discussion or criticism very personally - people throughout the country are reporting difficulty in talking against the system - there is fear of retribution - there is real concern that people and children are going to suffer because of this system and that we will not hear about it because there is no monitoring - it is a farce.*

In order to appraise the pilot process itself, it is necessary to formulate some evaluation criteria.

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<sup>1008</sup> Which was constructed by adding those that had indicated being confident about their knowledge and those indicating to have expert knowledge.

<sup>1009</sup> 72% of those reporting (07-08 combined) to have sufficient knowledge had actual PHP experience, while only 4% of those not having PHP experience considered themselves sufficiently knowledgeable. Interestingly, these percentages dropped between the 2007 and 2008 surveys, from 76% to 66% and from 5% to 3%. This would seem to indicate that the process is increasingly perceived as complicated or more difficult to gain knowledge of. Note: these statistics differ from my previous articles as a result of re-coding the level of knowledge perceived as being confident about the process.

<sup>1010</sup> Representing some 20% of all specialized practitioners in this area of law.

<sup>1011</sup> The mean response to the survey statement that “there should be no place for experiments in the courts at all” was a low 2.22 (disagree). See Table 17, and Figure 18. This response was almost identical in the 2007 and 2008 surveys (means 2.21 and 2.24). The 2.22 overall mean has a 95% confidence interval between 2.12 and 2.33. Although the response mean was slightly higher (2.28) for those with PHP experience over those without (2.18), indicating they were on average less enthusiastic about pilots, this difference was not statistically significant.

## CRITERIA FOR THE USE OF PILOTS IN POLICY DEVELOPMENT

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The increased use of pilots is driven by a need for good government, which includes a desire for research based development. Governments create an enormous amount of increasingly complicated interventions.<sup>1012</sup> A recent evaluation of a large number of pilots in the United Kingdom<sup>1013</sup> concluded that (when executed properly) pilots were an important and economical tool to test the effect of proposals and find flaws in their implementation. Another apparent advantage is the ability to unearth unexpected and unwanted side effects. Because of their controlled, relatively small-scale, and experimental nature, pilots can also provide useful information about the effects of small variations in the policy or process involved. Finally, pilots can be used to test and evaluate the way in which a policy or programme is implemented.

Material from New Zealand supports a rigorous approach to pilot studies and research in general,<sup>1014</sup> and in relation to the PHP specifically.<sup>1015</sup> Using the English recommendations and the limited New Zealand material, the following criteria for pilots can be found and these can be categorized as pre-conditions, key properties and methodology.

### *Pre conditions for pilot projects*

Pre-conditions for pilots include that a pilot should be truly experimental: the policy or programme and its delivery mechanism should remain open to rejection or amendment and not already cast in stone,<sup>1016</sup> otherwise the pilot is merely a distraction. A pilot must be allowed to run its full course and its time-frame and scope must be commensurate with the anticipated time it will take for the intended programme to “bed in” and start showing its effects. Early results may be misleading and care should be taken not to rely on them. The precise purpose of the trial –i.e. whether it is to test a policy or its delivery mechanism, or both– and its evaluation process and criteria must be made explicit in advance. A pilot should be preceded by a systematic gathering of information from similar programmes within the jurisdiction and abroad, which should inform the decision to undertake the experiment.

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<sup>1012</sup> These are ultimately laid down in legislation or regulation, but can take an enormous array of formats from creating monetary entitlements to providing services, limiting or restricting certain activity, procedural inventions etc.

<sup>1013</sup> See generally Jowell R *Trying It Out: The Role of 'Pilots' in Policy Making, Report of a Review of Government Pilots* (London, Cabinet Office of the United Kingdom, 2003).

<sup>1014</sup> See Chetwin A and Lee A "Getting the Most out of Programme Evaluation: The Evaluation of New Zealand's Domestic Violence Legislation" Paper presented at the Evaluation in Crime and Justice: Trends and Methods Conference, Canberra, 24-25 March 2003. Also note that the Principal Family Court Judge was for instance highly critical of a report by University of Waikato researchers, stating: *"I had no doubt at all when the research was embarked on that it would not be research"* and: *"I knew it would be a personal restatement of the authors' positions. I feared we would end up with what we got – the personal recollections far outweigh the research. I did not see why we should be part of a study and project that would not have integrity and I've been proved correct."* Interview in the Waikato Press, Wednesday, 29 August 2007. (As quoted <http://dad4justice.blogspot.com/2007/08/report-biased-says-bullshit-judge.html>, last visited 30 June 2009). In a subsequent speech the Principal Family Court Judge complained of the 'lack of balance' of this Waikato research project, see Boshier PF "The Family Court - Towards Achieving Our Best" Speech to the Auckland Family Courts Association, Auckland District Law Society, Auckland, 29 November 2007.

<sup>1015</sup> In the introductory speech to the PHP pilot, Judge Boshier stated that *"The trial will run for two years. This will allow us to undertake a quality evaluation, including a follow-up of cases to establish whether the outcomes have been successful"*. Boshier supra n658.

<sup>1016</sup> I.e. a pilot should be designed to include what may be called “planned obsolescence”: the policy or process that is trialled must be capable of being readily abandoned if the evaluation demonstrates that it is incapable of fulfilling its objectives.

### *Key properties for pilot projects*

The key properties of pilots are first and foremost independence: they must be free from real or perceived pressure to bring about the desired result. Those proposing the innovation should distance themselves from decisions about evaluation methods, execution of the pilot and its evaluation, and they should refrain from disseminating (interim) results. Secondly, the pilot methodology is vital, and should be subjected to independent, external scrutiny. A poorly designed pilot may be worse than no pilot at all. This extends to using the word “pilot”, which should be reserved to rigorous early evaluations, not for half-hearted attempts at convincing the population of the benefits of something that has largely been devised from behind the desks of policymakers, and that will be implemented in any event. Similarly, pilots should be guarded against the use of superlatives that create early and high expectations, which make neutral evaluation more difficult. Thirdly, there must be provisions for, and safeguards surrounding, interim findings. Fourthly, budgets and timetables should be sufficient to train those who implement the piloted innovation, particularly those who will assign participants to treatment and control groups. Training should include modules on piloting and evaluation, so that those involved are aware of the purpose and restrictions of the pilot process and the importance of proper methodology. This aspect is particularly relevant in order to avoid systematic errors.

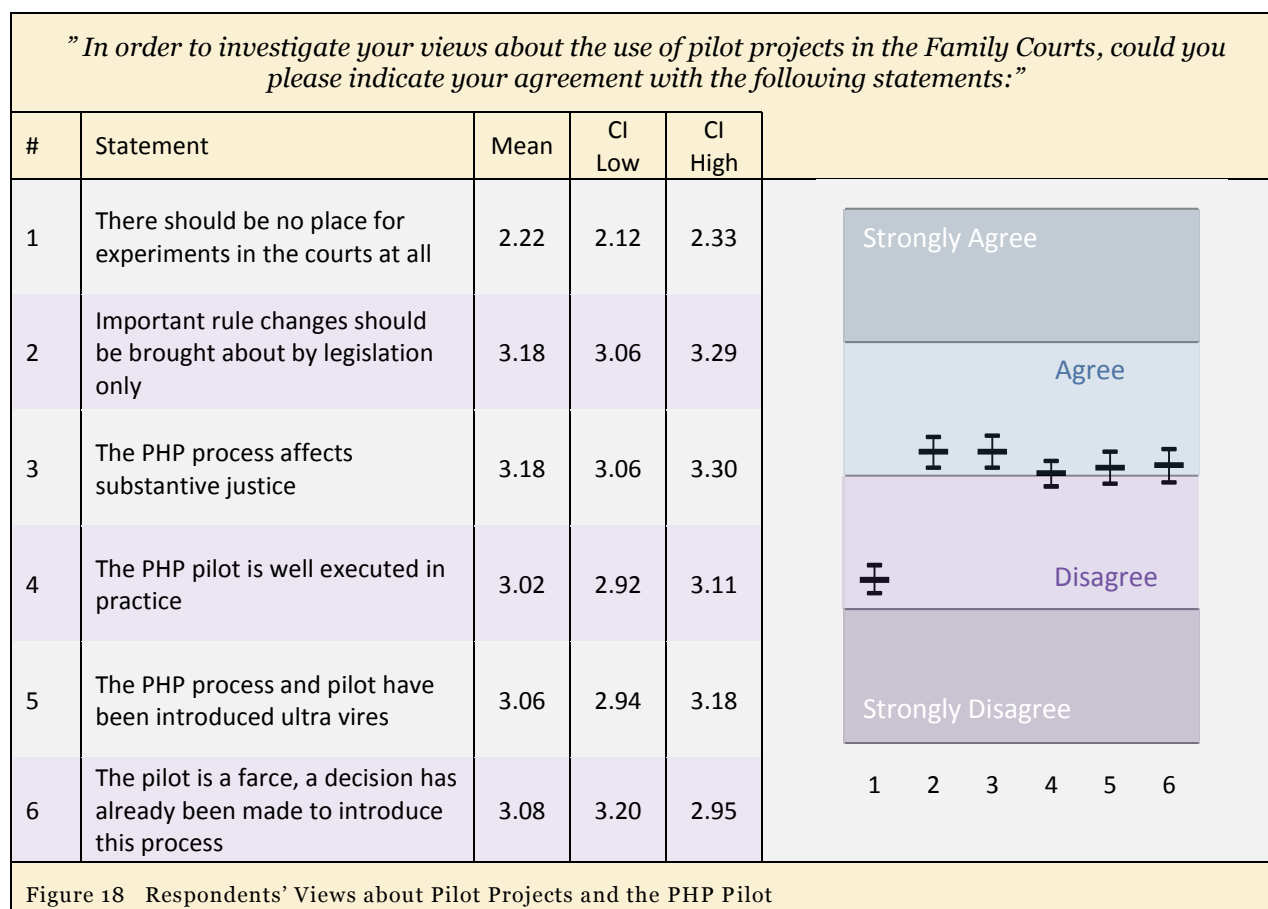
### *Methodology for pilot projects*

The piloting methodology and practices should be carefully considered and may consist of multiple methods of measuring and assessment. It may include experimental or quasi experimental methods and quantitative and qualitative techniques, all designed to get a complete picture. The pilot methodology should comply with the relevant scientific and practical principles. Combination of different techniques should figure in any rigorous evaluation. For policies that seek to influence individual behaviour or outcomes, randomized controlled trials of individuals provide the most conclusive result of the impact of the policy or programme under consideration. Policies designed to achieve change in an area, in a unit or at a service level are best tested by randomization at that level of aggregation. Where randomization is impossible or impractical or where that method is unsuitable to answer certain questions (such as why an intervention does or does not work), a range of other techniques can be considered. Rigour is not restricted to quantitative methods, but should also apply to qualitative techniques, while a combination of qualitative and quantitative methods may enforce the findings and conclusions. Ethical considerations are important, and may not be resolved completely by obtaining consent, particularly where inequities may result from allocating participants to the treatment- rather than to the control group. These ethical considerations should be mitigated, rather than being used to avoid trialing altogether.

Pilot results should be used carefully. Negative results should be viewed as a success, having assisted to avert a potentially significant embarrassment. The programme or process itself should always be designed in such a way that it can be abandoned or changed if the results of the pilot indicate that this is necessary. The parameters of the trial should be public, open and accessible, and available freely within and outside government. Reviews of pilot projects should be undertaken regularly and routinely reported on as a means of sharing experience and developing methods. A central electronic repository of pilot projects and reports, with as much data as possible should be part of this system of public disclosure.

## THE PHP PILOT IN THE CONTEXT OF THESE CRITERIA

The above criteria can now be applied to the PHP pilot. This also introduces the first block of responses to the survey questions and shows its format.<sup>1017</sup>



### THE PRE-CONDITIONS FOR PILOT PROJECTS

#### *A pilot must be a true experiment*

The Family Court indicated that the PHP process was to be continued and introduced to other family courts<sup>1018</sup> before the pilot was completed.<sup>1019</sup> It may therefore be doubted whether the PHP pilot was a true experiment, or as one respondent suggested:

*It is well known that the process is likely to be introduced whatever the evaluation of it suggests.*

That view can be supported by the strongly promotional and superlative character of the material that

<sup>1017</sup> Responses are represented numerically and graphically with mean values and the lower and upper limits of the 95% confidence interval for the mean value. Further details can be found in the tables with source data, to which will be referred as well, and which are available in the appendices and at the thesis website: [www.phpthesis.webs.com](http://www.phpthesis.webs.com).

<sup>1018</sup> The anecdotal evidence of this, in the form of non-pilot courts appearing in the departmental spreadsheets was confirmed by remarks from respondents to the surveys. It seems that this was mostly done on a consensual basis. Apparently this involved about a dozen, mostly smaller, Family Courts.

<sup>1019</sup> A development similar to the Australian CCP pilot, where the process was also formalised before the trial was completed, see chapter 10, above.

introduced the pilot,<sup>1020</sup> and the well documented views of the Principal Family Court Judge. The surveys indicated a mild perception that the pilot was a ‘farce’,<sup>1021</sup> but respondents accepted the integrity of the experimental character of the pilot, albeit perhaps with some skepticism:

*As far as I am aware it fits within the Care of Children Act framework. I have to believe the powers that be, that it is a pilot....nothing else.*

I conclude that the PHP pilot was intended to be experimental in nature, albeit probably more in respect of details of the programme than in respect of the question whether it is to be introduced at all. In that respect, the pilot did not comply with this criterion.

#### *A pilot must be allowed to run its course*

A period of two years ought to be ample for a process like to PHP to “bed in” and for a sufficient body of experience to develop. There are two issues that cause concern, first, the lack of uniformity. The Australian CCP pilot suffered from this problem, with the evaluation concluding that “judges had adopted different –indeed quite divergent– approaches to the implementation of the CCP”.<sup>1022</sup> The PHP trial had apparently been better coordinated, and more effort was spent on introductory training and materials, including the DVD, which will have played a role in standardizing the process by showing a prototype.<sup>1023</sup> Nevertheless, respondents commented:

*The Pilot programme in [Court] has been run differently than the process identified in the DVD...*

*My only concern is the variability of how the judges operate; this can cause real difficulty for clients.*

*...There is no consistency of approach by the judges. Better quality judges need to be appointed...*

*...Each judge has their own particular style and some are better suited to the process than others. That dependence on personality makes the PHP process more vulnerable than a normal hearing.*

*...Having a set process that all judges follow - currently it varies between judges which makes it very difficult to prepare clients...*

As was the case in Australia, there are significant differences between judges.<sup>1024</sup> Therefore an issue with generalization of the evaluation results remains.<sup>1025</sup>

Secondly, it is arguable whether the pilot duration was long enough to sufficiently test outcome objectives, as many of these have a long-term character.<sup>1026</sup> Nevertheless, with a sufficient control group, the two-year period from November 2006 should be long enough to start seeing statistically significant differences in respect of long term effects (for instance the “better outcome for children” and “enduring

<sup>1020</sup> In which there was mention of a trial for two years, but no suggestion the process could be abandoned after that period.

<sup>1021</sup> See Figure 18. The 3.08 mean has a 95% confidence interval between 2.95 and 3.20, placing the opinion marginally to the ‘agree’ side of neutral. The results for the two surveys were virtually identical (both means 3.08). Those with PHP experience tended to agree slightly more with the statement that the pilot was a farce (mean 3.12 against 3.05), but this difference did not reach statistical significance.

<sup>1022</sup> Hunter supra n602, 95.

<sup>1023</sup> A similar tool was introduced in Australia while the pilot was underway, without notifying the evaluator: *ibid*, 8.

<sup>1024</sup> It is acknowledged that different approaches or styles of the judges need not be a disadvantage. Nevertheless, the concept of justice requires that process must stay within reasonably narrow boundaries, as otherwise litigants and their lawyers will not be able to effectively prepare and participate.

<sup>1025</sup> And one would expect that the official evaluation will provide statistical material in respect of results across different judges and courts. [The official evaluation concludes that there were substantial differences between judges, but contains no material on how this may have affected the outcome variables of the pilot, i.e. “judge” was no independent variable].

<sup>1026</sup> As an example, court statistics show that about 40% of cases involve parties with prior court involvement. From my limited file analysis it appears that cases that return to the court, do so in 2-3 year cycles. Most of the concluded PHP cases are still well inside this period, and it would be difficult to draw conclusion about this aspect at this point. For some cases the word ‘cycles’ must be taken literally, they return to court more than once, and do so in a more or less regular pattern. This appears a topic worthy of further investigation.

outcome” objectives).

Although the decision to continue the PHP was taken before the pilot was concluded, the process was applied throughout the planned two year period, and presumably data was gathered throughout as well. In that sense the pilot complied with this criterion.

### *Explicit formulation of the purpose*

The PHP pilot was introduced without a clear and concise set of objectives and criteria for the pilot process, the way these will be measured and evaluated, when decisions are to be made about continuation or amendment, and by whom. This has not been provided to date. Apart from announcing that an evaluation would be undertaken, no details were provided, and it remains uncertain whether the entire process remains up for discussion and possible rejection or whether only details may be amended. The PHP pilot did not comply with this criterion.

### *Systematic gathering of information as a precursor to a pilot*

The PHP pilot was presumably preceded by gathering of information, although this appears mostly restricted to considering the Australian CCP trial and its conclusions. While the CCP evaluation raises serious questions, these were not discussed or even pointed out.<sup>1027</sup> There appears not to have been any empirical data gathering about the disadvantages of the existing system and its causes. There was no systematic analysis of the inquisitorial process, aspects of which are said to be a fundamental characteristic of the PHP. A principled discussion of the nature of the process and its validity in terms of natural justice was restricted to one inconclusive legal opinion, while strong assertions were made in that respect.<sup>1028</sup> The question whether there was jurisdiction to undertake this significant experiment, or whether it was constitutionally valid, was not raised. Although not overwhelmingly, practitioners did agree that the PHP process can affect substantive justice<sup>1029</sup> and that important rule changes should therefore be brought about by legislation:<sup>1030</sup>

*To some extent a change of this magnitude should perhaps have had at least some legislative process most likely through a rule change in the FC rules. The PHP does remove some right of litigants to have a judge consider issues which litigants put forward. It sails close to breaching the right to be heard. If it is introduced there should be some changes to the rules.*

At the time of writing, I have not found appeals from PHP decisions on the basis that the process was being trialed without proper legislative or regulatory introduction, and that it therefore lacked legal validity.<sup>1031</sup> The surveys investigated this aspect by asking whether the lawyers thought that the process was introduced ultra vires. The mean response was just slightly to the “agree” side of neutral.<sup>1032</sup> There is a difference in opinion between those with and without PHP experience: those with PHP experience

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<sup>1027</sup> [The official evaluation refers to the CCP trial, but does not discuss the CCP or the LAT in any detail.]

<sup>1028</sup> The question whether respondents thought natural justice was achieved will be addressed below.

<sup>1029</sup> See Figure 18 and Table 17. The 3.18 mean has a 95% confidence interval of 3.06 – 3.30. Those with PHP experience scored slightly higher on this aspect, albeit not statistically significant.

<sup>1030</sup> See Figure 18 and Table 17. The 3.18 mean has a 95% confidence interval between 3.06 and 3.29.

<sup>1031</sup> As per the argument developed in chapter 17.

<sup>1032</sup> The 95% confidence interval of the 3.06 mean was 2.94-3.18, see Figure 18 and Table 17.

are significantly more skeptical about the legality of the process and the introduction of the pilot.<sup>1033</sup> Apparently the effect of experiencing PHP hearings raises serious doubts about the appropriateness of the introduction of the process.

The PHP materials emphasize the importance of the lawyers' roles. Respondents, however, complained about a lack of consultation about the design of the PHP and the pilot.<sup>1034</sup> They felt being directed to operate in a certain manner, rather than being involved as professional stakeholders:

*The profession should have been involved at the earliest stage of planning. Clearly, planning decisions and implementation was a fait accompli as if we were children who needed to be managed. We have strong constitutional and jurisdictional issues which should have been canvassed thoroughly and no excuse such as getting it quickly into operation should again be used.*

*There is a place for innovation and improvement in Family Court processes. "Experimentation" is a strong word, but I do consider the PHP to be experimentation because of the lack of consultation, inadequate conceptual framework, lack of monitoring and evaluation, and differences from the Australian system (which requires "buy in" from the parties, as opposed to the NZ system which is imposed on the parties).*

The conclusion must be that the design of the pilot was lacking in respect of structured information gathering, consultation with stakeholders and appropriate consideration of the effects of the process. The PHP pilot fails to comply with this criterion.

#### THE KEY PROPERTIES OF PILOT PROJECTS

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##### *Independence*

The agency that proposed, devised and introduced the PHP pilot, the Ministry of Justice,<sup>1035</sup> effectively conducted the experiment, while it also designed and undertook the evaluation, provided intermediary results, and produced and published the final evaluation results. One of the committees responsible for coordination of the evaluation was chaired by a judge who is a very strong advocate of the PHP process, and who is apparently the author of the lists of objectives that appeared in the course of the pilot.<sup>1036</sup> The Principal Family Court Judge introduced the programme and is arguably its strongest vocal supporter and so far the only distributor of interim results. There is, in other words, no independence between those proposing, promoting, executing, and evaluating the pilot. The objectives and criteria for evaluation were not disclosed at the start of the trial and it is therefore impossible to have an independent investigation into whether any of its goals were actually met.<sup>1037</sup> The only not directly Ministry related participant in the committees that inform and oversee the evaluation is a practitioner who advocated for the innovation before the pilot was designed.<sup>1038</sup> The PHP pilot in my view lacked independence.

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<sup>1033</sup> Those with PHP experience agreed more with the statement (mean 3.18 against 2.96). Analysing the frequencies of the different responses across those with and without PHP experience showed the difference was significant: Pearson Chi-Square = 17.617, DF = 4, P-Value = 0.001.

<sup>1034</sup> This was further addressed in specific questions that were added to the second survey. See Table 12 and Figure 20 and associated text, below.

<sup>1035</sup> In collaboration with a limited number of selected judges.

<sup>1036</sup> See chapter 16 for an analysis and discussion of these objectives.

<sup>1037</sup> It may be that this approach to performance evaluation is structural within the Ministry of Justice, a department that produces an annual report that is replete with extremely ambiguous objectives that are almost invariably classified as "100% achieved". See for instance Ministry of Justice supra n 532 and Ministry of Justice supra n532.

<sup>1038</sup> Anthony Mahon, who was also instrumental in organizing the conference that brought CCP judges to New Zealand to advocate for the innovation, and who produced a short report of recommendations as part of the work for one of the two evaluation committees. He is a member of both evaluative committees.

### *External scrutiny / interim findings*

The pilot was introduced using superlatives about the power and benefits of the process,<sup>1039</sup> which created high expectations. Positive interim findings have been provided without provisos, and without corroborating and verifiable data,<sup>1040</sup> thereby practically committing those responsible to a positive evaluation.<sup>1041</sup> In Australia, the evaluation of the pilot by external and academic researchers was attributed to a desired research based approach to policy development.<sup>1042</sup> Arguably, this laudable concept was largely disposed of for political opportunity, but the matter had at least been given consideration. In the case of the PHP pilot, there is no mention of external scrutiny of the pilot design, its methodology, or the approach to its evaluation. In fact, the evaluation methodology was not disclosed, and will only become subject to scrutiny when the evaluation report is published. The PHP pilot has not complied with this criterion.

### *Budget and time tables*

No information was provided about a budget for the PHP pilot; one assumes the costs are to be absorbed within the ordinary operating budget.<sup>1043</sup> Although that approach may be fiscally prudent, it casts doubt on the sincerity of the experimental character of the pilot. Without a specific budget, it is also unclear how training of those responsible and involved in implementing the experimental innovation was provided for, and how resources were allocated to the pilot as opposed to ordinary cases. There is a real risk that resource allocation to cases that have been assigned to the treatment group disadvantage cases in the control group:<sup>1044</sup>

*Unless more resources are provided the overall resolution rate will be divided - cases on PHP will be decided faster but other cases are taking much longer - because hearing time has been taken by PHP cases.*

Without a detailed budget and associated reporting, it is impossible to evaluate economic characteristics of the PHP, while cost savings to the parties and the state were objectives.<sup>1045</sup> The absence of a budget and related financial evaluative data means that the PHP pilot fails this criterion.

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<sup>1039</sup> The briefing paper states that “the process will reduce delay and costs” and “will achieve more successful and enduring outcomes”, and that it “will provide better and faster access to justice”, and that it is “a more productive process”: Boshier and Udy supra n 234. The brochure for the parents states: “It’s a much better environment for deciding what’s in the children’s best interest”, and that it is a “more constructive process”: Ministry of Justice supra n860.

<sup>1040</sup> In the speeches and papers by the Principal Judge, the only reference is “data provided by the Ministry of Justice”, without such data ever being published otherwise.

<sup>1041</sup> Halfway through the pilot, the Principal Family Court Judge proclaimed that the results “were stunning”, and “dramatically different” from the traditional process, while it was said to be “satisfactorily achieving” the objective of reductions in time. See Boshier supra n1014. In a report to the United Nations Judge Boshier wrote: “The pilot has been running now for about seven months and already the Judges are reporting that many cases are being resolved at the preliminary hearing and that most, including the final hearings, are being concluded within the PHP time frames.” See Boshier PF “Memorandum of Principal Family Court Judge Peter Boshier” Memorandum to the United Nations Human Rights Committee in Response to Communication No 1368/2005, Wellington, 18 May 2007, paragraph 34, a memorandum that was also placed on the Family Court website, and thereby published to the public at large.

<sup>1042</sup> Or, as Hunter formulated: “The fact that an evaluation process was built into the CCP from the outset was exemplary, and consistent with the court’s ongoing concern for policy and procedural development based on research evidence.” Hunter supra n602, 7.

<sup>1043</sup> This is not publicly available. [The official evaluation indicates (at 1.1) that a specific budget was allocated, which is not disclosed.]

<sup>1044</sup> This would amount to a severe methodological flaw that could be detrimental to the evaluation results, depending on the construction of the control group.

<sup>1045</sup> [Reduction of costs to the state is not one of the objectives mentioned in the official evaluation (1.2), while reducing costs to the parties is mentioned as such, but is not evaluated.]



### *Experimental design*

The PHP pilot involved an experimental design. Cases were subjected to an innovative treatment, presumably in order to compare the results with the traditional process. It is impossible to apply the different treatments to the same cases, and hence a control group is needed.<sup>1046</sup> There are different ways of organizing the required sampling, and these have consequences for the pilot process and for processing the results. Details were not disclosed, and it is unclear whether characteristics of the participants were recorded in order to accommodate an analysis whether participant<sup>1047</sup> variables (differences between the samples) or the assignment process (i.e. pre-selection) may have played a role in result variability. It has not been clarified whether the pilot tests the result of the intervention on individuals, at the level of cases, at the level of individual courts, at the systemic level of the type of proceeding, or in respect of any combination of the above. Not making this clear at the start of the pilot throws doubt on the outcome, as it will remain unclear whether the criteria have been chosen in hindsight to fit the results. Not having this made explicit also raises questions about the selection process for cases entering into the PHP.

Using courts in varied locations, and processing all cases in the two PHP categories in those courts, provides some randomization of the sample, if the remainder of the courts (or some sample thereof) serve as control group.<sup>1048</sup> Unfortunately, there is no information on what basis the pilot courts were selected and whether any control group data was collected on the basis of criteria that can exclude variability in that respect.<sup>1049</sup> There were no estimates for the size of the sample that was to be subjected to the experimental treatment and the size and selection of any control group. It is unclear whether a control group was selected on the basis of demographic or other characteristics of the parties or their disputes, or whether such characteristics were recorded for the experimental and the control group. There is no information about the way in which information about the process was collected, and what the character of that information was. There is no public access to the evaluation methodology or to any results or intermediate data. There is no information on the (randomization) criteria that were used to assign cases to the treatment and control group. In stark contrast to the randomization requirements for proper experiments, the PHP process involves discretion whether cases will be included. The main criterion to exercise that discretion appears to have been whether the matter was suitable for the PHP process.<sup>1050</sup> This discretion to enter cases was potentially exercised by the same person who heard the

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<sup>1046</sup> But it appears from my file study that many PHP cases involve parties with prior parenting applications, and some information could be extracted on that basis.

<sup>1047</sup> Participant variables must here be read as case variables, including variables relating to the parties and the dispute.

<sup>1048</sup> Assuming parties would not choose a specific court to be placed in, or avoid, the PHP process. There is an additional problem, in that the survey results and anecdotal evidence indicated that other courts were applying the PHP process or similar interventions. This would require that the control group should be subjected to some scrutiny. Also, it appeared that the pilot courts did not apply the PHP to all potential cases by default, but applied some discretion as to which cases were subjected to the PHP process. [The official evaluation shows a highly selective sampling process where only 7% of the possible cases was assigned to the PHP intervention, see *supra* n1051.]

<sup>1049</sup> Alternatively, specific cases could have been assigned to a control group, as was for instance the case in the Australian CCP pilot, see Hunter *supra* n602. [The official evaluation disclosed that there was an intention to create a control group ex-post, but the evaluators were unable to actually do so (2.3).]

<sup>1050</sup> The PHP brochure for lawyers explains that a case can be “identified as a candidate for the process” and that a “direction to enter the case into the programme” can be made by the judge.

matter and made the directions on how to proceed. This strongly reduces the validity of any comparisons between the outcome of PHP cases and those subjected to the traditional process. At best the evaluation would show whether the entry process was able to select the appropriate cases.<sup>1051</sup> To this must be added that the judges who were selected to undertake PHP hearings were motivated to do so, and were vocal supporters for the benefits of the process.<sup>1052</sup> It may therefore be doubted whether the results obtained for the pilot are in any way representative for the reality following a nationwide introduction. This could also apply to other court staff, social workers, report writers etc. There is no information whether the judges who were involved in the pilot received any instruction in respect of the importance of their role in assigning cases to the treatment sample and the effects that this had on the validity of the pilot.<sup>1053</sup> To this must be added that participants in the PHP experiment (the parties) may have been aware of taking part in an innovative trial and had been subjected to compulsory and strongly worded promotion material that stated as fact that this new process was much better than its precursor. This may have influenced their behaviour.<sup>1054</sup> Furthermore, the experiment involves many factors (independent variables) and a large number of effects (dependent variables), i.e. it involves a complex experiment, which increases the importance of a robust design in order to avoid losing statistical relevance in the measured results.<sup>1055</sup> The combination of the complex experimental design, the judges' role in assigning cases to the experimental treatment, them also executing that treatment while at the same time being strong advocates for the process, *prima facie* destroys both the external and internal validity of the experiment.<sup>1056</sup>

Moreover, there is a problem with the PHP project's hypothesis. The evaluation of a pilot project requires that there exists a way to determine and measure the effects of what is being piloted, and that there is some statement of objectives with which the measured effects can be compared in order to determine whether the piloted intervention has achieved the desired results. Subsequently one is assumedly able to decide whether the trialed process is worthwhile as it is, in need of adjustment, or not fit for its purpose at all. It is generally helpful when the effects that are to be measured can be objectively quantified, so that obtained measurements can be reproduced and verified and the experiment can thus be said to have been undertaken with at least a modicum of scientific relevance. Ideally, as discussed above, an experiment must be undertaken against the background of an otherwise comparable sample of similar observations to which the experimental interventions have not been applied, while there must be some mechanism whereby the effect of other variables that may disturb the experiment are excluded or brought within controllable parameters. A comparison of measured effects between the two groups of

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<sup>1051</sup> [The official evaluation shows that a total of 319 cases were selected out of a potential group of 4,554 cases. This means that the 7% most suitable cases were selected for the pilot, which in turn, particularly in the context of not having a control group, practically invalidates the results of the evaluation.]

<sup>1052</sup> See for instance the presentations to professional seminars by judges: Smith *supra* n663. In the Australian pilot something similar happened, where the judges spent additional time in evenings and weekends to make sure deadlines were met.

<sup>1053</sup> Proper randomization could have been achieved by having a different judge determining whether cases were suitable and then randomly assigning cases to the treatment and control group, with different judges dealing with the matter. Obviously this would have required a very different organisation of the pilot process.

<sup>1054</sup> But see my reservations on that issue as recorded in n991, *supra*.

<sup>1055</sup> Where there are many factors and variables, one could be accused of "fishing" through the results for significant differences in any combination of dependent and independent variables, which could theoretically have been caused simply by random probability.

<sup>1056</sup> [And this was unfortunately confirmed by the results from the official evaluation, which showed a very high level of pre-selection of suitable cases, see *supra* n1051.]

observations then produces a level of (un-)certainty that it was in fact the intervention that caused the differences in results. It is best practice that the objectives, the system of measurement, and the anticipated differences between the sets of observations are described before the experiment commences, preferably in a manner that leaves little room for ambiguity. An experiment thus involves a hypothesis and a method by which this may be validated (or rather invalidated). Where the experiment involves a process that determines relationship parameters in complex inter-personal constellations between disputing individuals, there are a large number of potential criteria by which that process can be evaluated. Nevertheless, those criteria must necessarily be directly related to the objectives of the process that is being tested, and those in turn must be capable of more or less objective determination and measurement, so that observations can be analysed and compared with the hypothesized effect. Logic dictates that it is impossible to develop a valid testable hypothesis<sup>1057</sup> without having defined and described the criteria and the method of evaluation. While it is therefore understandable that neither a hypothesis nor a proper experimental method were provided, this only leaves the conclusion that the PHP pilot does not comply with best practice criteria for experimental design.

### *Execution of the experiment*

The actual execution of the experimental process itself also raises questions. The PHP is a process that involves many different participants in various roles. An example may clarify this. If the process innovation had been confined to stricter case management only, implementation could have been achieved by a rule change, assigning resources, communicating the change to lawyers, and instructing judges and registry staff. The PHP, however, involves a radical change, in which all participants must actively change a substantial part of their mode of operation. Implementing the process therefore requires a significant information exchange and education process, including the participants' commitment to the

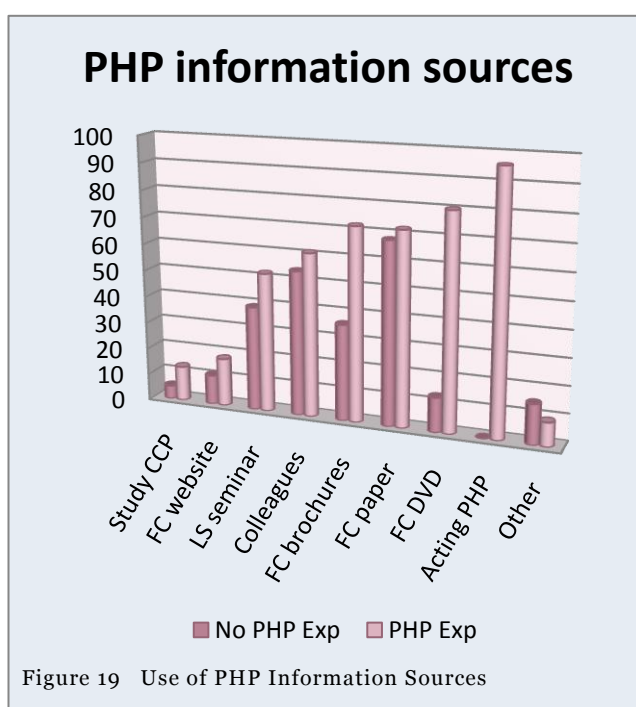


Figure 19 Use of PHP Information Sources

process and the experiment. All introduction materials emphasized the importance of “buy-in” by the legal profession. The pilot therefore tests the quality of the introduction as well as the PHP’s intrinsic values, while it is impossible to distinguish between the two in the results.<sup>1058</sup>

Providing information about the process itself was necessarily the first step to achieve the required “buy in”. A distinction may be made between the effectiveness of the method of delivery of that information

<sup>1057</sup> In addition, where the hypothesis involves a change in a specified direction, there are consequences for the statistical processing of quantitative results.

<sup>1058</sup> This could have been achieved with a different experimental design.

and its perceived quality. Both aspects were addressed in the practitioner surveys, with the overall results reproduced in Figure 20.<sup>1059</sup> The survey respondents were asked to indicate by what means they had gained knowledge of the PHP pilot and process.<sup>1060</sup> A textbox entry allowed respondents to refer to information sources not included in the question. This prompted some respondents to refer to discussion sessions between bar and judges, which were organized in the PHP areas.<sup>1061</sup> Figure 19 presents the relevance of the various sources of information. The lengths of the columns in the graph represent the use of each information source as a percentage of the number of respondents that answered this question. In that way, the relative importance of the various information sources becomes apparent. The graph separates the responses from those with and without actual PHP experience. An interesting observation is the rather limited use of the Family Court web site, which indeed contains little specific PHP information apart from copies of the readily available brochures. Equally interesting is the high reliance on communicating with colleagues. While those with PHP experience have been significantly more active in pursuing information, it seems strange that 17% of them did not mention the briefing paper in the 2007 survey, while this grew to 40% in 2008. When also taking into account the relatively low overall percentage for that item, it seems that vital information did not adequately reach the profession. Twenty per cent of those with actual PHP experience did not indicate having seen the PHP DVD, which is surprising, as this was compulsory for those taking part in the process.

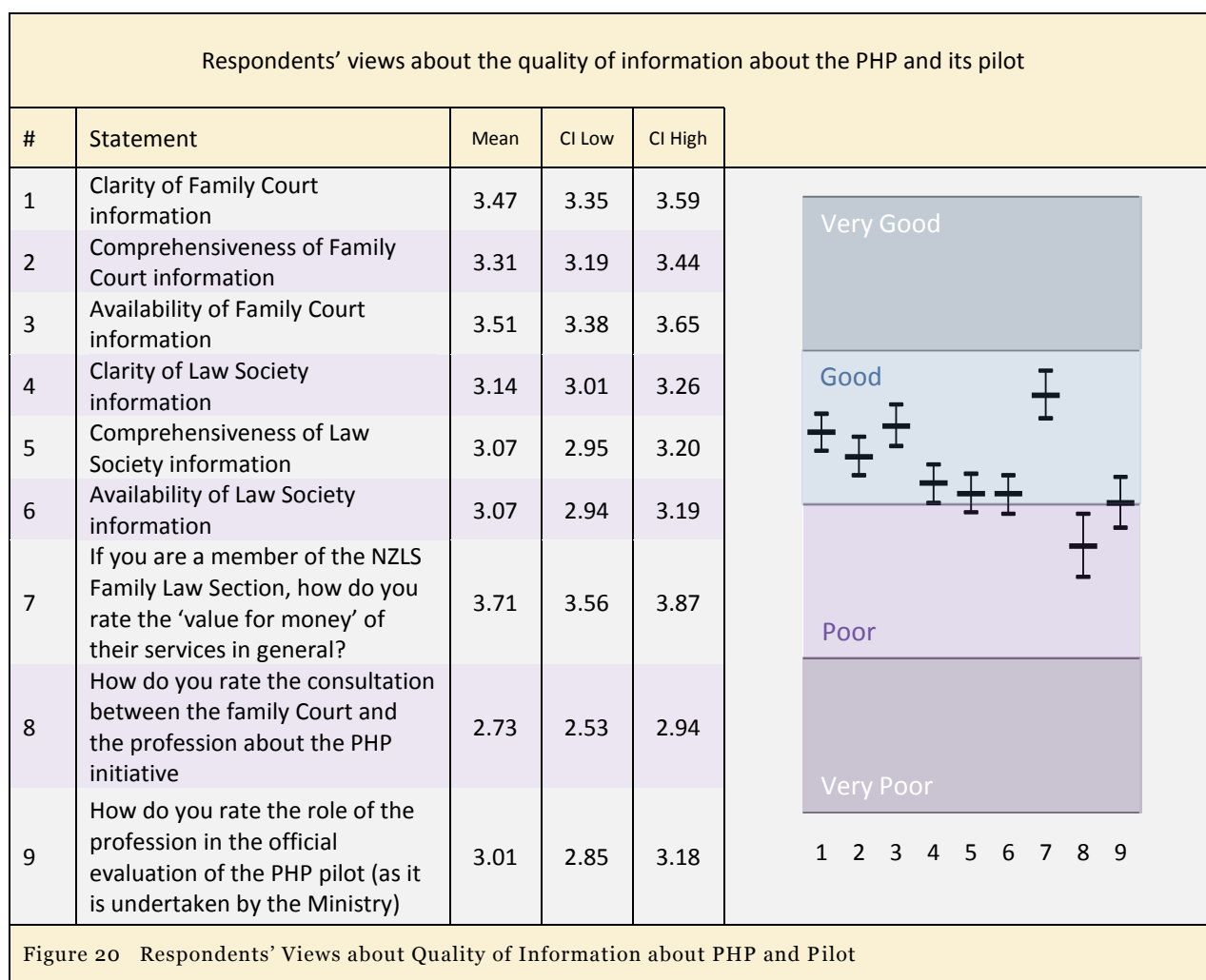
The next issue is how practitioners perceived the quality of the information they obtained. As quality is a multi-faceted concept, it was approached by asking opinions about clarity, comprehensiveness and availability of the information that was obtained from the Family Court itself and from the Law Society (i.e. the Family Law Section, or “FLS”), an institute that played an active role in the communication between the bar and the bench. The second survey contained additional questions about the quality of the services of the FLS, the consultation with practitioners, and the role of the profession in the official evaluation of the PHP pilot. The difference between the perceived quality of the information from the Family Court and the FLS is remarkable, although practitioners clearly indicated to be otherwise content with the services provided by the FLS. Practitioners with PHP experience rate the quality of information from the Family Court significantly higher than those without PHP experience.<sup>1062</sup> No such differences were observed in the opinions about Law Society information. Overall, the survey results show appreciation for the quality of the information supplied by the Family Court, although there certainly remains room for improvement.

<sup>1059</sup> Further detail may be found in Table 12.

<sup>1060</sup> See Table 4 and Table 5 for details.

<sup>1061</sup> Interestingly, one practitioner referred to “osmosis” as a means by which information had been obtained.

<sup>1062</sup> For “clarity of Family Court information” the mean scores from those with and those without PHP experience were 3.63 and 3.29. Analysis of the frequency of scores across those groups shows significant difference: Pearson Chi-Square = 11.104, DF = 4, P-Value = 0.025. For comprehensiveness these values are 3.5 and 3.1, and Pearson Chi-Square = 15.580, DF = 4, P-Value = 0.004. For availability the differences are even greater, 3.78 and 3.19 with Pearson Chi-Square = 26.087, DF = 4, P-Value = 0.000 (the latter meaning that the P-Value was within the rounding of the last digit). As already mentioned, it was obvious that those with PHP experience were much more diligent in obtaining information, while the Family Court of course focused on providing information to practitioners in the PHP areas. That additional effort clearly paid off, particularly in combination with the practitioners’ own efforts.



There was much less enthusiasm for the consultation about the design and evaluation of the PHP:<sup>1063</sup>

*The process was introduced without proper consultation with the profession...*

*The PHP was introduced in haste and without adequate consultation with the legal profession and with the wider community. At the time it was introduced it should have had a very clear arrangement in place to monitor the programme and the outcomes of the programme. There does not appear to be consistency across the country with regard to the types of cases being placed into the programme, which is also a matter of considerable concern.*

*What happened to public consultation or at least participation/consultation of family lawyers prior to the pilot being implemented?*

*The Judges have the ability to manage their own court; I just think that in general changes from the Ministry, Chief Family Court Judge, etc could be the subject of better consultation before being implemented.*

*We had to try something because it wasn't working right - it feels good to have a plan.*

*I do think that there was a dearth of proper consultation but with local goodwill a good process has been developed in our area and improvements made to natural justice concerns etc. So while it was too hasty to start it has turned out ok over the 2 years as we have all got our heads around the pilot and objectives.*

<sup>1063</sup> The lack of consultation is evidenced by the fact that the family court association commented on the PHP process and pilot after it had been formally announced, see Committee of the Family Court Association *Submission to Principal Family Court Judge in Respect of the Parenting Hearings Programme* (2006), while the content of these submissions already raise some of the issues that are now confirmed in the results of my surveys, such as lack of independent evaluation, differences between CCP and PHP, the practical problems with parent education, and the need for liaison with the profession.

*Better consultation would be a good idea. The Chief Family Court Judge is not actually God, and should refrain from making unilateral decisions about how the Court operates. I am aware that a number of Judges were opposed to the scheme. I certainly know that a large number of senior counsels opposed it. I don't recall ever being asked an opinion before being told it was being introduced. Sometimes the old ways are not necessarily in need of reform or change, just better resourcing.*

### *Ethical considerations*

The discretion to enter cases into the PHP contains an ethical dimension,<sup>1064</sup> but there is no information how that was mitigated, or whether it had been considered at all. Respondents opined:

*It is good that things be tried. However, using actual parties in test runs makes guinea pigs of them, which may be unfair for them, especially if the test system then proves to be flawed.*

*Kid's lives are far too important to play around with.*

Although equitable and ethical considerations cannot be entirely resolved, these issues should at least have been addressed explicitly, and not just been discarded by way of a comment that the parties' consent to the process was not necessary, because the process would be guided by natural justice.<sup>1065</sup> The rule making powers for the Family Court have been discussed previously, and in my view do not include the jurisdiction to engage in experiments without consent.<sup>1066</sup> The question of possible adverse effects on parties and children should have been addressed from an ethical perspective, in analogy with academic studies involving human participants. It is in that context interesting to note that the Ministry of Justice has a normative set of ethical standards<sup>1067</sup> that it applies when academics seek to obtain information or undertake research. The Ministry appears not to have applied these standards to its own experiment.

### *Public access to data, planned obsolescence, politics*

No public access to any data in respect of the PHP and its pilot has been provided. The Ministry of Justice has no history of making source data of its research projects available. Given the nature of the commitment to the project by those designing, implementing and promoting it, and given the obviously large initial investments, completely abandoning the PHP process on the basis of a merely inconclusive evaluation would appear unlikely, unless the process is otherwise untenable.

However, in contrast with Australia, where the CCP innovation had effectively been legislated before the pilot was even concluded, the political lobbying by the Principal Judge in New Zealand appears to have been less effective than that of the Australian counterpart. An important difference in that respect will no doubt have been that the CCP was but a part of a much larger range of policy development in the family area, while the New Zealand pilot stands on its own.<sup>1068</sup> Another important aspect may have been that

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<sup>1064</sup> The question whether cases that were only deemed marginally suitable were or were not included in the pilot for the purpose of testing the process, and what the effect of the process on the parties might be in such marginal cases.

<sup>1065</sup> The briefing paper states: "As the process will be guided by the principles of natural justice and procedural fairness, consent from the parties participating in the pilot will not be required."

<sup>1066</sup> Something which is prescribed by s10 of the New Zealand Bill of Rights Act.

<sup>1067</sup> These are not formally published, but provided to researchers applying for information. The author has a copy available as sent to him when applying for permission to undertake the file study. It is noted that such permission formally must be obtained from the judges (i.e. through the Principal Judge), but that this permission is meaningless without also having permission from the Ministry, because of its apparently always superseding administrative influence. [It is noted that the official evaluation referred to the ethics code for the evaluation interviews, but not for the experiment itself, see technical report, Knaggs and Harland supra n9, 12.]

<sup>1068</sup> Even though there was procedural Family Court legislation going through the House at the same time as the PHP pilot was run, the two were never politically merged, as was the case in Australia. In fact, important parts of the new legislation (everything

the Family Court in Australia has a much higher profile and standing (as a superior court) than is the case in New Zealand. Taken together, the PHP pilot did not have the political clout of the CCP, and it lacked the parliamentary commitment the CCP enjoyed. A negative or even lukewarm formal evaluation may well completely remove any political motivation to cast the process in law, which would arguably be necessary for its proper introduction.<sup>1069</sup> This would result in an interesting situation for which the tentative solution seems to be the creation of a separate ‘rules committee’ for the Family Court within the Ministry of Justice.<sup>1070</sup> In conclusion, the PHP pilot did not comply with the public access to data requirement, lacks planned obsolescence and to some extent appears to contain an almost political maneuver to introduce radically new rules without using the appropriate channels.

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#### CONCLUSION ABOUT THE PHP PILOT

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The PHP pilot fails to comply with most of the criteria for such trials. The only possible conclusion is that the PHP pilot was ill-conceived and badly executed. Unfortunately, this also directly affects the validity of the outcomes of its evaluation. The PHP pilot must be seen as an example of how not to undertake a pilot for an important procedural innovation.

## 20 EVALUATION OF THE PHP PROCESS

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The PHP was introduced without stating its objectives in a way that invites or even allows objective assessment and evaluation. As was the case in the Australian CCP pilot,<sup>1071</sup> the overall objectives of the PHP are described in rather abstract and ambiguous terms. Comments by a former Australian judge about the CCP/LAT “rules” apply equally to the PHP:<sup>1072</sup>

*A mixture of principles, assertions, exhortations and day to day directions as to how litigants and others must act. It seems like a document prepared by a committee sitting around a table, each outdoing the other in points to be included.*

It is therefore necessary to extract the objectives for the PHP first, and to place these in a logical framework, before an evaluation can be undertaken.

#### THE NATURE AND SOURCES OF THE PHP OBJECTIVES

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Before considering the objectives of the PHP, I introduce a structure in which these objectives may be organized. This ordering is helpful because objectives for innovations such as the PHP are not conjured out of thin air, but arise in a process from strategic policy formulation to operational process description and rule making. There is a hierarchy of objectives, where abstract ideas (policy objectives) are expressed

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relating to non-court mediation) have been delayed, ostensibly as a result of fiscal concerns, but the fundamental change of government may have played a role as well.

<sup>1069</sup> Given the political scene that will await the evaluation results, also against the background of a poor appreciation of the Family Court by the general public, it is perhaps unsurprising that the evaluation parameters of the pilot are not public, open or accessible, and have not been made available to practitioners, experts operating in the courts, or academics, let alone the public at large.

<sup>1070</sup> See the comments made above in chapter 17.

<sup>1071</sup> Hunter *supra* n602, 31.

<sup>1072</sup> Fogarty *supra* n598, 14.

in the format of desired achievements (outcome objectives), which then give direction to the development of a system of interventions, described by rules (process objectives). This process is of course not as linear as portrayed here, but the end result can be described in this hierarchical structure. Everything undertaken by the state in its many guises is ultimately the result of some form of ‘policy’, a concept that includes ideas ranging from the highly strategic to the mundane, from the expressly and publicly formulated to the highly covert and secret, from the utterly abstract to the incredibly detailed and from the most ideological to the banally ad-hoc, to mention but a few dimensions by which the vague concept ‘policy’ can be measured. Policy objectives are difficult to grasp, as a result of their often multi-faceted character and their complex structure of origin and purpose. This complexity tends to discourage clear definition in terms that are amenable to impartial and concise evaluation. Nevertheless, policy, in its abstract meaning, always seeks to achieve something; it is thus aimed at ‘outcomes’. Outcome objectives are therefore of a lower order, and hence more practical and concrete in their formulation. Where policy involves the question “why”, outcomes are concerned with the question “what.” Consequently, outcome objectives are (at least in theory) more suitable to evaluative determination, as long as they can be described in terms of measurable criteria. When turning to the question “how”, we reach the lowest rank of objectives, the practical description of the process that seeks to achieve the outcomes that in turn fulfill the objectives of the policy. A good, well constructed process requires precise description, including performance targets for its operation and criteria for their determination. It is impossible to accurately construct a process without knowing what the inputs to the process will be and how it must apply its intervention to achieve the desired outputs. Well defined process objectives therefore require sufficient detail.

Another point must be made about objectives generally; they may be distinguished, but they are rarely discrete. There will be direct and indirect interactions between objectives, and this may operate in varied and complex ways.<sup>1073</sup> In addition, it is often difficult to draw a precise line where policy objectives translate into outcome objectives, and where these are refined into process objectives. Unfortunately, policy and its implications are hardly ever described or implemented in a clear and concise structure.<sup>1074</sup> These complexities must be remembered when considering the analysis and evaluation of the PHP objectives.

### *The sources of the PHP objectives*

The PHP introduction material does not contain an explicit summary of its objectives. In order to evaluate whether the PHP can be said to have achieved its objectives, these had to be extracted from the

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<sup>1073</sup> For instance the objective to reduce the problems caused by adversarial process by changing the judge’s role and the objective to increase case management also by changing the judge’s role, operate in support of each other, while in combination they may assist to achieve another objective, that of reduced costs. By contrast, the combined objectives that involve changes in the judge’s role must be balanced with the objective to maintain a system that complies with natural justice and procedural fairness, which may be perceived as operating in the opposite direction.

<sup>1074</sup> For instance the demarcations between the policy objective to extend the welfare principle into adjectival law, the related outcome objective of more child-focused proceedings, and the process objectives that operationalize this policy, can be theoretically distinguished, but are difficult to analyse and discuss using such abstract distinctions.



available information.<sup>1075</sup> As will be recalled, the PHP was formally introduced in a speech by the Principal Family Court Judge on 14 September 2006, and further specified in the 6 September 2006 Briefing Paper. These were followed by the Family Court brochure for parents, the brochure for lawyers and the DVD, which were all published when the pilot started in November 2006.<sup>1076</sup> These communications were also the basis for the information sessions in the pilot areas at that time. In the evaluative communication with the Law Society, two lists of “objects” appeared in October 2008. These objects had been referred to earlier, in a judicial speech in November 2007.<sup>1077</sup> A judicial article in 2009<sup>1078</sup> provided a further list.

My process of extraction of objectives from these documents can be best explained by way of some examples. The speech that introduced the PHP contains the statement:

*The aim of this new process will be to introduce a less adversarial system for resolving conflict; a system that is properly managed by the Court rather than being driven by the parties and that keeps as its overriding objectives the need to resolve difficult cases speedily and fairly and putting the needs of the children first and foremost.*

As may be seen, this includes reference to a policy objective of putting the needs of the children first, the outcome objectives speed and fairness, and the process objectives “less adversarial process” and “managed by the court and not by the parties”. Albeit promotionally attractive for an introductory statement, such objectives are not sufficiently detailed for the purpose of evaluation. By contrast, the 14 September 2006 speech also contains a small number of process parameters that contain measurable objectives, such as “*an urgent list call within 14 days of identification*” and “*the parties will watch a DVD before the preliminary hearing*”.

Another example is the PHP briefing paper, which contains the policy objectives that the process is “*a more child focused approach*”, that it will “*provide better and faster access to justice*” and that it will “*increase public confidence in the Court system*”. Outcome objectives include: “*reducing the damage that protracted litigation does to the co-parenting and parent-child relationships*”, that it will “*produce better and more appropriate outcomes for the children, ones that ‘stick’*”, and that “*cases are resolved more quickly*”. Process objectives include “*parent education is vital*”, “*a single judge will deal with the proceedings from beginning to end*”, and “*the judge, not the parties will determine the issues that are to be addressed*”.

The explicit objectives listed in the 2008 evaluation consultation documents can also be categorized along these lines. Although appearing when the pilot was virtually completed, these lists also include a number of fresh objectives, such as: “*increases the level of participation in the proceedings by children*”

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<sup>1075</sup> [The official evaluation refers to a list of objectives established in May 2007, which were distributed by way of a (non-public) “judicial guideline”: Knaggs and Harland supra n9, 21. The evaluation states that these objectives have “changed a little” since the PHP’s inception.]

<sup>1076</sup> The Family Court also provided media releases, see Barton C “New Rules for Family Court Less Adversarial” *The New Zealand Herald* 15 September 2006, while the Principal Family Court Judge gave interviews about the programme, providing the reporter with Australian research material, see Barton C “A Truce between Parents at War” *The New Zealand Herald* 16 September 2006.

<sup>1077</sup> Smith supra n663, in which a list was produced that closely aligns with the second list from the consultation documents. [The list of objectives that was used for the official evaluation is almost identical to the first list in the consultation documents; the latter only adds the objective to “focus parties on future parenting proposals”. The various lists of objectives are available in the online appendices.]

<sup>1078</sup> This article also includes the remark that the author (one of the PHP judges who was the chair of one of the evaluation committees, and the author of the 2008 lists), was not aware of any criteria by which the PHP was to be evaluated, see Smith supra n663.

and “to retain and re-emphasize educational programmes for parents (for example, Parenting thorough Separation)”. Given their late appearance, it is difficult to see how these objectives can have been part of the PHP process or its pilot.<sup>1079</sup>

Using the above approach, I analysed the text of the introductory documents and produced a “compendium” of summary tables in which I formulated each identifiable objective, indicated its nature, identified the document(s) in which it was expressed, and provided some summary comment.<sup>1080</sup> In doing this, I identified a further hierarchical distinction. For instance: the overall policy expressed in the paramount welfare principle is of a higher order than other policy objectives, and these must therefore be implemented subject to the overriding welfare objective. This distinction comes clearly to the foreground when identifying process objectives. These are characterized by a limited number of high order objectives that “branch out” into increasingly detailed sub-objectives, until finally reaching the level of individual rules and their operating criteria. It may be seen that a “process parameter” and its associated rules as described above in chapter 14 are in fact low level objectives; they simply set a procedural target that must be met in order to comply with the rule system. I acknowledged this branched structure of process objectives in the lay-out of my tables and by using a numbering system that indicates the hierarchy of objectives. It will be appreciated that I was somewhat handicapped in this exercise not only by the lack of clearly formulated policy and output objectives, but also by the fact that the PHP rules were not provided in the traditional, structured format of court rules.

## POLICY OBJECTIVES

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In addition to the policy objectives that can be extracted more or less directly from the documents, the paramount welfare principle and the collaborative co-parenting model are clearly also policy objectives, as is an objective that prefers to address the perceived problems of the current process by way of systemic change.<sup>1081</sup> While not expressly formulated in the PHP materials, these additional policy objectives can be directly implied. Furthermore, I logically deduct policy objectives at higher levels of the hierarchy, which are not explicit because they operate at a level of abstraction that escapes explicit formulation, but which must be present to explain policy and outcome objectives. These may be seen as political and ideological objectives. The first remain amenable to the political process and subject to practical and economical considerations.<sup>1082</sup> The second category includes long term, immutable, objectives that may

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<sup>1079</sup> This comment also applies to the new and amended objects in the 2009 article (Smith *supra* n9), which of course appeared after the pilot had been concluded. While it can be said that the courts’ application of law must always be developing in the context of the underlying legislative intention, it is also detrimental to any form of evaluation if the goalposts for the experiment are shifting while it is underway. The character of the amendments and developments proposed by Judge Smith demonstrates another aspect of “judicial leadership” or perhaps even “activism” in this area, where the experimental character of a procedural innovation appears to be used to change the characteristics or emphasis of the outcomes that are intended in the policies that underlie the legislation. As an example: there can be no doubt of the central position of the paramount welfare principle or the emphasis on consensual dispute resolution in the legislation, but it is hard to see how that justifies using the judicial process to “*retain and emphasize educational programmes*”. Quite apart from the debate about judicial activism in general, such activism should certainly have no place with judges that operate in a division of an inferior court that arguably has no inherent jurisdiction.

<sup>1080</sup> Word length restrictions prevented inclusion of these tables in the printed thesis, but they are available in the online appendices, under the tab “compendium” and as a PDF document. In the footnotes to this chapter I will occasionally refer to the “compendium of objectives”, by way of example.

<sup>1081</sup> As opposed to addressing resource issues or improving the management and administrative systems of the court, which represent two approaches that were suggested previously by the Law Commission, but have not yet received any attention.

<sup>1082</sup> An objective to reduce the costs of the entire court system or an objective to reduce the costs of legal aid would fit within this category.

lie dormant in periods where the political power constellations are unfavourable to them.<sup>1083</sup> Altogether, I found a total of 13 distinguishable policy objectives, which can be condensed into the following six policy objectives that I suggest to be driving the PHP innovation:

- Extend the welfare principle to adjectival law in order to pursue normative policy objectives
- Resolve disadvantages of adversarial litigation by systemic change
- Resolve resourcing and management difficulties by systemic change
- Prefer social science based interventions over legal interventions
- Improve access to justice
- Reduce the costs of the Family Court system

*Extend the welfare principle to adjectival law in order to pursue normative policy objectives*

In chapter 6 I discussed the difficulties of using law and legal process to achieve changes in social behaviour, and I raised the question whether the PHP is an example of a trend away from family autonomy and towards increased state paternalism and normative control of family life, in this case in the “post separation re-structured family”. I discussed this aspect in the wider constitutional context in chapter 16, and will attempt to answer my initial question at this juncture; starting by considering the mechanism by which such a normative intervention can be enhanced.<sup>1084</sup>

The dominant effect of the welfare principle on the substance of judicial decisions is clear.<sup>1085</sup> However, it remains unclear whether the welfare principle was intended to also have direct procedural effect, other than that: “*decisions affecting the child should be made and implemented within a time frame that is appropriate to the child’s sense of time*”,<sup>1086</sup> and that proceedings must be dealt with “*in harmony with the purpose and spirit of the family law Acts under which the proceedings arise*”.<sup>1087</sup> While this supports a procedural policy that seeks speedy determination and recognition of the potentially corrosive character of adversarial proceedings it must be doubted whether it allows for the carte blanche approach of the PHP process.<sup>1088</sup> The PHP casually removes procedural safeguards that are essential to our legal system and that have withstood earlier innovations. This may be seen as evidence of a policy desire to now also use the judicial process to enforce normative standards of post-separation parenting behaviour. The PHP process with its semi-informal style of “discussion” between the judge and the parties, and the flexibility for the judge to move between mediative and adjudicative interventions with the parties remaining under formal oath and being audio taped for the record, has hallmarks of an Orwellian approach to persuasion. That is all the more the case where the judge also determines what issues are deemed relevant, what evidence may and may not be used, that the real issues between the parties are

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<sup>1083</sup> An objective to use court process to achieve behaviour modification in order to fundamentally alter the relationship between groups in society or between the state and citizens would be an example of the second category.

<sup>1084</sup> For a detailed text that discusses the use of legal process to achieve policy objectives as compared between Common Law and Civil Law legal systems, see Damaska supra n148.

<sup>1085</sup> It is legislated, Care of Children Act 2004, ss4 and 5.

<sup>1086</sup> Care of Children Act s4.

<sup>1087</sup> Family Court Rules 2002, r3.

<sup>1088</sup> The argument here involves fundamental procedural principles, not technicalities, which must obviously not be put in the way of the welfare principle: “*Technical and procedural arguments, however crafted, cannot assist an appellant in a case such as this where the welfare of the children required that the Judge act in the way that she did in determining substantively the allegations raised by the appellant’s actions in seeking the interim ex parte orders, and the technical procedural semantic arguments advanced by Mrs Harley. Immediate decisions were necessary to promote the best interests and welfare of children.*” *J v W* High Court Wellington, 28 July 2009, Gendall J, CIV-2009-485-001239, at [38].

different from those actually filed in the court by them, and that non-legal issues must be addressed that are considered to stand in the way of a resolution.<sup>1089</sup> The judicial role is, in other words, through “*redirect[ing] their attitudes and behaviour as co-parents along more constructive, child-focused lines*”,<sup>1090</sup> used for direct behaviour modification of the parents. The paramountcy of the welfare principle becomes not only the justification for the judicial intervention itself, but also becomes the guiding principle whereby one or both parents are re-educated about appropriate behavior in post-separation parenting and conflict resolution.

While it is not an ordinary function of a judicial system to directly modify behaviour, it is capable of being used in that way.<sup>1091</sup> While the Family Court organisation has had therapeutic processes in its arsenal since its inception,<sup>1092</sup> the PHP is a first obvious attempt to bring these directly into the formal court hearing environment.<sup>1093</sup> The PHP process can therefore be seen as a vehicle for delivery of normative policy that is aimed at three distinct areas: detailed authority over children, pursuing the collaborative model of post-separation parenting, and enforcing a model of appropriate post-separation dispute resolution.

While there is an arguable case for the continued relevance of the *parens patriae* concept, i.e. the state has a responsibility to protect society’s weakest in situations where their caregivers are lacking, it is questionable whether that responsibility extends to the notion that it is appropriately within the role of the state to prescribe detailed normative behavior in terms of highly complicated parenting arrangements, particularly where the basis of such arrangements is driven by political considerations. As already discussed in chapter 6, one can argue that the state is using a situation that has been excessively complicated through prior legislative intervention, to use its judicial role to subsume parental authority. At that point it was also noted that state control over children and through children over their parents is a common aspect of all socialist ideologies.<sup>1094</sup> The associated views and practices seem persistent in the design of the PHP innovation. The welfare principle is effectively used to deny the parents their right of access to justice on the issues that they consider relevant and important in the context of their parenting, while decision making over the children is assigned to the very agency that refuses to even hear their real grievances. The fact that this apparent injustice is accepted by the government must be proof of a significant policy objective to increase state authority over children.<sup>1095</sup>

The collaborative model of post-separation parenting is accepted as the desired norm in all but the most exceptional circumstances. That norm is derived from at best questionable psychological and child-

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<sup>1089</sup> See briefing paper: Boshier and Udy supra n234.

<sup>1090</sup> Ibid, 3.

<sup>1091</sup> And it has been argued that inquisitorial paradigms are substantially more suitable to achieve that than adversarial paradigms, see generally Damaska supra n148.

<sup>1092</sup> And notwithstanding suggestions that these should be organisationally separated: Boshier et al supra n17.

<sup>1093</sup> From which they were carefully separated through the court rules and principles of natural justice.

<sup>1094</sup> Or more precisely, “collectivist” ideologies.

<sup>1095</sup> And which is of course evident in many other ways as well, such as restrictions on home schooling, directions for school curricula, regulations about school tuck-shops, the “anti smacking” legislation and subsequent refusal to amend the law following an almost 90% referendum vote to that effect.

development research<sup>1096</sup> suggesting it is always in the best interest of children to develop and maintain attachments to both parents. From this concept is constructed an ideal that requires from parents a capacity to change a once intimate and emotional relationship through a period that may contain serious conflict into a cooperative arrangement that best suits the assumed interests of the children. It must be a token of parental commitment that the vast majority of separated parents in some way manage to achieve this feat. It is less surprising that some are simply not capable of it. The question must be whether it is appropriate that the institution, to which these conflicting parents turn for a determination, should continue to pursue a parenting model for which these parents have proven to be utterly unsuitable. I have not found research containing empirical evidence that the collaborative model is preferable in all circumstances, quite the contrary, as already discussed. As one survey respondent put it:

*The principles underpinning separated parenting orders are also a moving target - do we know whether a two home model (shared day to day care) is really to be preferred - yet this seems to be increasingly the benchmark to move towards within PHP. What checks are there to make sure we haven't got this wrong? It used to be "conflict" - too much and we accepted sharing day to day wouldn't be the best way of doing things - but this no longer seems to be the case either. Shared day to day care within PHP is common even where there is a lot of conflict.*

In how far the judicial process should be used to promote and enforce a collaborative model can be reduced to the practical question for which number of cases the state would be prepared to accept that it should simply make the (win-lose) decision which the parties request it to make, rather than to continue attempts to force them into a prototype ideal that they don't aspire to, for which they are unsuitable, and that is not supported by convincing empirical research. The PHP experiment suggests that this proportion is substantially less than the five per cent of cases where the parties are currently unable to come to or maintain arrangements. It appears therefore that the state deems it appropriate and desirable to further reduce that percentage by using its ultimately coercive process, executed by those with the ultimate state sanctioned coercive power, on pain of contempt and punitive sanctions.<sup>1097</sup> Alternatively, and cynically, one might suggest that the state simply doesn't want to expend the resources it currently spends on the difficult cases, and simply seeks a more efficient way (like the PHP) to process them into the desired model.

The same reasoning can be applied to the apparent importance of changing post separation conflict resolution behaviour. It is acknowledged that complicated and court ordered parenting arrangements are a source of further problems, yet there is seemingly no acceptance that high conflicting parties forced into collaborative arrangements are highly likely to return to court.<sup>1098</sup> Instead it is suggested that the PHP process includes such potent behaviour modification that these high conflict parties will now learn and adopt a model of dispute resolution that will enable them to autonomously sort out their differences

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<sup>1096</sup> Kelly and Lamb supra n214. The main problem with this research is that it is not in fact research, but a collection of assumptions and conclusions from other papers that not always support what is stated by the authors, or which refer to further non-empirical research by the authors. For a detailed critique see Kates supra n217, and the associated text.

<sup>1097</sup> For the application of the contempt jurisdiction, see supra n840 and associated text. Offences existed in childcare legislation to enforce compliance with access orders (s20 Guardianship Act 1968), but were extended to parenting orders generally in s78 Care of Children Act 2004. Preventing compliance is a criminal offence carrying up to three months imprisonment or a fine of maximum \$2,500.

<sup>1098</sup> While the statistics show that this is the case for some 40% of the cases and this has consistently been the experience.

in future.<sup>1099</sup> Again, the underlying policy must be one with a therapeutic objective; the role of the court is not seen as determining a conflict, but as achieving change in the people who are subjected to its jurisdiction. This policy objective must be so pervasive that it can set aside the traditional role of the court as decision maker to replace it with yet another variant of the therapeutic interventions that are already available.

In summary, the answer to my question must be that the PHP innovation is a symptom of, and an instrument in, a trend of policies that involve increased state intervention and normative control of family life. In that context the PHP is an attempt to force parents to comply with government policy objectives, one that does not hesitate to adjust the parties' behaviour to comply with those objectives. However, and in contrast to my own somewhat depressing conclusion, the survey respondents did clearly not agree with the proposition that the PHP is an attempt to force parents to comply with government policy objectives.<sup>1100</sup>

#### *Resolve disadvantages of adversarial litigation by systemic change*

Underlying the various objectives represented in this policy is the assumption that adversarial litigation is the root cause of conflict escalation, inherently leading to delays and inefficiencies. Given that adversarial litigation is the core litigation process of the Common Law legal system, it seems that the conclusion has been reached that the problem cannot be resolved without systemic change. This is further supported by the concurrent conclusion that adversarial litigation is also detrimental to the desired collaborative model. The required systemic change of the court process must therefore be in the direction of additional case management, inquisitorial judicial intervention and integration of mediation style methodologies in the court process, in order to achieve speedy and efficient decision making, parent education and behavior modification that support the collaborative model and the focus on the welfare principle. While there is an attractive logic in this argument, it is perhaps too simple in its assumptions and it takes some shortcuts in coming to conclusions. This must now be considered. As the responses to the first three items in Figure 21 indicate, there is substantial support for the assumptions about the disadvantages of the adversarial process. Before discussing the quantitative responses, it is illustrative to also reproduce a selection of the text comments on this issue:

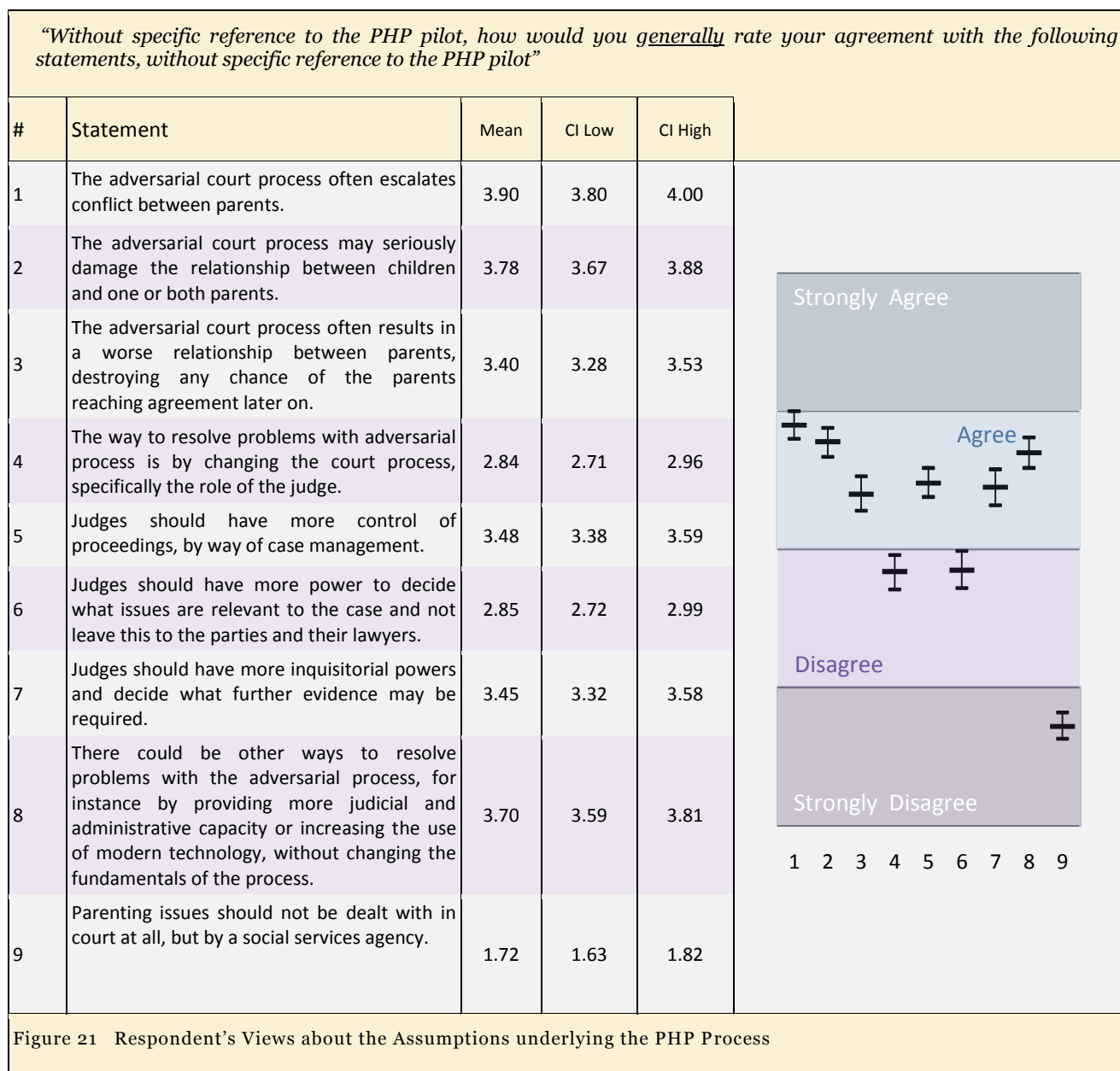
*I have been through the adversarial process personally and seen the damage that it can do. I am strongly in favour of any idea that removes the Judges and Lawyers from this process in all but the most bitter and entrenched cases. Judges and lawyers are still needed but should be as a last resort once counselling and specialist intervention has failed to get an agreement between the parents.*

*The imperfect adversarial process is BUT one means of resolving disputes; there are many, many others which have a more constructive flavour BUT there will probably always be a need for a last stop such as the Family Court and in some instances a traditional hearing may be just what is needed. The danger is in rejecting outright an -albeit less than perfect- system and replacing it with an arbitrary, untested and unproven process. Judges are NOT always right and their power and authority must be constrained by the painstakingly developed principles of natural justice*

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<sup>1099</sup> [As in the Australian evaluation, the official PHP evaluation concludes that the number of cases returning from the PHP process is higher than from the traditional process. Knaggs and Harland supra n9, 57-58.]

<sup>1100</sup> The mean score being 2.62, with a C.I. between 2.51 and 2.73, see Figure 22 and Table 16. Out of the 236 respondents that answered the direct question on this topic, only 26 agreed and 4 agreed strongly. I must conclude that my views represent an extreme end of the spectrum. There were no significant differences in respect of this response between those with and without PHP experience or different seniority in family law practice.



*The main issue is actually delays. The process in the Family Court is good. The speed of the process is bad. Matters escalate because problems are not resolved swiftly. The parent who has the child often has greater control and this can create unfairness - not because of the law, but just because of the dynamics. Parents cannot quickly change situations they view as unfair or prejudicial. They feel bitter about this and this leads to conflict between the parents.*

*It is dangerous to be critical of an adversarial system, which is not properly funded and relies on the good will and super human efforts of the professionals operating within the system from judges, court staff, social workers and lawyers. The Legal aid system for family lawyers is a joke when compared to the funding available for representation at the Waitangi Tribunal. If only the Family Court was as well funded at the Employment Court and the Employment Relations Authority, when a member of the Authority can convene a 1 day mediation conference almost straight away.*

*The adversarial process begins because parents are already in serious disagreement, so the process cannot be entirely blamed - sometimes but certainly not always a hearing can be quite cathartic for parents and their relationship may improve thereafter*

*I have often considered that the lawyer who has to win at any cost, is the one who does more harm to the parties and their children, rather than the process per se*

*There are cases where the “blood-letting” experience of the court allows the parents to simply get it out of their system*

*There are elements of both the inquisitorial and adversarial systems that are useful in the context of resolution of parenting disputes - as are elements of social science, child development etc. It is not as simple as one system being better for these sorts of disputes than the other*

*I agree that court can be destructive but an early meeting with a judge, venting spleen about marital misbehavior and then getting on with it, to my mind produces more timely results for kids and actually is better than months and months of manipulated mediation.....these parties failed in living together: why do we think they are the perfect people to decide the best for their kids!*

*It is an easy assumption to make, that the adversarial process makes things worse, when in fact the quality of advocates and the wisdom of judge are significant factors in making the outcome positive*

*It needs to be remembered that the parenting issues resolved by adversarial hearings are for the most part the intractable ones that are probably not amenable to more mediatory styles of resolution. The alternative processes must be available and offered but if they are not successful the sooner an "adversarial" decision is made the less the trauma to all involved*

*I don't agree with your wording of "the adversarial court process" and while I have answered the question I do not agree that the process escalates conflict on all matters, only a small proportion. It also depends on whether you are including availability of court time and other agencies as part of your definition of "process". DV matters are adversarial, no doubt about that. In terms of parenting matters, counsel and the court have a duty to promote conciliatory relationships. It can get adversarial - often by the unavailability of court time to deal with matters in a more expedient matter, or having to wait on other agencies to provide reports to assist the court, again slowing the process down. When the process is slowed down in that fashion, this is often when the parental relationship deteriorates.*

Despite the many qualifications in the text responses, the statement that the adversarial process often escalates conflict between the parents received strong support in quantitative terms.<sup>1101</sup> There was no significant difference between those with and without PHP experience,<sup>1102</sup> between the two surveys,<sup>1103</sup> or between practitioners with a different seniority in family law.<sup>1104</sup> Similar support was found for the statement that adversarial process may seriously damage relationships,<sup>1105</sup> also without significant differences between these categories.<sup>1106</sup> Respondents were not as strongly convinced of the long term effects of the adversarial process on the parties' capabilities to reach agreement later on. It is interesting that respondents with PHP experience had a significantly less damaging appreciation of that effect.<sup>1107</sup> This difference is even stronger when the responses are compared on the basis of the respondents' experience in family law. Those with experience of more than 8 years had a significantly lower assessment of the disadvantages of adversarial litigation in that respect.<sup>1108</sup> One would conclude that experienced practitioners have observed some of the more adversarial inclined parties able to contain their conflicts after sufficient time had passed, and that their longer experience may have simply exposed them to more examples of this than their less experienced colleagues.

Although the respondents' views about the disadvantages of adversarial process align to some extent with

<sup>1101</sup> Mean 3.90, C.I. from 3.80 to 4.00.

<sup>1102</sup> Means of 3.94 (PHP exp) and 3.87 (no PHP exp), analysing the frequencies of the different responses across those with and without PHP experience showed the difference was not significant: Pearson Chi-Square = 6.921, DF = 3, P-Value = 0.074. The DF value is the result of having no respondents strongly disagreeing with the statement, and removing those cells from the equation.

<sup>1103</sup> Means of 3.98 (2007) and 3.81 (2008); Pearson Chi-Square = 4.441, DF = 3, P-Value = 0.218, see comments on the degrees of freedom for the calculation in the previous note.

<sup>1104</sup> Means of 4.03 for those with less than 8 years experience and 3.86 for those with more than 8 years experience, Pearson Chi-Square = 3.197, DF = 3, P-Value = 0.362.

<sup>1105</sup> Mean 3.78, C.I. from 3.67 to 3.88.

<sup>1106</sup> Means of 3.69 and 3.85 for those with and without PHP experience, Chi-Sq = 3.600, DF = 3, P-Value = 0.308. There were also no significant differences based on practitioners' family law experience (means 3.85 (<8yr) and 3.74 (>8yr), Chi-Sq = 4.459, DF = 3, P-Value = 0.216), or between the two surveys (means 3.79 (2007) and 3.75 (2008), Chi-Sq = 0.937, DF = 3, P-Value = 0.817). For these calculations the cells for the 'strongly disagree' response (n<2) were included with the 'disagree' frequencies.

<sup>1107</sup> Mean for those with PHP experience 3.25 and 3.52 for those without. This difference was significant: Pearson Chi-Square = 12.663, DF = 4, P-Value = 0.013. (Allowing that 2 cells had expected counts 1>n<5, because of the lack of 'strongly disagree' responses). When removing these cells the difference analysis is: Chi-Sq = 12.549, DF = 3, P-Value = 0.006.

<sup>1108</sup> Means 3.74 (<8yr) and 3.28 (>8yr), Chi-Sq = 14.219, DF = 3, P-Value = 0.003. (Removing the 'strongly disagree' frequencies, as these were <2).



the starting assertion in the argument that supports the PHP process, the suggestion that systematically changing the court process –especially role of the judge– is the panacea for the perceived harms, is not supported as a general proposition.<sup>1109</sup> There was a difference of opinion depending on the respondents' experience in family law. Those with 8 years experience or more were significantly less impressed with the idea that changing the judges' role could assist in resolving problems with the adversarial process.<sup>1110</sup>

There is, however, substantial support for modest changes in the judge's role, specifically for better case management, as may be apparent from the responses to the fifth statement.<sup>1111</sup> These responses were not significantly different for those with or without PHP experience or with different family law experience. A similar score was recorded for the proposition that judges should have some inquisitorial powers in respect of determining what further evidence may be required.<sup>1112</sup> Again, these scores did not significantly vary between those with and without PHP experience or with different seniority in family law.

As the responses to the above statements reveal, practitioners recognize and acknowledge the problems that can be caused by the adversarial system, and they accept that a part of the resolution may be found in increasing the involvement of the judge in tighter case management and control of evidence. However, this is certainly not to be interpreted as support for the idea that changing the role of the judge can resolve all of the problems encountered with the current operation of the adversarial system, or that the judge's role must be altered to such an extent that it creates a fundamental systemic change. This conclusion is strongly supported by the response to the sixth statement, which suggested that the next inquisitorial step should be taken, involving judicial discretion in deciding the relevant issues and not leaving this to the parties or their lawyers. That suggestion is rejected,<sup>1113</sup> with no significant difference in opinion between those with and without PHP experience or different seniority. Comments made in that context emphasize the differences between the relationships lawyer-client and judge-party and the resulting difference in understanding what the real issues are. Cultural and socio-economic differences between the judge and parties were cited, as was the risk of sacrificing thorough and multi-faceted fact finding for procedural efficiency. The following comments exemplify practitioners' opinions:

*The role of a lawyer cannot and should not be minimized in their relationship with their client, particularly ascertaining the client's legal issues. This relationship cannot be superseded by Judges, as their role does not include dealing direct with clients!*

*More inquisitorial powers for judges would be useful but should not completely replace the adversarial process, particularly where counsel is not competent, but the adversarial process does still have some value to "discover" issues that judges do not identify.*

*The adversarial system can damage relationships between parties and their children; however the inquisitorial system can do the same. Often parties and children are relieved that a decision has been made the way forward is known. The adversarial system is not perfect, nor is any other system. My concern is that the common law system is based on the adversarial system; it has been refined over many years. We should be reluctant to throw it away on a whim. Proper procedure needs to be put into place so there is consistency; proper evaluation needs*

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<sup>1109</sup> Mean 2.84, C.I. from 2.71 to 2.96. The percentage fractions of responses were respectively: strongly disagree 10%, disagree 29%, neutral 31%, agree 29%, strongly agree 2%, giving a 95% confidence interval for the mean between 2.71 and 2.96. There was no significant difference in responses between those with and without PHP experience (Pearson Chi-Square = 3.892, DF = 4, P-Value = 0.421).

<sup>1110</sup> Means 2.75(>8yr) and 3.11 (<8yr), Pearson Chi-Square = 9.728, DF = 4, P-Value = 0.045.

<sup>1111</sup> Mean 3.48, C.I. from 3.38 to 3.59.

<sup>1112</sup> Mean 3.45, C.I. from 3.32 to 3.58.

<sup>1113</sup> Mean 2.85, C.I. from 2.72 to 2.99

to be done.

*Your research questions thus far pre suppose there is a fundamental problem with the adversarial process currently in place. The real problem is that the PHP creates a whole range of new problems and doesn't solve those perceived with the original process. What it does achieve is often leave on party feeling totally deprived of having the issues they want to have dealt with brought to the Court and considered.*

*I feel the survey has been prepared on the basis that the scheme is a better alternative to the traditional family proceedings and this survey was to affirm that premise. There quite pointed questions like the ones that assert the traditional court process alienates children and parents from one another. There is always alienation, but that alienation has much to do with the dynamics of the parties. The questions point to the Judge having better judgment than the parties of what is important - rather than the Judge being the arbiter of fact. It is a very paternalistic stance - perhaps reflective of some Judges. I would agree to more negotiations - more med/arb but at the end of the day if things need to be litigated they ought to be on the basis of what the parties think relevant and not the Judges.*

*Judges can easily miss important issues particularly when dealing with those of a different socio-economic position in life to themselves (common) and a different ethnic cultural background (happens often) therefore they can shut out very relevant issues pertaining to the welfare of the child etc. Lawyers cannot always advocate to the judge the relevance of issues fully without being able to present evidence in support of their argument, and yet they must make such arguments before not after producing any such evidence. Judges may need considerable persuasion from a person such as an expert witness to credit relevance to issues which in their world has no such relevance.*

As the last comment indicates, while there is support for the judges' increased role in determining evidence requirements, this does not extend to limiting evidence, which is directly linked with determining that entire issues may not be relevant. In its essence, the argument is that a judge cannot decide whether an issue will be relevant without having heard at least some evidence on it. The next question is whether it is appropriate that a judge determines an issue on the basis of restricted evidence. This aspect touches on one of the core aspects of the new role for the judge: whether the judge or the parties determine what evidence is relevant to each issue:

*The cases I have been involved in involved issues which required wider and more expert evidence. I was concerned on both occasions that a Judge dealt with the matter before appropriate independent evidence was available.*

*I think the preliminary hearing is helpful - the parties speaking for themselves helps bring out the real issues. The concern is the preliminary findings and the restrictions on what further evidence may be brought, especially if there has not been time to get all affidavits that would have been desirable filed before the preliminary hearing.*

Another consequence flowing from restricting evidence is the acceptance of the decision by the parties. As a consequence of the policy objective to promote collaborative post-separation parenting, most decisions involve some shared care. A decision is therefore only as good as the parties' compliance with it. Where the parties feel that the decision was reached without sufficient consideration of all evidence and issues they considered pertinent, they may be reluctant to comply, or it may actually lead to more, rather than less conflict:

*Giving the Judge's more power and control over evidence and other aspects of the process may have administrative benefits but they can never know as much about the issues as the lawyers do and if decisions are made on insufficient evidence then that will prevent parties accepting the decision and that in itself may lead to further conflict between the parents and/or the children.*

This is a valid point: by attempting to reduce adversarialism through restricting evidence, it may well be that the parties (or at least the "loser") have less respect for the decision: parties that have not had "their day in court" reject rather than respect the decision:

*Parties often just want their day in Court no matter how useless their case may be. (I.e. the element of just being heard or taking a stand for the children) There are occasions where the parties can show their true colours or sincerity and commitment to the children by going through the Court process which at times can strengthen the parental relationship.*

My overall evaluation of the policy that seeks to resolve perceived problems with the adversarial process

by a systemic change is that the survey respondents recognize and acknowledge the problems that are present, but do not accept that all these are caused by the adversarial system, or even that it is the root cause of all problems, as the argument that promotes the PHP suggests. They can see some improvement by modest changes in the judges' involvement, but clearly reject a complete and fundamental change of the system. This of course raises the question what the respondents do see as the main problem in the current process, or what they see as the resolution for the perceived problems with the adversarial process. That aspect can be best discussed together with the next policy objective.

*Resolve resourcing and management difficulties by systemic change*

This policy objective finds its origin in the fact that a small percentage of parenting matters cannot be resolved through the conciliatory arm of the Family Court. These matters require a court hearing, and they are typically the most resource intensive. They take up a substantial part of the Family Court resources. In fact, and unfortunately, it has been found that the court organisation is unable to cope with the resulting workload within acceptable standards of procedural quality and timing.<sup>1114</sup> The policy apparent from the PHP documents is that this problem should be resolved by fundamentally changing the nature of the court process. In other words, the problem is not considered to be the result of poor management or insufficient resources, but the result of problems that are inherent in the adversarial paradigm. Once that is accepted, it follows that the only possible solution is systemic change. This conclusion is of course supported by the previous policy objective and vice versa, and it is therefore unsurprising that the chosen solution is promoted as providing a synergetic advantage. Although there is a dearth of information about the operational and economical performance of the family court system in relation to its resources,<sup>1115</sup> this apparently attractive argument can be subjected to theoretical scrutiny and by using the views of the survey respondents.

From a theoretical perspective (using management theory), the first thing that must be noted is that the suggestion that the problems arise from systemic characteristics is advanced by the organisation responsible for all aspects of managing and resourcing the court process.<sup>1116</sup> The only parameters not in control of those promoting systemic change are the current process parameters. I suggest that this observation alone makes the entire argument highly suspect, particularly where it is advanced without any underlying data about the current performance, or a demonstration of how a systemic change will make any difference in terms of the substantive quality of the process and in terms of its efficiency.<sup>1117</sup> A simplistic analogy can be presented, where a factory that is incapable of economically producing bread of an appropriate quality, changes its production to cake on the basis that the necessary infrastructure and ingredients are almost the same and available, and can be used to produce a higher quality product in a more efficient manner by simply changing the recipe that is being used. While it is immediately apparent

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<sup>1114</sup> And this conclusion was reached in all the official reviews of the Family Court, from the 1993 Boshier report to the 2004 "Access to Justice" report.

<sup>1115</sup> But note that the reviews of the Family Court so far have always recommended that a solution to the core problem of delays should be sought in resourcing and organisational improvement.

<sup>1116</sup> And that agency, the Ministry of Justice, had effectively taken over the Department for the Courts on the premise that their management capabilities would resolve the managerial problems in the court organisation.

<sup>1117</sup> As was seen in chapter 15, practical comparison with an efficiently organized inquisitorial jurisdiction does not support the proposition either.

that this metaphorical scenario contains a logical fallacy,<sup>1118</sup> it is precisely the reasoning advanced to support the PHP initiative.

Survey responses indicate that practitioners generally arrived at the same conclusion, and are of the opinion that it is the implementation and resourcing of the current court process that is the cause of the current problems, not some systemic problem inherent in the adversarial process:

*The PHP v "adversarial" system is an unhelpful dichotomy - the crux of the issue is funding and resourcing. If judges are going to remove non-PHP cases from the lists as they are doing ..... it will obviously make the non-PHP system look really bad for timing - yet the issue remains resourcing.*

*Court processes correctly applied and followed, and court time made available promptly, and not weeks or months after it is really required would remove a lot of the difficulties. The maxim justice delayed is justice denied is highly pertinent.*

*If there was greater adherence to the laws of evidence and legislative timeframes, the adversarial process may work better than it does now.*

*Most Family Court Judges are good at sorting out issues, especially involving children. The big problem I see is that there is not enough Judge time available. It can take six months to get a hearing regarding contact, and counselling and mediation often will not work at all in the meantime where one party will not budge. The standard processes may be fine, if sped up. Where Judges handle list dates matters are not so bad because interim orders can be made, but Registrars are not equipped to handle this.*

*Much of the different case management required to make the system more efficient and focused on relevant issues is already available to the Bench. Up skilling some Judge's may assist.*

*The major problem with the current family court system is the significant delays involved in getting anything done. This is not only a result of the court system being overloaded but some counsel not doing what they have been asked to do in a given timeframe and judges not being very proactive in ensuring things get done. This makes a huge difference in a smaller provincial town because we only have a family court judge 3 or 4 days a fortnight.*

*...the main problem with current system is slowness of decision making and that is simply an under resourcing issue as with most government provided services.*

*Unless more resources are provided the overall resolution rate will be divided - cases on PHP will be decided faster but other cases are taking much longer - because hearing time has been taken by PHP cases.*

Unsurprisingly, therefore, the proposition that there could be other ways to resolve problems with the adversarial process finds strong support.<sup>1119</sup> This support is even stronger than that for a limited extension of the judges' powers.<sup>1120</sup> The profession is very hesitant to replace the current system without first trying to fix it, preferably by increasing resources and by improving its efficiency,<sup>1121</sup> including limited additional powers to streamline proceedings. There thus appears to be agreement between practitioners and the promoters of the PHP about the symptoms of the problems, but there is strong disagreement about their cause and a possible solution. Several respondents made additional, alternative suggestions:

*For many years (and have practiced for 34 years) I have advocated a panel approach to resolving care issues. This would comprise where appropriate social worker, lawyer, psychologist (counsellor), which would investigate all issues which were relevant (most important) to the circumstances, reach a decision and explain to the parties the reasons for their decisions and implementation of care arrangements. I have always maintained that in defended proceedings best interest of the child is a test the court applies but has little relevance to the approach parents take to resolving such matters. Retribution for perceived rights or wrongs, petty point scoring and a personal success and thereby an element of control over the other parent often seems to be the*

<sup>1118</sup> That fallacy being the suggestion that one who can't manage bread production can manage cake production.

<sup>1119</sup> Mean of 3.70, C.I. 3.59 to 3.81, see Figure 21 above, and Table 13.

<sup>1120</sup> Compared with additional case management powers the means are 3.70 and 3.48. Compared with limited inquisitorial powers (require additional evidence) the means are 3.70 and 3.45. However, these differences were not statistically significant at  $p < 0.05$ .

<sup>1121</sup> And it is noted that such an approach is in line with all the official reviews to date. None of these suggested a systemic change, but they all emphasized the importance of proper resourcing and management.

*desired outcome. Unfortunately the children's interests become submerged in an effort to establish 'bragging rights'. The parents often have what I term a soap opera mentality to such disputes and seem to thrive on conflict and confrontation. It is also noted, anecdotally, that those who pay personally generally settle earlier than those who receive state funding. In each case there are financial implications and in the latter it may be there are economic factors i.e. benefit retention not child care which is the ultimate driver.*

*There should be more use of judicial settlement conferences.*

*Long drawn out hearings are counterproductive. In the olden days (70's) we didn't have affidavits, we had no idea what nasty surprises could be sprung and we usually had a full hearing and an extempore oral judgment in one day. The quality of the outcome was just as good as today, cost far less and was far less traumatic.*

*The fact the judges are reluctant to use the enforcement provisions in the COCA, and would rather talk to the parties about the issues, indicates that possibly these matters should not be dealt with in the court system and that a parallel system outside of the court should handle parenting problems etc.*

In conclusion, a thorough analysis of the real causes of the perceived problems is required, together with a first focus on making the current process operate effectively and efficiently, by proper management and resourcing, before contemplating any fundamental systemic change. Any change should be evidence based and not derived from assertions and presumptions.

### *Prefer social science based interventions over legal interventions*

As the last comment in the previous section indicates, the concept of increasingly interventionist approaches –the “social-science approach”– raises the question whether parenting disputes should actually remain located in a legal setting. For several decades there has now been a development that increases the relevance of social science paradigms in substantive law in this area, with an increasing pressure on applying these approaches in procedural terms as well. Before reaching a defended hearing, a case typically progresses through a number of social science based interventions. In Australia this development is ahead of that in New Zealand, and social science interventions are effectively taking over the engagement between the parties in the legal system up to the very final stages of court involvement, and they remain dominant in that final stage.<sup>1122</sup>

In New Zealand parenting matters are also increasingly removed from the formal court process, and directed towards interventions that are more amenable to the pursuit of policy objectives, rather than to the determination of legal issues.<sup>1123</sup> This transition also implies a diminished role for lawyers. At the very least it suggests that lawyers would typically be confined to an auxiliary advisory position rather than having a managerial and representative role. Contrary to my analysis, however, respondents disagreed that the PHP represents a trend whereby social services agencies gain dominance, leading to a reduced role for lawyers and a decreasing importance of justice.<sup>1124</sup> The suggestion was rejected significantly stronger by those with PHP experience.<sup>1125</sup> The next issue, whether parenting matters should be resolved completely by using social service agencies, rather than through the legal system, was strongly rejected by the survey respondents.<sup>1126</sup> There was no significant difference of opinion between those with and without PHP experience, but there was a stronger rejection of the idea by those with

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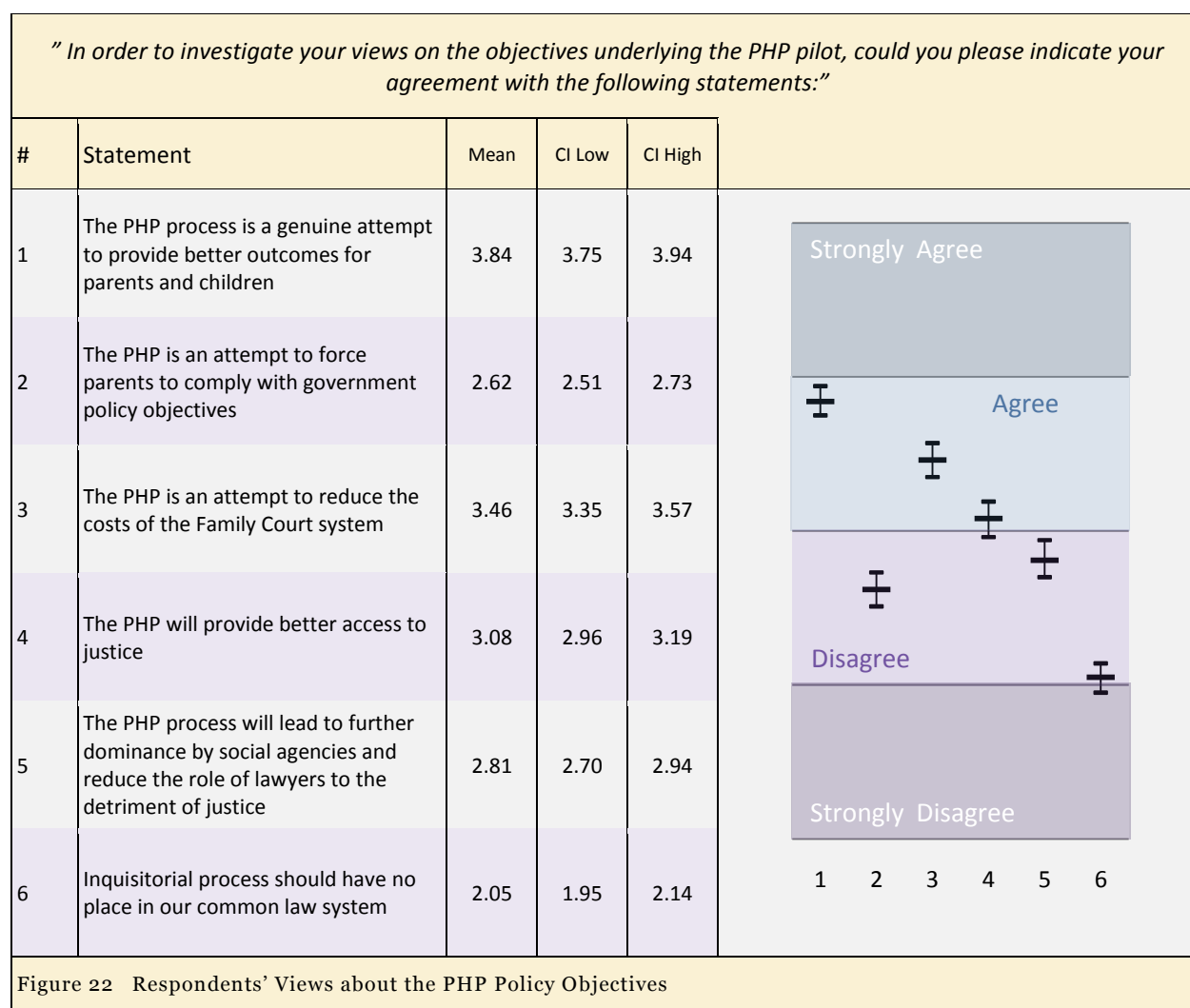
<sup>1122</sup> An interesting study into the professional relationships between legal and social science practitioners in this context in Australia may be found in Rhoades H, Astor H and Sanson A "A Study of Inter-Professional Relationships in a Changing Family Law System" *AJFL* (2009) 23, 10-29.

<sup>1123</sup> Noting of course that there often are only limited legal issues in any event, since the introduction of no fault divorce.

<sup>1124</sup> Mean 2.81, C.I. 2.70 to 2.94, see Figure 22 and Table 16.

<sup>1125</sup> Means 2.53 (PHP exp) and 3.06 (no PHP exp), Pearson Chi-Square = 18.513, DF = 4, P-Value = 0.001.

<sup>1126</sup> Mean 1.72, C.I. 1.63 to 1.82; see Figure 21 and Table 13.



While this response from lawyers is akin to the famous “turkeys voting for Christmas” conundrum, it again raises fundamental issues involving the tension between the role of the state and family autonomy. Ultimately the central question will be whether the state is prepared to do adjudicative justice between citizens that request so, or whether it will seek to resolve matters by increasingly normative control and behaviour modification geared towards a policy determined paramount welfare principle. The preference at the moment is obviously for the latter, thereby indicating a strong preference for social science based, rather than rights based, legal interventions.

### *Improve access to justice*

Access to justice is the central theme of recent changes in civil procedure in many Common Law jurisdictions. Although far reaching proposals in that respect by the New Zealand Law Commission<sup>1128</sup>

<sup>1127</sup> Means 1.85 (<8yr) and 1.68 (>8yr) Pearson Chi-Sq = 7.797, DF = 3, P-Value = 0.050 (technically meaning that the difference just failed to reach statistical significance).

<sup>1128</sup> New Zealand Law Commission supra n137.

were ignored by the government of the day,<sup>1129</sup> the issue appears to make its return to the agenda.<sup>1130</sup> It is therefore not surprising to find improvement of access to justice stipulated as a PHP policy objective. However, it is not clear how this objective is to be pursued, other than by perhaps producing the promoted PHP outcome objectives.<sup>1131</sup> This leaves room for substantial debate, as it can be argued that improving access by effectively lowering the quality of justice is a counterproductive effort. Increasing access to justice must necessarily mean achieving access to at least what is currently perceived as justice and not to whatever can be made more practically available. Access to justice and the quality of justice (including compliance with natural justice), therefore involves a balancing exercise. The survey respondents disagreed with the asserted simple correlation between achieving PHP outcomes and improving access to justice and confidence in the court system. They responded practically neutral in their opinion about the statement that the PHP process will provide better access to justice.<sup>1132</sup> Those with PHP experience demonstrated significant lower agreement with this statement.<sup>1133</sup> Given the very low score on the assessment whether the PHP complies with natural justice,<sup>1134</sup> this must mean that any improved access to justice as a result of the increased speed of the process is, in the views of the respondents, likely to be neutralized by a reduction in the quality of justice. In conclusion, the PHP does not provide a significant improvement in access to justice.

#### *Reduce the costs of the Family Court system.*

Reducing the use of Family Court resources and reducing costs to the parties are mentioned as objectives. I assume that there also is an overall policy objective that seeks to reduce the costs to the government of the family court system as a whole. That assumption is based on the observation that the courts present a significant cost to government, not only in respect of day to day operation, but also in respect of legal aid and other direct costs to the state. Parenting disputes provide an example of conflicts that come at great, and ever increasing, costs but that have no (or very little) beneficial result to society as a whole. Their relevance is to the parties involved, and these are increasingly dependent on state contributions and institutions financed by the state to pursue their interpersonal grievances. Albeit that I only had a small sample to work with, my file analysis indicated that a majority of litigants in PHP matters was depending on legal aid, while in most cases at least one party was also completely dependent on one or more welfare benefits. Although there are no robust statistics available on this aspect, it would appear that much of the conflict in parenting matters is effectively state funded. To make matters worse, the Family Courts are also highly controversial; hardly a month goes by without a serious complaint about it or an incident that results from some out of control family situation.<sup>1135</sup> In short, from a politician's perspective the Family

<sup>1129</sup> New Zealand Government supra n330.

<sup>1130</sup> See for instance a recent speech by the New Zealand Attorney-General: Finlayson "Access to Justice, Legal Representation and the Rule of Law" Legal Research Foundation Conference, The Rule of Law, Auckland, 23 October 2009; and see :Boshier supra n523.

<sup>1131</sup> For a list, see the next section. After stating most of these objectives, the briefing paper simply holds that: "*In this way, the new process will provide better and faster access to justice, and will increase public confidence in the Court system.*"

<sup>1132</sup> Mean 3.08, C.I. from 2.96 to 3.19, see Figure 22 and Table 16.

<sup>1133</sup> Means 3.0 (PHP exp) and 3.14 (no PHP exp), Pearson Chi-Square = 21.315, DF = 4, P-Value = 0.001.

<sup>1134</sup> See below, under outcome objectives, Figure 24 and Table 14.

<sup>1135</sup> Some father's group activists claim that annually 300 fathers commit suicide following extended parenting dispute, a claim that is impossible to verify. A number of horrific incidents following from drawn out parenting dispute have been well documented, and have in fact been the cause of changes in domestic violence legislation.

Court is an area with high risk and little potential for gain. While Australia has attempted to spend itself out of this problem with vast investments in decentralized family centres and a very well resourced Federal Family Court, that is certainly not the direction the New Zealand government has taken, quite the contrary. Reduction of costs seems an obvious objective behind the PHP. The survey respondents agreed with this sentiment:<sup>1136</sup>

*The PHP is an attempt to force resolution of parents' disputes regarding care of their children within the budgets set by the government for the Family Court. It is a costs saving exercise.*

*..There needed to be a great deal more thought out into this experiment which I suggest was based far more on fiscal concerns rather than any desire to get better outcome than those achieved by the original process.*

Given the lack of data, it was impossible for me to evaluate this objective in any more detail.

## OUTCOME OBJECTIVES

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I identified 34 more or less explicitly stated outcome objectives.<sup>1137</sup> For evaluation purposes these can be synthesized into the following:<sup>1138</sup>

- Reduced adversarialism generally
- Speedier results
- Compliance with the rules of natural justice
- Less expensive process
- Better outcomes for children
- Better outcomes for parents
- Educated parents with modified behaviour
- Increased confidence in the court system

### *Reduced adversarialism generally*

Addressing the perceived problems of the adversarial process is the common thread throughout the PHP innovation. Virtually all of its outcome and process objectives include aspects of reducing adversarialism. It is difficult to describe “reducing adversarialism” in terms of discrete and concrete outcomes, as it is always connected to some other objective. Nevertheless, there are several outcome objectives with an emphasis on reducing adversarial behaviour that can be identified more or less autonomously.<sup>1139</sup> These adversarialism-reducing outcome objectives all have a therapeutic notion, like reducing harm, preventing conflict escalation, reducing bitterness, teaching conflict skills, protecting relationships, addressing non-legal issues, and promoting consensual decision-making.<sup>1140</sup> These objectives have in common that they are difficult to measure directly.<sup>1141</sup> Their evaluation must proceed on the basis of a hypothetical relationship with other outcome objectives that may be more amenable to measureable criteria.<sup>1142</sup> Because adversarialism has been asserted as the root cause of just about all problems in the Family Court,

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<sup>1136</sup> Mean score 3.46, C.I. 3.35 to 3.57, see Figure 22 and Table 16. There were no significant differences in opinion for those with and without PHP experience, or between the two surveys.

<sup>1137</sup> The compendium of objectives lists these (available in the online appendices at [www.phpthesis.webs.com](http://www.phpthesis.webs.com)).

<sup>1138</sup> It is noted that the first two objectives relate to similar process objectives. Their “outcome” aspect is discussed here, while their “process” aspect is discussed in the next section.

<sup>1139</sup> See compendium: policy objectives G and L and outcome objectives: 4, 7, 8, 9, 11, 12, 13, 15, 17, 18, 19, 20, 23, 27, 28, 31, 32 and 33 (available in the online appendices at [www.phpthesis.webs.com](http://www.phpthesis.webs.com)).

<sup>1140</sup> These objectives can also be seen as indicators or evidence of the policy objective to use social science based, rather than legal processes to resolve the dispute that brought the parties before the court, see the discussion in the previous section.

<sup>1141</sup> Let alone to measure their ‘adversarialism-reducing’ component.

<sup>1142</sup> For instance: it may be expected that in the official evaluation “reduction in adversarialism” will be tested by the proportion of cases that terminates by consent order rather than judicial decision.



any positive perception of the PHP process will no doubt be taken as evidence of the success of reducing adversarialism, while all negative perceptions are bound to be described in terms of not yet having achieved a sufficient reduction in adversarialism.<sup>1143</sup> The underlying anti-adversarial assumption and the lack of reliable evaluation criteria will, therefore, reduce any evaluation of a reduction of adversarialism objective to a mindless word game, as “adversarialism” by itself is a meaningless (in the sense of undeterminable, and too abstract) concept. It is unclear how the PHP evaluation will deal with this complexity.<sup>1144</sup> The practitioner surveys did not contain questions that addressed reduction of adversarialism at this level of abstraction. Questions that addressed the disadvantages of the adversarial process generally have been discussed above. Some comments from practitioners exemplify their thoughts on reducing adversarialism:

*Reducing the role of lawyers may be based on assumptions that partisan lawyers inflame conflict. That is not necessarily the case. Some lawyers also act as lawyers for children. All family lawyers attempt to resolve matters. It is unsafe to leave it to judges to interview parties without lawyers having a full right to ensure all the relevant evidence is before the court by way of affidavit and submissions.*

*Judge Boshier has been concerned to limit cross examination in the family court for many years. He gave a paper on it at a conference in 2005? Cross ex is a hallmark of democracy. People lie, well trained lawyers who know the case well get to test this in cross. People exaggerate, or misconstrue or lack objectivity, used properly cross shows this too. In my experience (25years) lawyers are poorly trained in cross in fam crt cases. Too few undertake the litigation skills training available, leading to unfocused irrelevant questioning, and possibly poor analysis of the important issues that should be tested.*

*There are very real concerns that a process put in place without adequate consideration and without sufficient checks and balances will not deliver appropriate long-term positive results for the subjects of the proceedings. The inquisitorial system is highly dependent on the quality of the tribunal, and that leaves real risks where that is inadequate. We already have many cases where it is apparent that the presiding judge has not familiarized themselves with the file or read the documentation. The cross checks of cross-examination often sort out that problem.*

Another way of looking at reducing adversarialism is by applying the hypothetical dichotomy between adversarial and inquisitorial approaches. I have discussed this in some detail in chapter 15, where I considered a true inquisitorial Civil Law system, and concluded that its potential to resolve difficult parenting matters was not significantly better than the Common Law adversarial paradigm. I concluded that “adversarialism” is a function of the parties and their conflict, not of the system in which it is adjudicated. Nevertheless, the entire PHP experiment (and its CCP/LAT counterpart) is proof of the continued belief that increased judicial powers can reduce adversarial tendencies. If that belief is correct, the level of increased judicial intervention should in some way correlate with a reduction in adversarialism. Both concepts are extremely difficult to measure and evaluate in a meaningful way, and this hypothetical correlation will therefore be difficult to establish. As was seen, survey respondents could see some advantage in limited inquisitorial techniques (typically those already available), but had serious problems with deeper reaching interventions, particularly those involving issue and evidence reduction.<sup>1145</sup>

An area that has inquisitorial characteristics, but that does not involve case management or responsibility

<sup>1143</sup> To a certain extent this quandary describes the development of the Family Court since its inception.

<sup>1144</sup> It is difficult to conceive objective criteria and principles of measurement for degrees of “adversarialism”. [The official evaluation did not address the issue in any measured way, but considered the concept very generally and in abstract terms as well as by considering assumedly related concepts such as the appreciation for the opportunity to interact with the court, firmer control by the court and limiting issues and evidence, i.e. by considering process objectives.]

<sup>1145</sup> [The official evaluation circumvented the issue somewhat, by asking respondents whether the PHP was “effective in appropriately limiting” cross examination, issues and evidence.]

for issues and evidence, is the interaction between the court and the parties directly. It will be recalled that the Dutch system included a possibility for the judge to directly engage with the parties in a discussion, rather than an examination format. This was also introduced in the CCP/PHP (albeit more formalistic, with the parties sworn in, and presenting a prepared statement followed by questions). The Australian evaluations showed that all parents used this opportunity and generally appreciated it. Parties in PHP hearings shared this appreciation.<sup>1146</sup> While the new interaction is mostly a process issue (and hence discussed below), it has at least one “reduction of adversarialism” outcome component: it may reveal that the issues between the parties are less extreme than may appear from the affidavits and written statements.<sup>1147</sup> This is likely to be the case where matters have been escalating for some time, particularly where a number of written statements have been exchanged.<sup>1148</sup> The survey respondents marginally agreed with this proposition.<sup>1149</sup> It must be observed that this reduction in adversarialism is quite limited in its practical application, as it only comes into operation at the start of the first court event, which does not occur until either all the conciliatory approaches have failed, or the situation has already escalated between the parties to such an extent that the case is classified as ‘serious’.<sup>1150</sup>

In summary, while reducing adversarialism is one of the main objectives of the PHP process, it is a difficult concept to grasp in ways that allow meaningful evaluation. In any event, the PHP intervention comes at a time in the life-cycle of the conflict that is likely to be too late, and at a point in the overall court process that will virtually guarantee that all the cases that make it to the PHP process have proven to be resistant to adversarialism reducing activities.<sup>1151</sup>

### *Speedier results*

This represents one of the main outcome objectives of the PHP process,<sup>1152</sup> and fortunately one of the few that is accompanied by explicit performance targets and a system of measurement. The time limits are related to the different steps in the process, and the targets have been detailed to that level. The overall objective is to have PHP cases completed within three months from the date of entry in the PHP system. As discussed previously, the date of entry is not the date on which the parties formally engaged the court,<sup>1153</sup> but the date of the judicial decision to enter the matter in the PHP process. Intermediate results of the PHP pilot in respect of timing were released during presentations by the Principal Family Court Judge. A speech in November 2007<sup>1154</sup> stated:

*For Guardianship Case applications, which is another description for Care of Children Act applications, disposed of between 1 November 2006 and 31 October 2007, 43.7% of defended Guardianship applications were disposed of within 33 weeks. 63.8% of all substantive Guardianship Case applications were disposed of within 33 weeks. The position is dramatically different so far as cases under the Parenting Hearings Programme is concerned. 75.2% of all cases were disposed of within 33 weeks. But that does not tell the whole story. The 75.2% relates to*

<sup>1146</sup> [And this was also the finding in the official evaluation.]

<sup>1147</sup> This is also one of the assertions underlying the increased interventionist judicial role in the PHP, see for instance the briefing paper, Boshier and Udy supra n234, 8.

<sup>1148</sup> See also the discussion in chapter 13, conflict theory.

<sup>1149</sup> Mean 3.33, C.I. 3.14 to 3.52, see Figure 24 and Table 14.

<sup>1150</sup> This presents yet another argument for a much earlier judicial intervention.

<sup>1151</sup> [And this may well be the reason that the official evaluation found that only a limited number of cases was deemed suitable for the PHP process.]

<sup>1152</sup> See “compendium”: policy objective J and outcome objectives 1, 4, 8, 12, 17, 18, 20, 32, 33, 34.

<sup>1153</sup> Depending on the “PHP track”, that date may have been months earlier.

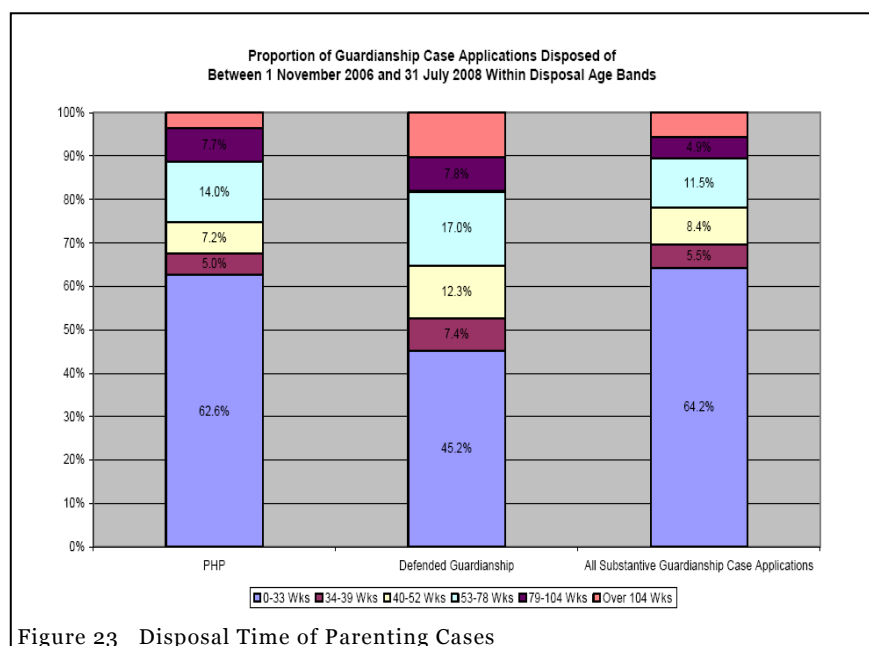
<sup>1154</sup> Boshier supra n1014.

*the whole life of the case from the time of filing to disposition. In track B cases which do not enter the programme until counselling and mediation have finished, you will see that quite some time would already have elapsed. Yet, the overall achievement is 75.2% of all cases within 33 weeks. The statistics indicate that the overwhelming majority of PHP cases are resolved within 12 weeks of entry into the programme.*

A rather modest increase in the number of cases disposed within 33 weeks is here promoted as dramatic, while there is no information whether the difference is statistically significant. The percentages associated with the “overwhelming majority” claim were not disclosed. The conclusion is that a significant number of cases did not meet the processing time criterion and that the claim from the brochure: *“This means that your case should be fully dealt with within three months”*<sup>1155</sup> was probably not achieved in the majority of cases. A speech in September 2008 included the following statement.<sup>1156</sup>

*“Whilst we await a formal evaluation of the Pilot, early informal feedback has proven positive both in quantitative and qualitative terms. Early this year statistics showed that overall time-frames for the completion of cases had dropped significantly when a case was channelled into the programme; with the median disposal time for those cases from the date of application to the date of disposal only 18.1 weeks. Later, in April 2008, the Ministry of Justice noted in an internal briefing meeting that although the median disposal time for PHP cases had increased to 22.5 weeks, disposal times remained lower than the median disposal time of defended Care of Children Act cases which was 37 weeks. Clearly therefore, the programme was continuing to have its intended effect of reducing delays.”*<sup>1157</sup>

This presentation included the graph in Figure 23 which was said to demonstrate that PHP cases were disposed of faster.<sup>1158</sup> Upon closer inspection, it raises some questions. The first is why the data has not been organized to also provide other relevant information about the PHP, such as compliance with the individual time limits of the process, or even with the overall 12 week limit. Secondly, the appearance of PHP cases with an ‘age’ over 104 weeks in a table representing data up to 31/7/08 (i.e. 92 weeks into the pilot) seems strange. This would effectively mean that these cases had to have been in the system for at least 12 weeks before the PHP even started. Thirdly, there seems to be a serious problem with the data itself, as it is impossible that the proportion of all cases disposed within 33 weeks (64.2%) is larger than the similar proportion for PHP cases (62.6%), while that proportion for non-PHP cases is lower (45.2%). Given these problems, it would seem that the accuracy of the data on which the enthusiastic



<sup>1155</sup> Ministry of Justice supra n860, 5.

<sup>1156</sup> Boshier supra n1.

<sup>1157</sup> The presentation did not provide details of how the comparable disposal times for the traditional process were calculated. Also, because no details were provided, it is difficult to analyse these number more accurately.

<sup>1158</sup> There was no reference to source data, it is noted that other data in the presentation were referenced as ‘statistics provided by the Ministry of Justice’, so it is reasonable to assume that this graph originated from that agency.

interim results were based is at best doubtful. It is, however, clear that the performance targets have not been met although there seems to be some increase in speed for cases that have been dealt with under the PHP regime.<sup>1159</sup> The survey respondents observed that the PHP process resulted in cases being decided faster:<sup>1160</sup>

*I would comment that the best aspect of the PHP process is the speed. It simply speeds up the process, therefore helping prevent more conflict, ingrained positions, unsettling of children.*

*The benefit of the PHP is having straight forward cases dealt with quickly. They are often left to fester in the usual process and there is huge benefit to everyone having these sorts of cases resolved quickly. PHP is not suitable in my view for more complex cases because of the time frames and the nature of the legal issues.*

*The huge benefit is the lessened time it takes to get a matter heard.*

However, practitioners were of the view that speed should not be a goal in itself, but must be balanced against the need of properly dealing with a matter. Strict time limits can, in that view, present a disadvantage and potentially also cause problems in getting matters organized in time, particularly where other agencies are involved:

*Often because it is such a quick process, we are getting the litigants back in the system. I don't think the PHP is a better environment for deciding what's in the children's best interests - but nor is it worse, it's just faster and is brilliant for some cases. But too hurried for others.*

*Parents that are not as well spoken may well be at a disadvantage in PHP hearings. The speed of the process can also mean that important issues are overlooked or not given the time deserved.*

*The PHP process moved so quickly I found it hard to find a solicitor to act as my agent particularly because a.) I needed a solicitor who was prepared to do legal aid b.) Solicitors were too busy to take on a case at short notice c.) The PHP pre-lim had to be prepared for as if it would proceed as a hearing so required significant effort from the agent in a short space of time.*

*There are difficulties in getting all agencies to report in time. My experience has been that they do but sometimes the reports are not as thorough as I would like. A lot of preparatory work also has to be done in a hurry by L4C if the PHP is to be successful hence my comment about the increased role for L4C. Also, there are considerable delays in our court as PHP takes priority over other matters and that is leading to frustration for counsel and clients.*

*Legal Aid doesn't necessarily recognize the urgency with which matters need to be dealt with. The time limits can be too tight to adequately get proper evidence before the Court (the problem being that if you do not get it in before the Preliminary Hearing you can find yourself with a direction that no further affidavits be filed).*

These comments raise the question whether the time limits that have now been set are considered to be adequate for dealing with parenting matters. The respondents were of the opinion that this is not the case, but this was not a strongly held view.<sup>1161</sup> Presumably this will vary from case to case, and instead of setting strict time limits, it may be preferable to provide some flexibility depending on the characteristics of the case.

The PHP process description refers specifically to the constraints that will be placed on report writers. Apparently the Family Court had entered into a planning arrangement with CYFS (social work) in order to expedite the reports for PHP cases,<sup>1162</sup> and this will no doubt have been monitored.<sup>1163</sup> It must be seen

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<sup>1159</sup> [The official evaluation revealed that in only 19% of cases the preliminary hearing took place within two weeks from entry of the case into the system. Only 49% of cases had that hearing within four weeks. Most cases did not have a final hearing (88%), and should therefore have completed in the two week limit. The official evaluation (incorrectly) uses the 90-day maximum time limit for cases that have a final hearing to evaluate compliance with the timing limit. Even after this manoeuvre, only 50% of cases completed in time, i.e. in 90 days. It is obvious that the PHP in fact completely failed to achieve its timing objectives.]

<sup>1160</sup> Mean 3.67, C.I. 3.46 to 3.87, see Figure 24 and Table 14.

<sup>1161</sup> Mean 2.83, C.I. 2.63 to 3.04, see Figure 25 and Table 15.

<sup>1162</sup> Information provided by Family Court Registrars, and confirmed in the observed correspondence in the file study, where report requests and reports mentioned this specifically.

whether such a priority arrangement can be sustained when the PHP becomes a mainstream procedure. Despite these arrangements, respondents were of the view that other agencies or professionals such as report writers, could not comply with the time restrictions set by the PHP process.<sup>1164</sup> The Legal Services Agency (LSA)<sup>1165</sup> performed slightly better in this respect. It introduced a special protocol for PHP cases<sup>1166</sup> but nevertheless, the respondents reported that the LSA could not meet the time restraints,<sup>1167</sup> although there was an improvement as the pilot progressed.<sup>1168</sup>

The 2007 survey indicated that speed was seen as the main advantage of the process.<sup>1169</sup> It was therefore prudent to investigate the relationship between speed and the perceived quality of the process in more detail. For that purpose, two questions were added to the 2008 questionnaire. These essentially asked a similar question twice, but in reversed format.<sup>1170</sup> As the scores demonstrate, respondents perceive a positive correlation between the speed and quality of the court process.<sup>1171</sup> While the PHP pilot was clearly capable of providing speed improvements, and while this was seen as the major advantage of the innovation, there was a degree of scepticism whether the increased speed was achieved by higher judicial commitment and/or delaying other matters,<sup>1172</sup> and whether it can be maintained if the process would be introduced more widely, and once the novelty wears of:

*I am concerned that the time efficiency (which to me is the greatest advantage of the PHP) may not be retained if pilot opened to all cases.*

*PHP cases do get allocated hearing time faster but logistically this process could not roll out across the board - we do not have enough Judges and counsel to comply with the timetable. One PHP case I have been involved in has exceeded the expected time frames because of the changing nature of the case and is an exact example of why fast tracking files doesn't work and cannot "guarantee" better outcomes.*

*The process does not and cannot guarantee anything. Parties have the same ability to have their say in mediation conferences and, in fact, self-represented parties seem to say a lot at any time. The main advantage is the fast tracking and that advantage will no doubt be lost when PHP cases increase and get put on ever growing waiting lists.*

The Australian evaluation also pointed to this potential problem. There is no conclusive data available whether the Australian system is still operating within its initial constraints, anecdotal information indicates that is not the case, and that delays are causing increasing concerns again.

In conclusion, increased speed is seen as the major advantage of the PHP, but it is highly uncertain whether this can be maintained if the process is implemented more widely. There is no conclusive information whether increasing the speed of the ordinary process would have similar positive effects.

<sup>1163</sup> [The official evaluation contains no data about compliance with timing directions by report writers.]

<sup>1164</sup> Mean score 2.50, C.I. 2.32 to 2.67, see Figure 25 and Table 15.

<sup>1165</sup> The agency responsible for the approval and provision of legal aid in New Zealand.

<sup>1166</sup> A document titled: Legal Services Agency "Interim Policy on Parenting Hearings Programme" Memorandum from the LSA to family law practitioners.

<sup>1167</sup> Mean score 2.80, C.I. 2.62 to 2.98, see Figure 25 and Table 15.

<sup>1168</sup> Means 2.60 (2007) and 3.02 (2008), the difference failed to reach statistical significance. [The official evaluation doesn't contain data about LSA compliance with timing restrictions.]

<sup>1169</sup> [This was also the finding of the official evaluation: Knaggs and Harland supra n9, 16.]

<sup>1170</sup> Note that all questions in each block were asked in random order, so that respondents would not encounter these 'reversed' questions together as they are listed in Figure 25, but would encounter them in random order and randomly distributed amongst the nine questions in this block. As the results demonstrate, the expressed opinions remain similar, whether expressed negatively or positively.

<sup>1171</sup> I.e. they disagree with the suggestion of a negative correlation and agree with the suggestion of a positive correlation. Speed affects quality negatively: mean 2.67, C.I. 2.40 to 2.93; speed affects quality positively: mean 3.46, C.I. 3.17 to 3.75. See Figure 25 and Table 15.

<sup>1172</sup> As was the case in Australia, see Hunter supra n602.

### *Compliance with the rules of natural justice*

Despite its novel characteristics, the PHP process remains judicial in nature and must therefore comply with the tenets of natural justice.<sup>1173</sup> The broader context of this aspect has been discussed in chapter 16. At that point, and starting from a theoretical perspective, I identified several potential problems. While the introductory materials emphasize compliance with “natural justice and procedural fairness”, the results of the surveys show that the lawyers involved in PHP hearings disagreed this to be the case.<sup>1174</sup> This finding is extremely worrying, as it indicates that parties’ legal representatives appear to have little confidence in the process, while one of their duties under it is to “advise them [the clients] and ensure they are protected”,<sup>1175</sup> and while the parties are ensured by the court that: “If you have a lawyer, he or she will be present at all times, to look out for you interests. If your lawyer thinks anything about the process is unfair to you, he or she will raise this with the judge”.<sup>1176</sup> The probability of a client having a lawyer who disagrees or even strongly disagrees that the process complies with natural justice is about 51%,<sup>1177</sup> in other words, half the parties in the PHP process are being “ensured that they are protected” by lawyers who themselves have little confidence in the application of natural justice in the system:

*I have a serious issue as to the Judge having the ability to determine what evidence should or should not be called. Whilst I appreciate that there is a lot of unnecessary and irrelevant evidence filed under the present system, if the Judges were more active in making rulings to strike out evidence that is opinion, submission or irrelevant then many of the current problems with the current system would be addressed. This should be teamed with a more inquisitorial process whereby if evidence that is needed has not been filed the Judge can request it. I am not suggesting that the adversarial way is the way that is always appropriate, however, there are many circumstances where there just needs to be a hearing and I have real concerns that the PHP programme and the processes involved under that system are just not constitutional.*

*Judge Boshier basically lied about the PHP being based upon the Australian process when he knew full well it was very different; he was also very naughty in putting Simon Jefferson’s opinion allegedly about the PHP on the family law section website apparently in support of the PHP when it was very clear that it had been written for an earlier version of a PHP type programme by Judge Doogue. Natural justice is breached all over the place with this process - the Family court rules 174 - 179 are breached every time a judge enters the fray of settlement discussions and then moves into adjudication mode. PHP just gives more power to judges to bully punters and counsel.*

*The major concern expressed by many counsel, in my experience, is that natural justice issues are not always addressed - this has not been resolved and may lead to a situation where there are more appeal proceedings.*

In conclusion, the PHP does not guarantee compliance with natural justice.<sup>1178</sup>

### *Less expensive process*

Although savings in costs to the parties is listed as one of the key features of the PHP, the introductory materials do not indicate how that is to be achieved in practice. Presumably, this advantage will be one of the results of increasing the speed of the process overall, shortening hearings, reducing evidence and affidavits, and eliminating tactical overtures generally. All of these restrictions can potentially reduce

<sup>1173</sup> See compendium: policy objectives G,I and J, and outcome objectives 1, 4, 7, 8, 9, 11, 12, 15, 17, 18, 20, 23, 27, 28, 31, 32, 33, 34.

<sup>1174</sup> Mean score of 2.54 with a C.I. between 2.33 and 2.74. The question was only presented to those with PHP experience. There was a small, but statistically insignificant improvement between the two surveys: Means 2.45 (2007) and 2.64 (2008), Pearson Chi-Square = 4.720, DF = 4, P-Value = 0.317. There was no significant difference of opinions between those with different seniority, between those with different specialization in respect of parenting dispute (more than 50% of workload or not), or depending on the number of PHP cases experienced (experience in 5 or more cases or not). See Fig 24 and Table 14.

<sup>1175</sup> Briefing paper, Boshier and Udy supra n234, 4.

<sup>1176</sup> Ministry of Justice supra n860, 4.

<sup>1177</sup> Calculated as 56 out of 110 respondents with PHP experience, see Table 14.

<sup>1178</sup> [Albeit hesitantly, the official evaluation confirms this concern, and considers that it “may warrant further attention”: Knaggs and Harland supra n9, 66.]

costs, not only in terms of the costs for the legal process itself (court fees, lawyers, experts etc), but also all the costs that are indirectly associated with having court proceedings and with being unable to move on with one's life. Significantly reducing the parties' costs would represent a very real and important achievement for the PHP process. It is unclear whether the official investigation will be addressing this issue and whether data has been collected in respect of parties' costs.<sup>1179</sup> Court files do not contain information on the costs to the parties, so I have not been able to analyse this issue in any detail. Survey participants were not asked to comment on the issue of costs to the parties.

### *Better outcomes for children*

A better outcome for children is a multi-dimensional concept.<sup>1180</sup> It includes, or is directly related to, many of the other output objectives. Determining whether an outcome is "better" is highly dependent on the policy objective that is sought to be achieved, in this case mainly the collaborative post separation model. As a result, it is a highly subjective exercise to establish whether an outcome is better by itself, or whether it may be better because it complies with some theoretical ideal. It is also difficult to establish the criteria to measure the quality of an outcome in this respect. Given the unique situation of each case, and the huge amount of variables that impact on the welfare of a child, there are severe methodological problems that must be overcome before any comparison of outcomes may be considered relevant. The Australian evaluation of the CCP process struggled with this aspect as well. Hunter<sup>1181</sup> considered three approaches to establishing whether outcomes were better, first the substantive "rightness" of the decision, which she considered unsuitable for objective determination. Secondly, a possible measure of psychological wellbeing as compared between CCP and control group cases. This was eventually undertaken in an "exploratory way" in the McIntosh evaluation.<sup>1182</sup> That evaluation involved a small sample of the larger study, in which parents were asked to report on the wellbeing of the children, using a psychological questionnaire, applied during a telephone interview. Thirdly, by measuring it indirectly through other aspects of the court process, such as duration of proceedings, the level of adversarialism, compliance with the outcome, endurance of the outcome, subsequent litigation etc. Hunter used the third approach in her evaluation, recognizing that the observed characteristics are typically interrelated. Apart from the problems of measuring some of these characteristics, the main problem of this approach is that it measures components of the solution that is proposed, not the actual effect that is being sought.<sup>1183</sup> An additional problem that Hunter faced was that the actual objectives for the CCP remained vague and ambiguous until well into the experiment, and even at that late stage it appeared that the main objective of improving outcomes for children was misunderstood by those involved. In the case of the

<sup>1179</sup> [The official evaluation refers to reducing costs as one of the objectives of the PHP, but does not discuss the issue further, or provide further data in that respect.]

<sup>1180</sup> See compendium: policy objective A, B and H and outcome objectives 5, 8, 13, 17, 27, 28 and 30.

<sup>1181</sup> Hunter *supra* n602, 33-60.

<sup>1182</sup> McIntosh *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being*

<sup>1183</sup> To provide an analogy, if a mechanic suggests that replacing the water pump on an engine (the intervention) will result in less overheating (the outcome), then establishing that the water pump has been replaced (the 'evaluation') does not mean the overheating problem has been resolved, particularly if the actual cause was something different, say a slipping fan belt. Similarly, if the perception is that problems are caused by adversarialism, then establishing that adversarialism has been reduced does not mean that the problems have been resolved, only that one possible cause has been removed.

PHP, no information has been provided about how the official evaluators will approach this question,<sup>1184</sup> but the introductory material connects better outcomes for the children with process characteristics, and it may be expected that the Hunter approach to evaluating this aspect will be followed. This then will also result in the problems that Hunter acknowledged, with the consequence that the evaluation's relevance is diminished.

My research did not involve obtaining data from parents or children. I did, however, gather data about the respondents' views about the characteristics of the process and the procedural aspects that are suggested as influencing the quality of the outcomes. I acknowledge that all these aspects interrelate and overlap as per Hunter's suggestion. A less adversarial process,<sup>1185</sup> faster results and reduced costs have been discussed above; at this point some of the other process variables that influence child outcomes can be considered. That issue was also addressed directly, by asking the respondents whether they agreed that the process guaranteed an outcome that was better for the children. This question used the word "guaranteed" because of the high expectations raised by the PHP documentation, and to focus the response on the outcomes and process features compared to the traditional process.<sup>1186</sup> Disturbingly, the respondents disagreed with the suggestion of guaranteed better outcomes.<sup>1187</sup> Practitioners with PHP experience apparently remain of the opinion that the traditional system delivers better results on arguably the most important outcome objective. There were no significant differences between those with different seniority, different specialization in parenting work or different experience in PHP cases.

Turning to other relevant factors, the child focus of the process (a process objective), must play a direct role in achieving better outcomes for the child. Respondents agreed –albeit not overwhelmingly– with the proposition that the judge's control assisted in keeping the parties focused on the needs of the child.<sup>1188</sup> Hunter used subsequent litigation as an indicator of the quality of the outcome. She found that CCP cases were three times more likely to return to court than cases in the control group; measured within the time frame of the evaluation, with the return rate for CCP being some ten per cent.<sup>1189</sup> Previous statistics from the New Zealand Family Court indicate that some 37% of cases return to court following the traditional process.<sup>1190</sup> There is no information about the average time lapse before subsequent litigation occurs. The official evaluation of the PHP will presumably contain details on this aspect.<sup>1191</sup> The practitioner surveys addressed this issue by asking respondents (with PHP experience) whether they agreed with the statement that the PHP process would guarantee outcomes that last

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<sup>1184</sup> [The official evaluation doesn't consider the question of better outcomes for children at all, it only considered (on the basis of limited anecdotal response) whether outcomes were "fair and just", whether parties were satisfied with outcomes, and whether parents' behaviour had changed. Durability was considered another aspect and the statistical and anecdotal information on that topic suggests that the PHP performed poorer than the traditional process: Knaggs and Harland supra n9, 57-60.]

<sup>1185</sup> Including settlement versus determination.

<sup>1186</sup> The questions thus ask response to the suggestion that by using the PHP process there will be a better outcome in all possible scenarios, i.e. it is the change of process that causes the change in perceived output/process quality.

<sup>1187</sup> Mean 2.62, C.I. 2.45 to 2.80, see Figure 24 and Table 14.

<sup>1188</sup> Mean 3.23, C.I. 3.03 to 3.43, see Figure 24 and Table 14.

<sup>1189</sup> Which would indicate that the return rate in the Australian "traditional system" was quite low compared to that in New Zealand, and the CCP return rate close to the New Zealand statistic. [Note that the official evaluation of the PHP shows an increased rate of return.]

<sup>1190</sup> See chapter 5, there is no information available about the time between court interventions.

<sup>1191</sup> [The official evaluation found that within the time frame of the evaluation, between November 2006 and August 2008, some 20% of cases had already returned to court, excluding those that returned so fast that the system could not determine that the 'return' was not a step in the initial proceeding: Knaggs and Harland supra n9, 57-60.]



longer.<sup>1192</sup> Practitioners strongly disagreed with that suggestion.<sup>1193</sup> There were no significant differences between the surveys or between practitioners based on specialization, seniority or experience in PHP cases.

A measure of the quality of outcomes can also be found in practitioners' opinions on whether the PHP process would guarantee better acceptance of outcomes.<sup>1194</sup> Again, the respondents disagreed.<sup>1195</sup> Interestingly, while there were no significant differences between the surveys, or the specialization or seniority of the participants, those with more experience in PHP cases had a significantly better appreciation for this "acceptance" of the outcomes, although the nominal opinion remained very close to the 'neutral' value.<sup>1196</sup> This could indicate that more experience with the process increases confidence that workable arrangements can be constructed using the PHP.

In conclusion, while it is difficult to determine criteria to measure outcomes for children, there is no evidence that the PHP has characteristics that guarantee that outcomes for children are better.

### *Better outcomes for parents*

In theory, outcomes<sup>1197</sup> for parents and children are closely related.<sup>1198</sup> In addition, the PHP also has objectives that primarily seek parent-oriented outcomes. For the CCP evaluation Hunter used a parent questionnaire that sought opinions on such outcomes including: whether parents felt safe in court, whether they felt they had the opportunity to be heard and whether they considered the process to be fair. While the CCP-parties scored significantly higher on these issues than the control group, the absolute results were considered "*hardly a ringing endorsement*" for the CCP method.<sup>1199</sup> Hunter also asked her respondents for substantive comment, which resulted in a "*long essay of grievances*", for the non-CCP parties, while it was "*more restrained*" for CCP parties. Nevertheless, some 60% of CCP respondents complained about issues that varied from the quality of (psychological and social work) reports, unequal treatment of fathers, important issues being ignored and insufficient input from children. It may be expected that the official PHP evaluation will include questions to the parties about these issues.<sup>1200</sup> As said, I did not obtain data from parents directly, but lawyers' comments included:

*There is nothing to suggest that parties emerge from PHP better equipped to make decisions.*

*Most of the results I have personal experience with or knowledge of have had outcomes totally unworkable for at least one of the parents and on one occasion for both parents.*

*It is too early to know whether decisions made a PHP hearings will last, or are more accepted by the parents, or better for the children.*

<sup>1192</sup> In the introduction material this was also referred to as "outcomes that will stick".

<sup>1193</sup> Mean 2.47, C.I. 2.31 to 2.63, see Figure 24 and Table 14.

<sup>1194</sup> Which can be seen as the second dimension of the "outcomes that will stick" criterion from the introduction materials.

<sup>1195</sup> Mean 2.78, C.I. 2.61 to 2.95, see Figure 24 and Table 14.

<sup>1196</sup> Means 2.63 (<5 cases) and 3.16 (>4 cases), Pearson Chi-Square = 17.733, DF = 4, P-Value = 0.001. The analysis had too many cells with a frequency <5, but a repeated test with 2x3 analysis (by combining the strongly agree and agree and strongly disagree and disagree counts), found a similarly low P-Value <0.0001.

<sup>1197</sup> See compendium: outcome objectives 5, 6, 9, 10, 11, 12, 15, 21.

<sup>1198</sup> Albeit that conflict theory explains why this is often not the case in severe parenting disputes, see generally chapter 13.

<sup>1199</sup> See Hunter supra n602, 53-55. Most scores were only marginally in "positive" territory, with Hunter commenting that on a 5-point Likert scale for performance criteria, she would have interpreted only scores of closer to 4 being significant endorsement. It is noted that Hunter does not provide details on how the scores she found correlated with the substantive outcome of cases (i.e. does a parent's opinion of the process relate to whether they had the feeling to have won or lost?). One would hope that the PHP evaluation will include this type of statistic. [It does not.]

<sup>1200</sup> [The official evaluation contained questions on these issues, but limited discussion.]

Given the lackluster results about improving outcomes for children, it would seem that respondents entertained similar views about the outcome for parents. An important parent-related outcome objective of the PHP process is that it will improve the parents' capability to resolve issues in future, i.e. that the process will have taught them skills, or improved their relationship, with a positive result for their post-separation collaboration, which is described as "*providing parents with a model for resolving disputes constructively*".<sup>1201</sup> The survey respondents disagreed with the suggestion that the PHP process will have that suggested outcome.<sup>1202</sup>

In conclusion, it appears that the PHP fails to meet the outcome objectives for parents.

### *Educated parents with modified behaviour*

One of the truly novel aspects of the PHP process is its integration of therapeutic interventions into the actual hearing. In the case of the PHP process this not only involves consensual dispute resolution methods. It goes further, and introduces education and behaviour modification in the preparation for and during the proceedings as explicit objectives.<sup>1203</sup> Education of the parties prior to the process is formulated as being of crucial importance, while the lawyers are cast in the role of educators of their clients. This role involves ensuring that their clients watch the DVD and are aware of the objectives and characteristics of the PHP approach. The clients must also be assisted in their preparation for their opening statements and the subsequent communications with the judge. In this light it is unsurprising to find that the introductory material emphasizes that "support and buy-in" from the lawyers is an important component of the success of the pilot. While the lawyers have a task in assisting the client throughout the proceeding, and making sure issues are not missed or miss-addressed, the clear intention of the programme involves direct communication between the judge and the parties. This direct communication plays an important role in the judge's involvement in determining issues (see below under process objectives), and it will no doubt also be fundamental in achieving another outcome objective: "*The new process is intended to redirect their [the parents] attitudes and behaviour as co-parents along more constructive, child-focused lines*".<sup>1204</sup>

In chapter 5, I discussed the influence of political ideology on court process and the development of the "therapeutic state", where law and legal process are used to achieve ideological conceptions of good health and social adjustment. In that utopian environment, no court process is undertaken without conciliation attempts and/or re-education of the parties in order to demonstrate to them the errors of their behaviour and their lack of conformity with appropriate social norms. It would seem that the PHP process is attempting that type of achievement. Rather than hearing and determining the issues as perceived by the parties, the court engages in communication, re-education and behaviour adjustment in order to achieve "consensual agreement" about behaviour patterns that align with policy objectives.

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<sup>1201</sup> See briefing paper, Boshier and Udy supra n234, 2.

<sup>1202</sup> Mean 2.70, C.I. 2.56 to 2.85, see Figure 24 and Table 14. There were no statistically significant differences between the 2007 and 2008 surveys or between categories of practitioners in this respect.

<sup>1203</sup> See compendium: outcome objectives 7, 13, 18, 19, 21, 22, 23, 24 and 31.

<sup>1204</sup> See briefing paper, Boshier and Udy supra n234, 2.

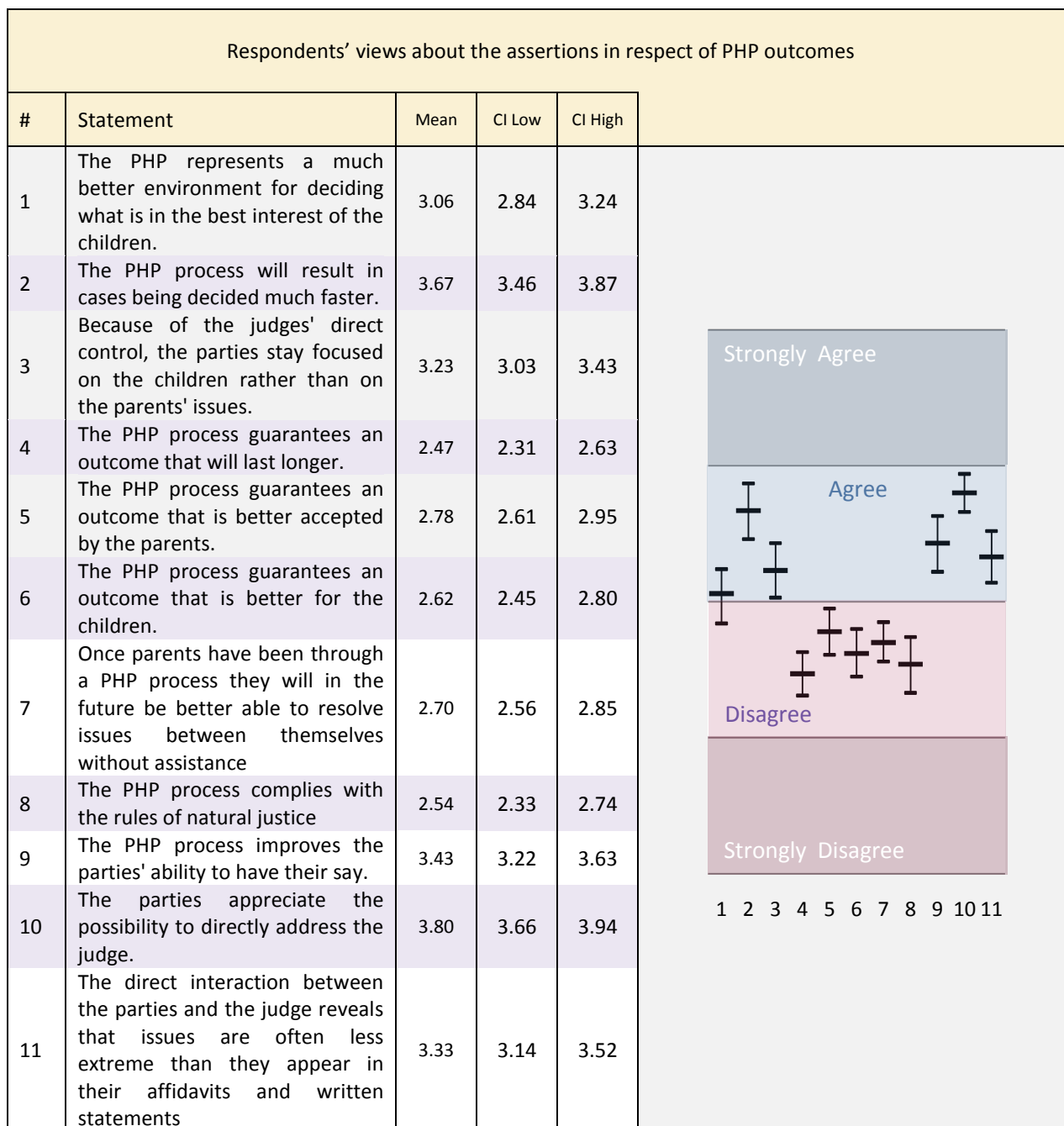


Figure 24 Respondent's Views about the Assertions in Respect of PHP Outcomes

The intended outcome involves re-adjusted citizens that have “*transcended the blinkers that separation conflicts often create*”.<sup>1205</sup> While there is no doubt that conflict creates such blinkers it is highly debatable whether “transcending” them is an appropriate objective for the judicial process.

The same may be said about the objective that the PHP process should “*retain and re-emphasize*” educational programmes that are undertaken elsewhere in the governmental structure, such as the

<sup>1205</sup> Briefing paper, Boshier and Udy supra n234, 2.

“parenting through separation” courses.<sup>1206</sup> While providing that sort of programmes can conceivably be seen as a proper government function,<sup>1207</sup> it is difficult to understand why the courts should be using their judicial authority to re-emphasize, let alone retain such programmes. One becomes almost palpably aware of an intervention from a social science perspective. Where such ideas become part of judicial presentations,<sup>1208</sup> and even judicial directions, there arguably is a level of advocacy present that does not properly belong in a court system where civil matters are adjudicated, regardless of the potential benefit of such programmes.<sup>1209</sup>

The outcome objective of parent education and behaviour modification is multi-faceted and very difficult to evaluate directly, short of applying psychological instruments. My research did not involve any direct contact with parties, and it must be seen whether the official evaluation will address this issue. Indirect measurement of this objective may be obtained by considering the quality of the outcomes for children and parents, as already discussed above, but there are too many confounding variables to properly ascertain any effect of education and behaviour adjustment separated from all the other innovations included in the PHP process. This problem is aggravated by the lack of specific information about treatment levels or about any hypothesis underlying this objective.<sup>1210</sup> There were no specific questions in my surveys to address this aspect, other than the question whether parents would in future be better able to resolve issues, after being involved in a PHP proceeding. This was already discussed under the previous heading, concluding that the PHP does not seem to create the desired outcomes.

#### *Increased confidence in the court system*

Restoring and improving confidence in the court system is related to access to justice,<sup>1211</sup> and the perceived quality of judicial process. An important and often heard criticism about civil court process relates to delays. Given the many other problems arising from delays in family matters, it is understandable that speed increase is common to many PHP objectives. However, the list of complaints about the Family Court is long<sup>1212</sup> and it contains issues that have little to do with speed, or that in fact represent “the other side of the coin”: quality of justice.<sup>1213</sup> Arguably, increasing the speed of the process must never be pursued by reducing its quality. Practitioners considered that overall (including the speed issue), the PHP process was only marginally better than the traditional process,<sup>1214</sup> while the responses were either neutral or marginally negative on the other quality aspects, and positive about its speed. It

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<sup>1206</sup> One of the “objects” formulated by Judge Smith, see Smith *supra* n663, 184. [It is noted that this topic receives considerable attention in the official evaluation, mentioning also that some judges required sighting of the completion certificate of that course before undertaking the PHP process: Knaggs and Harland *supra* n9, 61 and 72.]

<sup>1207</sup> Perhaps under the heading “public health” or “social development”.

<sup>1208</sup> See articles by Judge Smith, n663, above.

<sup>1209</sup> It has been argued that the approach to use courts to address social problems is misconceived and that it has been unsuccessful for almost a century, because such attempts are hampered by structural issues, such as overwhelming caseloads, administrative inefficiencies and problems in finding charismatic judges that can actually perform the required role: Spinak JM “Romancing the Court” *Family Court Review* (2008) 46, 258-274.

<sup>1210</sup> One would imagine that a part of the treatment sample could have been assigned to not having seen the DVD, or been subjected to different assistance from the lawyers or that the judge had applied a different approach. While this would have complicated the design and execution of the experiment, the information obtained from it would have been much finer-grained.

<sup>1211</sup> Lack of access to justice is generally perceived as one of the most damaging factors for public confidence in the court system, see New Zealand Law Commission *supra* n137.

<sup>1212</sup> For an overview see New Zealand Law Commission *supra* n328.

<sup>1213</sup> Unfortunately, the issue is not clear cut, as improved speed only improves the quality of the process to the extent that speed improvements do not affect other quality aspects.

<sup>1214</sup> Means 3.14, C.I. 2.93 to 3.44, see Figure 25 and Table 15.

would follow therefore, that the speed advantages of the PHP are neutralized by disadvantages on other aspects. In conclusion, it is not speed by and in itself that is determinative; it is a speed increase while preserving quality that should be pursued, i.e. the quest should be one for efficiency. This aspect will be discussed in more detail below.

An original suggestion included in the PHP material is that confidence in the system (trust in the process) will also be improved as a result of the parties' opportunity to directly engage with the court, particularly through their opening statements in the preliminary hearing. That suggestion was based on the observation that in the Australian CCP pilot every litigant took the opportunity to directly address the judge, and that the CCP evaluation found that this was appreciated. Other than by directly asking the parties, it is difficult to establish whether this causality exists. As will be seen when evaluating the process objectives, PHP parties did also appreciate the opportunity of direct interaction with the judge, and the improved ability to have their say. This also had an effect on the adversarial mindset early in the hearing process, which must certainly be an advantage for the process.<sup>1215</sup> Given this appreciation for direct interaction with the court, it would be interesting to consider an adjustment to the process where this first interaction with the court would take place much earlier, for instance at the very beginning of the process, somewhat akin to the "comparison" hearing from Dutch procedure. It is unclear how the official evaluation will measure and analyse the process' performance in respect of this objective, other than by directly asking the parties and comparing this with a control group of non-PHP cases.<sup>1216</sup> It is also noted that the number of PHP cases over the pilot period was just one percent of all similar cases in all courts.<sup>1217</sup> It is inconceivable that the PHP will have had any significant effect on general confidence in the court system, so it would be futile to attempt to measure this objective in a general way.

## PROCESS OBJECTIVES

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A large number of process objectives can be extracted from the PHP documentation,<sup>1218</sup> but there is very little information about performance targets. This problem is aggravated by the informal, ambiguous, and abstract character of the PHP information as compared with the structured format of court rules. It is also difficult to set precise targets in a process that is largely governed by discretionary, flexible and somewhat nebulous procedures. The only concrete criteria are the time limits between the various stages of the process. I was unable to obtain access to CMS<sup>1219</sup> data and am therefore unable to provide an analysis of the PHP performance at the level of time related process objectives.<sup>1220</sup>

The practitioner surveys contained a number of items that addressed process characteristics and some of these have already been discussed above, in the context of the assumptions that underlie the PHP innovation. The results for an additional block of questions that related to process objectives are

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<sup>1215</sup> This has been discussed above under 'reducing adversarialism'.

<sup>1216</sup> [The official evaluation does not discuss this issue.]

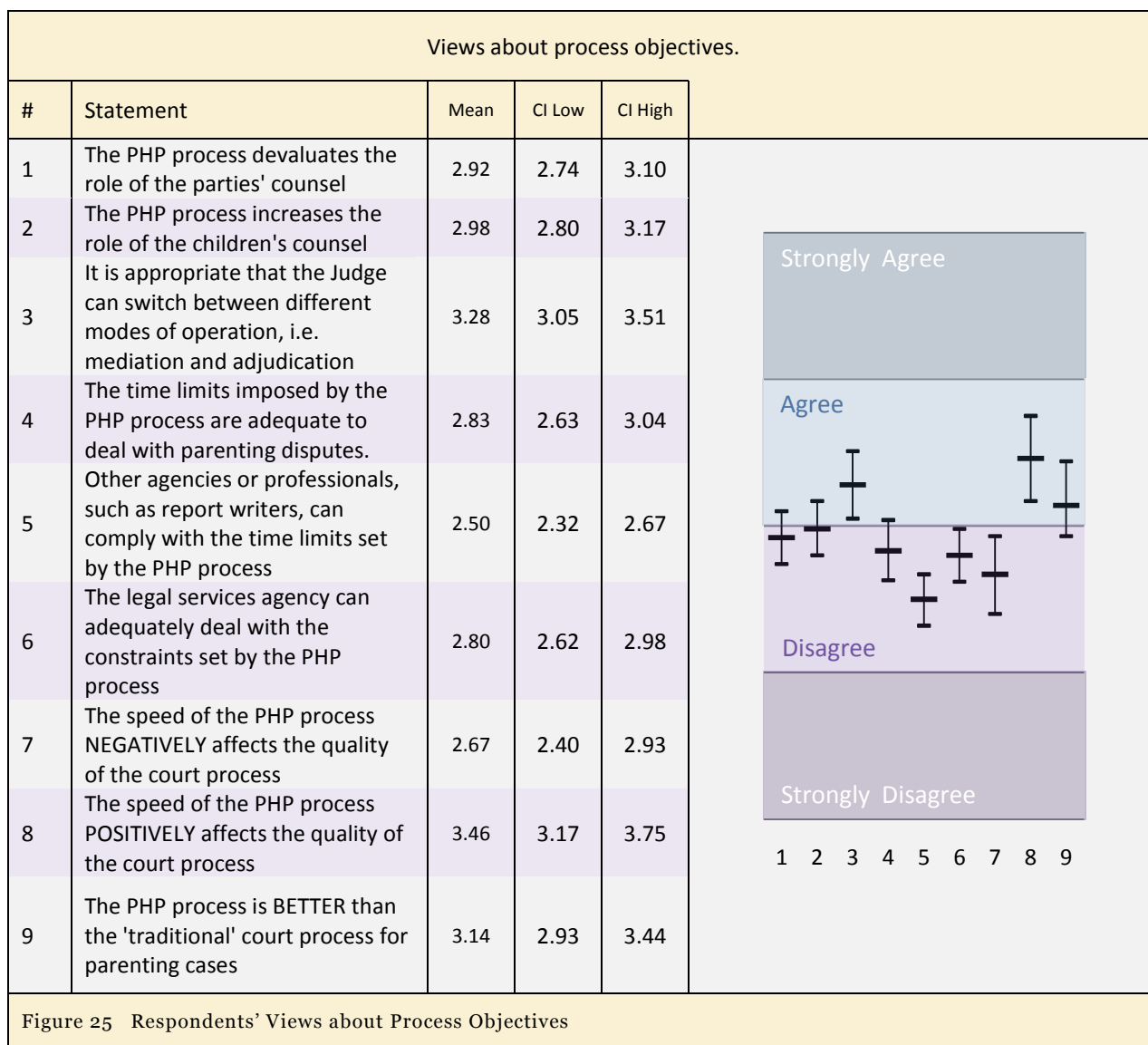
<sup>1217</sup> [Knaggs and Harland *supra* n9, Table A1.]

<sup>1218</sup> The "compendium of objectives" includes these objectives and demonstrates how they can be further sub-divided and organized to the level of process rules. See the online resources at [www.phpthesis.webs.com](http://www.phpthesis.webs.com).

<sup>1219</sup> CMS stands for Case Management System, the central database that is used for case administration.

<sup>1220</sup> [The official evaluation discloses that the evaluation team that had access to CMS data was also largely incapable of providing detailed analysis as a result of deficiencies in the CMS system and its use. See Knaggs and Harland *supra* n9, appendix 1. What is clear is that the timing objectives were not achieved.]

summarized in Figure 25.



The discussion can be organized by the three main categories of process objectives I identified:

- A less adversarial process; in control of the court
- Focus on the child
- Integration of (therapeutic) ADR techniques

Conceptually, the first translates into the main body of rules, while the second and third give direction to the interpretation of the rules or the purpose of the rule system. Before discussing the process objectives, I must address the procedural effect of domestic violence issues.

#### THE EFFECT OF VIOLENCE ISSUES ON PROCESS OBJECTIVES

It will be remembered that two 'tracks' enter the PHP system: those resistant to consensual interventions and urgent cases. Cases from both tracks may contain violence or abuse issues, albeit that the second track is a more likely candidate. While the PHP introduction material is quite explicit that cases

involving violence issues can be entered in the PHP process, it does not provide for an amended procedure.<sup>1221</sup> Several survey respondents questioned whether cases that involve violence or abuse should be entered into the PHP process at all,<sup>1222</sup> while some complained about the lack of clarity about the criteria for entrance generally:

*In [...] we were promised that domestic violence and serious abuse and sexual abuse cases would not go in to the programme - they are - the system is judge dependent - run in different ways in different areas - the clients are railroaded into settling often without the chance to cross examine psychologists or social workers or anyone else - it appears that fundamental dynamics between parties are being missed (e.g. alienation vs. violence - power and control etc) by such urgent early assessment of issues controlled by the judge who has never met the parties before or only briefly - the judges who are meeting the children are not getting the full picture - but think they are - rules of natural justice are being breached - there remains no list of criteria to establish what makes a case suitable for entering the programme or not - I had to ask one judge 5 times the same question - it appears that it is the case that "looks right" - when asking judges what the PHP system actually is some believe it is just a faster system. Judge moving between mediation (not that they can all do this) and judging is a clear breach of natural justice critiques are not available unless fought for.*

*As noted above, in my view the PHP process is suitable where the issues are narrow or already defined because the parties have already been to Court before and there is already substantial material before the Court (e.g. already a previous s133 report). It is not suitable for cases involving violence and abuse because it does not allow time for all relevant evidence to be put before the Court, for proper testing of evidence, and for adequate report writing. Even where the programme does suit particular cases, it tends to increase the time taken to dispose of cases which do not go into the programme. Some litigants are advantaged, but at the expense of other litigants (and their children).*

*PHP hearings particularly disadvantage victims of domestic violence and those who are inarticulate or powerless. They are a vehicle whereby Judges can conveniently ignore power inequalities and deny relevant evidence in the name of judicial expediency.*

*The major advantages of the PHP are the speed and the ability of the Judge to "sift" issues at the preliminary hearing. The outcomes should not be too different although there is a risk that the process may result in a blunter or superficial outcome. Where a court is required to make findings such as s60 COCA the inquisitorial role of the Judge is inappropriate and so allegations of DV need to be determined in the traditional adversarial process rather than PHP.*

Given this type of comments and recent statistics about domestic violence,<sup>1223</sup> it is necessary to consider the arguments to exclude cases that involve violence altogether, or to at least use a different procedure. The first is that the assumptions underlying the PHP include the idea that overly adversarial or intractable proceedings result from mutual ongoing conflict, which must be overcome or set aside in order to be able to re-focus on the child's interests. In violence cases there may not be a mutual conflict at all; the abuse can be utterly unilateral. To suggest in such circumstances that violence must be overcome or set aside by both parties to promote a collaborative model is a strange approach, particularly where the abuse is of a nature that may well damage the children. The only way to "mend" those situations is by complete relinquishing of abusive control by the dominant (violent) party with acceptance of responsibility, perhaps even contrition. If that cannot be achieved, the "alternative" approach of the PHP has no proper foundation.

Secondly, the PHP programme is strongly based on the (social science) assumption that virtually all contact with both parents is good for children. This is not the case in high-conflict situations, particularly

<sup>1221</sup> Although my court observation indicated that a different approach is used where allegations of violence are present. See also: *GDPP v HJG* Family Court Dunedin, 15 January 2008, Judge Smith, FAM-2007-012-723 (case enters PHP after the s60 hearing); *AABB v HHTN (Php Case)* [2009] NZFLR 371; *B V N (PHP Case)* Family Court Rotorua, Judge MacKenzie, FAM-2008-063-143.

<sup>1222</sup> [The official evaluation found that lawyers were overwhelmingly of the opinion that cases with serious violence and abuse issues were not suitable for the PHP process. See Knaggs and Harland supra n9, technical report table A20.10.]

<sup>1223</sup> Statistics indicate a high occurrence of family violence, typically directed at the female partner: Families Commission *Family Violence Statistics Report* (Research Report No 4/09) (Wellington, Families Commission, 2009).

those including inter parent violence, and certainly not in situations where the violence concerns the child. While the legislation clearly provides for a different approach under substantive law,<sup>1224</sup> the PHP does not recognize this in its procedure.

Thirdly, the PHP requires direct communication with the judge, in a court setting. The process does not recognize that victims of abuse may have psychological problems with this, and can be severely disadvantaged by it. This applies also to mediation, and mediation literature accepts that serious abuse cases are unsuitable. The PHP effectively enforces compulsion with both aspects.

Fourthly, the PHP process is orchestrated to look to the future. It explicitly seeks to exclude the past. That message is not too subtly impressed on the parties, to the extent of including compulsion to view a DVD demonstrating appropriate court behavior. That material never raises the issue of violence, or how to deal with it in the PHP process. It is ignored; the most contentious issue in the DVD is an allegation of minor drug use. The scenario as portrayed is at odds with the reality for intractable disputes and particularly for cases involving domestic violence. As a result a victim of violence may well be inhibited to raise the issue for fear of being seen as antagonistic or provocative, or they may feel anxious or guilty about revealing the violence or the extent or nature of it.

Fifthly, the process strongly enhances the role of the judge, and therefore the judge's personal views on the issue of violence and his or her attitude to addressing it. Obviously, this can have advantages and disadvantages, depending on the judge. In a proper legal system there should not be such differences, and a clear process directive would be preferable. From my court observations it was clear that a slightly different process was followed in at least some cases involving allegations of violence. In those cases the preliminary hearing started with a brief introduction of the issues, followed by a short traditional style intermezzo to determine whether violence was proven and its extent. There followed a ruling on that aspect, and then the process continued.

Sixthly, the problem of early identification of issues and early "fixing" of them in order to then determine what evidence will be relevant. If violence is not raised by that stage, the proceeding may well be set on a course that is slanted against the victim, for instance by not having the issue addressed in reports. Clearly, it is the lawyer's role to make sure any violence issue is identified and addressed at an early stage. This in turn may well lead to an increase in the often heard complaint from men's groups that violence is spuriously raised in order to evoke a biased attitude from the court. Creating a specific process where violence is alleged, also creates a potential problem, that of tactical abuse of such a process.<sup>1225</sup> That is particularly the case where a different process gives rise to presumptions or procedures that may be seen as disadvantaging one party. Given that violence allegations by their nature (and in law) may not be ignored, this problem can only be resolved by a very swift determination of the evidential basis and severity of the alleged violence or abuse. That determination should ideally be undertaken as a distinctly different step in the proceedings, given the disadvantages of applying the PHP method to parties who

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<sup>1224</sup> S60 of the Care of Children Act 2004 requires that a court first establishes whether allegations of violence against a child or against the other party in the proceedings have been proven. For some cases exemplifying the difficulties that may arise, see *J v W* High Court Wellington, 28 July 2009, Gendall J, CIV-2009-485-001239; *Cap v Sil* [2008] NZFLR 370.

<sup>1225</sup> For an example, see *J v W* High Court Wellington, 28 July 2009, Gendall J, CIV-2009-485-001239.



may have been in a violent relationship. As said, the PHP process does not currently contain such an additional step, albeit that it appears that violence allegations are in practice addressed as a distinct part of the preliminary hearing. It may be expected that the official evaluation will provide further data on this issue, and suggestions on how to deal with it.<sup>1226</sup>

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*PROVIDE A LESS ADVERSARIAL SYSTEM, MANAGED BY THE COURT*

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The main group of process objectives creates a set of rules that implements a “less adversarial” process. Each rule in that system should ideally have been described in terms that make it amenable to evaluation and performance targets such as time limits, restrictions on certain activities,<sup>1227</sup> or instructions to comply with certain directions.<sup>1228</sup> In practice, however, performance targets have only been made explicit and quantifiable for a few time limit objectives. In addition, there are overall (collective) process-objectives that one would expect in a pilot, but that are not mentioned at all. Examples are the proportion of cases that settle at the various stages of the process, the number and nature of issues that settle and those that need to be determined, the number and length of affidavits, compliance with report directions, or the duration of events (e.g. hearings). Furthermore there are a large number of potentially relevant variables relating to the parties or case scenarios that can be recorded and that may be used to analyse how case characteristics correlate with performance at the level of process objectives. It is unclear whether this type of data has been collected and whether the official evaluation will consider the pilot’s results at that level of detail or aggregation.<sup>1229</sup>

*Two types of cases enter the system*

It is unclear whether the purpose of the PHP process is that eventually all parenting cases will be subjected to it. This also raises the question what criteria were used to determine whether cases were suitable for the pilot process, and how this might translate to the process that will eventually be introduced. There is no information available about the number of cases that were deemed unsuitable for the PHP process,<sup>1230</sup> and what the typical characteristics of those rejected cases were.<sup>1231</sup> No information has been provided about the proportion of cases entering the PHP process through either of the two tracks, and how this correlates with processing times and other process variables.<sup>1232</sup>

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<sup>1226</sup> [The official evaluation does address the issue specifically, confirming the approach witnessed in my observations, and noting that lawyers were not convinced that the PHP process should deal with violence, and were in fact strictly against the PHP dealing with cases with allegations of child abuse and serious mental health issues. See Knaggs and Harland supra n9, 35-36.]

<sup>1227</sup> For instance that no additional affidavits may be filed without leave, or that no witness summons can be issued without leave.

<sup>1228</sup> For instance directions that a report must be provided addressing specific issues.

<sup>1229</sup> [The official evaluation does not contain information of that nature.]

<sup>1230</sup> [The official evaluation reveals that 7% of potentially suitable cases in the pilot courts were assigned to the PHP process. It is unclear whether that means that 93% of parenting cases were deemed unsuitable.]

<sup>1231</sup> [The official evaluation concludes that suitable cases for the PHP are “those where parties were willing to resolve matters, where issues had not become too entrenched, and where cases involved narrow issues.” Apparently, these were also the cases that were selected, as 82% of responding lawyers opined that suitable cases were selected generally. See Knaggs and Harland supra n9, 15. Nevertheless, one third of lawyers had experienced at least one case that was not suitable for the process: *ibid*, 36. By interpreting the report data (*ibid*, tableA20.8, 72) it seems that 84 cases were deemed unsuitable (assuming that only one lawyer in each case has this opinion). This would represent 26% of all PHP cases, despite the careful selection on suitability criteria. Cases that were deemed unsuitable are those involving violence and/or child abuse and serious mental health issues.]

<sup>1232</sup> [The official evaluation does not address that issue.]

### *The process is strictly prescribed in stages*

There is no information available about compliance with the strict prescription of stages within the process. If my court observations are representative for the entire pilot, it would be necessary to further streamline the process and clarify the rules, particularly to the lawyers involved, and to a lesser extent to the judges. As far as I have been able to establish, there was no structured recording of compliance with the process steps, so it is unclear how this will be evaluated.<sup>1233</sup> A study of actual court files, analogous to the limited file study that I undertook, would be a suitable avenue to gather data in this respect. That could be extended by also including the audio recording that was made during all PHP proceedings or the transcripts that were made in some cases.

### *Changing the judge's role and powers*

The procedural changes brought about by the PHP process are mainly aimed at changing the role of the judge and increasing the judge's powers. By necessity this also requires changes in the roles of the other participants in the court process. It is appropriate to briefly consider the "traditional" role of the judge and the perceived disadvantages associated with that role that are now sought to be cured. In 1956, Lord Denning sketched the fundamental differences between adversarial and inquisitorial paradigms on the judges' role as follows:<sup>1234</sup>

*In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find the truth and do justice according to the law; and in the daily pursuit of it the advocate plays an honorable and necessary role. Was it not Lord Eldon LC [in Ex parte Lloyd (1822) Mont 70, 72n] who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'?...and Lord Green MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations?*

This quote has been used in the Australian CCP/LAT context to identify and portray the perceived problems with the adversarial judge's role in the conduct of parenting cases.<sup>1235</sup> The picture thus painted does, however, not recognize that the quote itself significantly qualifies the extreme proposition of the aloof and uninterested arbiter who only acts upon demand. It also fails to acknowledge that the quote involved a workplace dispute (a mining accident) and not a family matter, that it concerned a case where the judge was alleged to have been too interventionist, that it is more than 50 years old, and that in the intervening period some extreme changes have been made to both substantive and procedural family law. It further ignores that parenting matters as recognized today, with their emphasis on collaborative post-separation co-parenting, simply didn't exist until the early eighties. Lord Denning would most likely have been flabbergasted by the child welfare arguments that are now advanced in family courts on a daily basis. To be using this caricature as a starting point to promote a different judicial role for parenting cases smacks of misrepresentation.<sup>1236</sup> In any event, it can be argued that even in the Australian LAT

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<sup>1233</sup> [The official evaluation does not contain information on that issue.]

<sup>1234</sup> The quote is from *Jones v National Coal Board* [1957] 2 QB 55 at 63, a case which considers inappropriate judicial meddling in the proceedings. Interestingly, this case was also quoted by the Australian Family Court in allowing an appeal on grounds of natural justice against a decision reached in a "LAT" proceeding which had been undertaken without consent, see *"Dobbs & Brayson"* [2007] FamCA 1511.

<sup>1235</sup> See for instance Harrison *supra* n558, 4.

<sup>1236</sup> See also Fogarty *supra* n598, 6.

method, the role of the judge is not intended to be as fundamentally altered as is promoted in Harrison's report, but that the legislative intent was merely aimed at directing the judge to more assertively use the powers already available under the evidence legislation to more closely adhere to the principles in the 'LAT' sections.<sup>1237</sup> That argument cannot be deployed in respect of the PHP, as that process has not yet been formally introduced in legislation or regulation. There is therefore no material that can be analysed in order to determine precisely what the new role and powers of the judge are, or are supposed to be, and how these fit within the existing rules and traditions that govern civil proceedings. The PHP introduction materials deviate substantially from the format by which court rules are normally promulgated in New Zealand. Nevertheless, the PHP is supposed to be a "new process" and the introduction materials must therefore have the intention to operate as a rule system. Absolutely central in the PHP process is the role of the judge, described as:<sup>1238</sup>

*...A more proactive role for the Judge in identifying the issues to be resolved and in deciding the process for doing this. The Judge will decide what evidence may and may not be called, and in what manner.*

This new judicial role also involves a completely different style of engagement with the parties, and a freedom to take whatever information from that engagement and turn it into admissible evidence, even when the character of engagement is conversational or mediative in nature. It is contemplated that by directly engaging with the parties, the judge may determine that issues are different from what has been filed in court, or even that non-legal issues must be identified and resolved. The briefing paper states in that respect:<sup>1239</sup>

*Further, listening to the parties directly allows the judge to hear and observe the true dynamics between the parties, and to get a sense of any significant non-legal issues that are obstructing a resolution of the case. The parties' statements may also reveal that their true positions are quite different from and less extreme than, the legal documents they have submitted – for example, it may be that a dispute about day-to-day care is really about the extent of contact. In the Australian programme, the parties were typically more measured in their statements than they might otherwise have been.*

While this type of statement may invoke images of a "big brother" approach to dealing with litigants, the perception of lawyers is that the parties appreciate the ability of having their say,<sup>1240</sup> with respondents with more experience in PHP providing a significantly higher score.<sup>1241</sup> Unsurprisingly therefore, there also was a small but significant difference between the two surveys.<sup>1242</sup> The results also show that the parties appreciated the direct interaction with the judge,<sup>1243</sup> while there is also agreement with the suggestion that the direct interaction reveals that issues are often less extreme than they appear from affidavits and statements.<sup>1244</sup>

In the PHP introduction material, the role of the judge is heavily emphasized and the role of the other participants (particularly the lawyers) is clearly made inferior to that of the judge. While a judge by

<sup>1237</sup> Ibid, 16-17.

<sup>1238</sup> Briefing paper, Boshier and Udy supra n234, 2.

<sup>1239</sup> Briefing paper, ibid, 8.

<sup>1240</sup> Mean 3.43, C.I. 3.22 to 3.63, see Figure 24 and Table 14.

<sup>1241</sup> Means 3.94 (>4 cases) and .3.22 (<4 cases), Pearson Chi-Square = 14.453, DF = 4, P-Value = 0.006.

<sup>1242</sup> Unsurprisingly because in the second survey there will have been more respondents with more PHP cases experienced. The means were 3.48 (2008) and 3.38 (2007), Pearson Chi-Square = 11.671, DF = 4, P-Value = 0.020.

<sup>1243</sup> Mean 3.80, C.I. 3.66 to 3.99, see Figure 24 and Table 14. Question only put to respondents with PHP experience. This was one of the most outspoken opinions in the surveys. [The official survey confirms this aspect with 91% of lawyers noting this as a positive aspect, which was also the highest score in the official lawyer survey, see technical report: Knaggs and Harland supra n9, table A20.18.]

<sup>1244</sup> See also n1149, and associated text.

nature of their role must have authority and be in charge of the proceedings, there is nothing in the law or in tradition that requires the judge to be placed upon the all-knowing and omnipotent pedestal that the PHP process appears to be seeking. In ordinary civil proceedings, the parties present their evidence and argue how the law applies to it. A judge may or may not engage in some exchange about the application of the law, will take submissions and decide the matter. The Family Court has always deviated somewhat from this model, with a judge that engaged in the issues from the child's perspective (by engaging the lawyer for the child) and had more flexibility in evidential terms. There would arguably have been room for some further development of an interventionist role, for instance by taking a more assertive stance on evidential relevance and admissibility, or directing the lawyer for the child to bring additional evidence. It is unclear why the PHP takes the rather aggressive approach of radically changing these matters in the way this was also done in Australia.<sup>1245</sup> If one was to hazard a guess, the Australian urge was based on collusion between the social science lobby and the Family Court judiciary.<sup>1246</sup> In New Zealand there appears to be less influence from the social science lobby directly, but there seems to be a strong ideological component in the way the Ministry of Justice seeks to use the procedural operation of the Family Courts to achieve policy objectives, coupled with a well documented vision of the Principal Judge to fundamentally adjust procedure. Whatever the underlying cause, the changes the PHP process brings to the judicial role are substantial. The role of the judge attracted much comment in the open questions in both surveys. The quality, skills, experience, consistency and availability of judges were mentioned most often:

*My only concern is the variability of how the Judges operate; this can cause real difficulty for clients*

*Many answers are dependent on which Judge is running the PHP hearing, some are better than others!*

*Much depends upon the quality of the Judge who is managing the file. In the event that he has a clear pre-determined view, the danger that he has increased powers of what may or may not be the issues can be dangerous. The role of experienced lawyer for child cannot be over-emphasized.*

*We need more Judges, as it is practically impossible to get a fixture these days. The issue of ADR is a separate one, but I don't think we should be giving the few Judges we have more non-judge work. The Judges actually aren't that good at ADR. Though there are times when it is good to have the firm hand of a Judge on case management issues, the existing case management process with case managers usually works fine. ADR is critical but we should be getting more resources, specifically trained mediators, to fill that role.*

*Judges far too often interfere with cross examination generally because of time factors. They decide what is relevant far too early and shut down complex questioning without real understanding of what counsel are trying to achieve. They could speak to counsel in chambers or have 'side bars' like in the US but not enough time! Here however there is demeaning intervention with judges often getting the wrong end of the stick. The text book 'set up' of cross-examination is long gone in the family court!*

*To make our judges more inquisitorial: then they are going to need specific training.*

*The PHP project relies heavily on the skills (including people skills) of the Judge. If you have a really good people/legal Judge then PHP is great. If not, then the process is extremely painful and largely unhelpful for all involved!! It would also help if there was consistency re: the hearing. Parties are directed to watch the DVD but on occasion (perhaps more often than not) the hearing does not resemble the DVD in any way shape or form. If I were a party I would be particularly confused. My final comment is that regardless of the process (PHP or standard) so much depends on the skill of the Judges. When you have a good Judge either process will work if not then the adversarial process has the potential to cause far more damage. By "good" I mean good legal skills and good people skills - not all our Judges have both. Come to think of it - not all practitioners have that either - so maybe we are all equally to blame for any shortcomings of the Family Court.*

<sup>1245</sup> See Fogarty supra n598, 5-9.

<sup>1246</sup> See the articles in which the Australian Chief Justice co-authors or provides forewords, for instance Harrison supra n558, McIntosh, Bryant and Murray supra n612.

*I do not think NZ Family Court judges are trained or experienced enough to work in an inquisitorial way. When they try to do this, it sometimes escalates conflict more than the adversarial process.*

*My positive feedback on the process is that parties feel they have been listened to, have a chance to get matters off their chest early in the piece and can focus on the future and making workable arrangements. It is very issue focused and stops lawyers/parties going off on tangents. The case management has generally been very good. My negative feedback is that the role of the Judge is critical. He/she must understand the dynamics and current psychological research on domestic violence so that consent to arrangements is not extracted where it is not informed or given under pressure, and proper s60 assessments are undertaken.*

*Judges already decide relevance of evidence. The court process can sometimes reduce conflict too - through mediation and a constructive lawyer for child. Leaving judges to decide relevance further may impede parties' access to justice and leave them feeling unheard.*

The quantitative responses in respect of the changes to the judges' role have been discussed previously, showing that there is support for increased case management and some inquisitorial powers, particularly in respect of additional evidence, but there is disagreement with the idea that the more far-reaching interventions will provide a better process. What is particularly evident from the responses is that the quality and consistency of the judges will be a determinative factor for the overall success of the PHP process.<sup>1247</sup> Where a good judge uses the process appropriately, it may have distinct advantages:

*I thought the PHP process was just great - like mediation with teeth. The Judge (who of course was a top family lawyer in former life) was able to cut through a lot of nonsense by asking questions direct to the parties. [I'd think that should be more satisfying to the Judge too, rather than having to sit and listen to whatever the lawyers decide to put before the Court] However I don't think one can GUARANTEE things as referred to above.*

This must be balanced with comments like:

*I liked the fast timing of the first hearing. I disliked the arrogance entailed in the judge dominating the proceeding, the failure to specifically give counsel opportunity for submissions, counsel would need to interrupt the judge's regime to take up this aspect which is claimed to be allowed, the judge didn't understand the client's language, the judge told the clients he wasn't keen on hearing criticism of the other parent, so began shutting them up before we started.*

In the end, it may come down to the quality and skills of the lawyers as well:

*The advocacy skills of counsel come to the fore in these cases. The more experienced the better the result, more so than in the traditional hearings. As the process differs from judge to judge and sometimes from case to case, counsel do not know what the process will be. More importantly parties do not know what the process is. It is essential that parties know what the process should be and what they should expect. If lawyers don't know what to expect they cannot prepare their clients.*

The information about the PHP pilot does not provide how the changes in the judges' role will be evaluated. Presumably this will be seen as another derivative from "reducing adversarialism", i.e. if the evaluation shows that cases are resolved faster or that parties are "more satisfied" by some measurement, then it will be assumed that all aspects of the innovation have contributed to that result. A properly designed experiment would have tested at least some of the major aspects of the innovation independently, for instance by processing a number of cases faster within the bounds of the 'traditional' procedure.<sup>1248</sup> As under the previous point, a thorough evaluation of the changes in the judges' role could be achieved by studying a substantial sample of court files in detail.

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<sup>1247</sup> [The official evaluation notes concerns about consistency between judges and courts: Knaggs and Harland supra n9, 69. It does not raise issues about judicial quality, which were prominent in my results.]

<sup>1248</sup> [The official evaluation considered this by asking lawyers and judges whether the speed advantage of the PHP could be reproduced by creating "urgent interim hearings". Lawyers were largely of the opinion that the effect would be similar as were some of the judges. Five of the nine judges asked the question opined that this was not necessarily the case, as urgent hearings would not have the other PHP characteristics: Knaggs and Harland supra n9, 71.]

### *Changing the parties' role*

One of the more prominent changes introduced in the PHP process is the interaction between the parties and the court. It is noted that (at least on paper) the parties' direct involvement in the communication with the judge remains a voluntary aspect of the PHP process, but it is difficult to see how the average party would feel able to refuse that modus operandi in an environment where engagement with the judge is promoted beforehand as the norm and as highly advantageous. This will be particularly relevant where one party is reluctant (for instance in abuse situations), while the opponent does engage directly with the judge, and may be more confident (as is also typically the case in abuse situations). Not engaging with the judge is clearly presented as deviant behaviour, and human nature will always conclude that this is somehow punished, or at least frowned upon, regardless of statements to the contrary. Other than asking the parties about their perception of this aspect of the PHP process, it is unclear how the practical merits of the direct interaction between parties and the court will be evaluated.<sup>1249</sup>

Under the section on outcome objectives I discussed the educational and behaviour modification outcomes and the increased focus on the needs of the child. The PHP material does not provide information how these translate into process objectives or rules, other than the educational role of the lawyers and the judges' powers to determine what the relevant issues are and how these will be dealt with. Given the lack of further specifics or criteria, it is difficult to suggest how this might be evaluated. One way would have been to use or develop a psychological instrument that could have been applied to a number of PHP and non-PHP parents following the conclusion of their cases.

As was seen above, survey respondents reported a high level of satisfaction of their clients with their opportunity to directly engage with the court, and the improvement in the ability to have a say. While some caution must remain in domestic violence cases, the new role for the parties appears to be a useful innovation, unfortunately lacking substantial empirical support in terms of actual outcomes and parents' opinions, rather than lawyers' perceptions.

### *Changing the lawyers' role*

The new roles of the judge and parties directly influence the lawyers' role. Traditional representation and advocacy is replaced by a support model, where the lawyers assist the parties to prepare their opening statements and educate them about the process' objectives and mechanics. The parties' lawyers' role is one of quality control and the occasional specialist activity, such as legal advice, examination and cross examination, drafting proposals etc. The PHP documents also include that the support and "buy in" of the lawyers is required as is their skill in explaining the process and guiding their clients through it. Part of this guidance is apparently that they must advise the clients and ensure them "*they are protected*". It has not been specified what this protection is from, but given the text in the brochure for parents, this is presumably aimed at natural justice and fair process. Another task is guiding the client and contributing to the discussions with the judge.

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<sup>1249</sup> [The official evaluation interviewed some parents, but results from a survey of parents were not used due to the low response. Parents' own opinions on this issue were apparently inconclusive: Knaggs and Harland *supra* n9, 48-50.]

The PHP documents do not provide for any standards in respect of these activities, or who will be monitoring compliance with them, presumably the judge. There is no information about sanctions for non-compliance or insufficient compliance. It will be interesting if case law develops on whether a lawyer has done enough to prepare and educate a client or has perhaps failed in “guiding the client through the process”. The new role for the lawyer for the parties is certainly very different from the traditional model. There is no information how the effect of the changed role for the lawyers will be evaluated, what criteria will apply, what sort of information is being collected for the purpose of this evaluation, and what actions may be undertaken if the objectives have not been realized.<sup>1250</sup>

### *Changing the experts’ role*

The PHP process seeks to focus the experts’ role on the issues that have been determined by the judge, and it places time constraints on the production of reports. While there is logic to the idea that expert reports should be as concise as possible, the reality is that experts are precisely that, experts. As a consequence, they have knowledge and experience in their specialist field well beyond that of a judge, they have their own professional responsibility, and operate within codes of ethics and established professional practices. It is debatable whether overriding those responsibilities by way of court directions is legitimate and whether it will ultimately be to the benefit of the children involved. One is left to wonder why experts are necessary, if the judges are already capable to direct with great precision in which direction expertise should be applied. This also raises the question of the practical use of expert reports. Reference has already been made to empirical study that found that after several decades of increasing use of expert reports, the outcomes of proceedings had not substantially changed.<sup>1251</sup>

The role of the expert is one of the few significant differences between the PHP and its Australian counterpart. In the CCP/LAT the expert is brought into the process and takes what may be described as a central role, the family consultant, who engages in what can best be described as a partnership with the judge.<sup>1252</sup> In the PHP no such role exists, quite the contrary, the judge seeks to limit and ring-fence the role of the expert. Fiscal considerations and very high expectations<sup>1253</sup> of the judges’ skills and qualities are probably the basis of this difference. Again, there is no information how this aspect will be evaluated, what the criteria and standards are, how measurements will be undertaken, and what sort of corrective initiatives would be available if matters didn’t operate as desired.<sup>1254</sup>

### *The process remains subject to formal controls*

The PHP material refers several times to the process remaining subject to “natural justice and procedural fairness”. It also provides that decisions can be appealed to the High Court. Natural justice is not a formal control in itself, but may be a ground to evoke one, i.e. an appeal. As far as I have been able to

<sup>1250</sup> [The official evaluation does not shine any light on these issues.]

<sup>1251</sup> Supra n 411 and associated text.

<sup>1252</sup> A role already suggested more than 25 years ago, see Emery, Lauman-Billings, Waldron, Sbarra and Dillon supra n464, 325.

<sup>1253</sup> Probably even unrealistically high, given that judges are after all prima facie experienced lawyers, and not psychologists, despite substantial experience in this area of law.

<sup>1254</sup> [The official evaluation discusses the problems with the timing of expert reports: Knaggs and Harland supra n9, 45-46), but does not address quality issues or comparisons between outcomes in cases with/without expert reports. The difference with the CCP/LAT in this respect is not discussed.]

establish, no appeals from PHP decisions on this ground have been heard at the time of writing. I discussed the potential problems with appeals from the PHP process in chapter 14, particularly where decisions are (partly) based on consent. Whether an interim decision in a PHP procedure could be appealed before the final decision had been given has not yet been raised in New Zealand. It is unclear whether the official evaluation will deal with these issues.<sup>1255</sup>

#### *FOCUS ON THE CHILDREN'S NEEDS AND VIEWS*

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##### *Participation and parent education*

Increased participation of the children and educating the parents about the effects of conflict on children are relatively new aspects of this objective, added to a range of already existing methods to bring the welfare principle to the centre of attention. The question must be asked where the saturation point of obtaining views about the child's interest lies, and what the role of the child's lawyer is in that context or as one respondent put it:

*The child's right to be heard is equally important, but poorly done by their counsel as a general rule. Biggest issue is systemic abuse of children, and the sheer number of people who feel they have to be involved in ascertaining the wishes of a child e.g. L4Child, Psychologists, counsellors, school teachers/counsellors, family, grandparents and friends are all getting involved unnecessarily. And then when their own lawyer fails to advocate effectively the wishes of the child, preferring their own views on the paramountcy rule, there are constant conflicts of interests that are regular features working against the child, leaving the average lay-person uncertain and disillusioned with the process. Most parents will listen to their children, and will consider what they want to see happen, and this often leads to resolution of the dispute if handled correctly by L4Child.*

The PHP materials do not provide specific details about the way by which child participation is increased<sup>1256</sup> or how that will be measured, recorded and evaluated.<sup>1257</sup> This also applies to the additional education of the parents in that respect.

##### *Child focused decision making*

This objective combines output objectives and process objectives. The PHP process attempts to create an environment that is better suited to decision making about children. It attempts to do that by changing the roles of the participants and by shifting (and restricting) the focus of the proceedings. The idea that the PHP process must provide a better focus on the needs of the child permeates all the introductory material.<sup>1258</sup> But the objectives of the PHP go much further, the process is "*intended to re-direct their [the parents] attitudes and behaviour as co-parents along more constructive, child focused lines*".<sup>1259</sup> This therapeutic outcome objective has direct effect on the process itself: PHP decision making is presumed to be better because the parents' attitudes and behaviors are first adjusted to it. There is no specific justification for that approach in the PHP materials. There is no analysis as to where exactly the traditional process is deemed to have failed to focus on the children, or why any perceived problem

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<sup>1255</sup> [The official evaluation does not consider this issue.]

<sup>1256</sup> It is noted that child participation appears to be the "next frontier" of development in Australia. The recent legislative amendments in New Zealand, now also introduce the possibility of child participation in the mediation and counselling process, as discussed above.

<sup>1257</sup> [The official evaluation confirms that increased child participation was an objective, but concludes that this has not been achieved: Knaggs and Harland *supra* n9, 53-54.]

<sup>1258</sup> See "compendium" items A and 13, 18, 21, 27, 30.

<sup>1259</sup> Briefing paper, Boshier and Udy *supra* n234, 2.



cannot be resolved under the existing rules and powers. The complaints about a lack of child focus are the blanket allegations against adversarial process. No criteria by which the child focus of proceedings may be measured have been provided, and there are no specific performance targets in this respect.<sup>1260</sup>

The practitioner survey asked respondents about the child focus of the process, i.e. whether the judges' control assisted to focus the parties on the needs of the child, as opposed to the adult issues. Respondents appeared somewhat in agreement with that suggestion.<sup>1261</sup> The matter of child focus can also be approached by considering whether the PHP represents a much better environment for deciding what is in the best interest of the children. The respondents were not convinced that this is the case.<sup>1262</sup> Overall, it would seem that the PHP process does not provide a substantial improvement over the traditional process in respect of child focus.

#### *INTEGRATE ADR TECHNIQUES AND THERAPEUTIC INTERVENTIONS*

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While the process objective of integrating ADR techniques and therapeutic interventions into the hearing process is expressly formulated, the PHP materials do not address the difficulties with such a mixture at all, as I discussed in chapter 14. There is no information about the way by which these innovations will be evaluated.<sup>1263</sup>

#### *Summary of Part V*

In this part I evaluated the PHP process and its pilot. Using international research, I constructed criteria for trial projects and concluded that the PHP pilot was devised and executed rather poorly. The official evaluation became available after this thesis was completed, and is therefore not discussed in any detail. Generally, the official evaluation is very limited in scope and depth. Despite using a largely uncritical approach and stating that the PHP "offers important benefits", it effectively concludes that the performance improvements associated with the PHP are at best marginal. The way the PHP pilot was undertaken impresses as a largely political exercise to implement a radically new process in the Family Court without it having been subjected to reasonable scrutiny.

The PHP process itself fares only marginally better in my evaluation. There are some aspects that receive praise, such as the advantages of speed, stricter case management and the opportunities for the parties to directly interact with the judge. But overall, I could not find much enthusiasm for this particular innovation. Important problems that were signaled are non-compliance with natural justice, the quality and consistency of judges, the question whether speed improvements can be maintained with wider implementation and the sustainability of outcomes.

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<sup>1260</sup> [The official evaluation does not mention better outcomes for children or improved child focus in hearings as objectives, and does not discuss the PHP from that perspective, but views these issues in the context of achieving parenting arrangements. The evaluation thus bypasses the question whether such 'arrangements' are in fact desirable in all cases.]

<sup>1261</sup> Mean score 3.23, C.I. 3.03 to 3.43, see Figure 24 and Table 14. The question was only presented to those with PHP experience. There were no significant differences between the 2007 and 2008 results, or between those with different seniority, different specialization, or different PHP experience.

<sup>1262</sup> Mean score 3.06, C.I. 2.84 to 3.24, see Figure 24 and Table 14. Note that this question was only presented to those with PHP experience.

<sup>1263</sup> [The official evaluation does not consider this issue.]

It is doubtful whether a radical innovation like the PHP is necessary when it is generally thought that improved resourcing and efficiency of the existing system would deliver the same, or better, outcomes.

# **PART VI**

## **CONCLUSIONS**

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### **21 CONCLUDING DISCUSSION**

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The PHP process is a judicial innovation that seeks to address two major problems, the pressure on the Family Court resources caused by parenting cases requiring judicial intervention and dissatisfaction with the achieved results compared with the paramount child welfare objective. While the pre-hearing conciliatory processes operate at high and internationally comparable resolution levels, the absolute number of cases requiring a hearing remains high as a result of the large volume of cases that present to the court. I suggested two causes for that high volume.

First the ongoing decline in the popularity of marriage and the reduced relationship between marriage and parenthood, leading to the decline of the traditional family. While apparently outside the reach of policy, these developments correlate with legislative initiatives, and can therefore be placed in a political perspective. The traditional family is an associational construct with strong self autonomy and well understood relationship structures. It is a building block of larger social structures which in turn act as a buffer between individuals and the state. Legal and social recognition of a new diversity of family structures, the accompanying decreasing relevance of traditional marriage and the increased use of legislation and policy to set parenting norms has led to “families” which exist by legal definition but which do not have inherent within them an accepted and deeply cultural embedded set of relationship norms. Hence when difficulties arise in such relationships resort to the legal system is not uncommon.

The second is the almost universal acceptance into policy –and thus legal principle– of an in fact poorly supported social science concept: collaborative post separation parenting. This forces individuals wishing to terminate their relationships into a cooperative effort that requires at least a modicum of empathy. In a small percentage of cases the estranged parents or their circumstances have characteristics that make it impossible to comply with this ideal, while they remain prepared to engage, albeit in conflict. These cases often involve mental health or other issues that are in fact outside the parameters that are recognized in the legalized dispute. The resulting ongoing serious and formalized conflict is harmful for all involved, particularly the children.

Rather than recognizing that for some cases perhaps the desired collaborative model is simply unsuitable, and that the welfare principle may in fact require application of “old fashioned” custody approaches, the problem is assumed to be caused by the legal process to which the conflicting parties are ultimately submitted: the Common Law adversarial litigation model. The PHP represents a procedural innovation that embodies this mode of thinking. It seeks to deal with these difficult cases by increased judicial powers that will allow a quasi inquisitorial process and a merging of ADR techniques into the traditional court hearing. The objective of the exercise is to change the parties’ behaviour and their thinking before re-focusing the attention on the nebulous welfare principle as an external guide to collaborative behaviour. The process uses therapeutic and mediative techniques to coax the parties into semi-consensual arrangements. If that fails all information gathered during the consensual approaches is then used to come to a traditional judicial determination. While no doubt efficient from the court’s

perspective, the process is at odds with principles of natural justice and it does not fit within the current court rules, while it was arguably introduced outside the jurisdiction to amend the court's procedure.

The assumptions on which the process was based and the arguments by which it was promoted do not withstand scrutiny. There are too many fundamental differences with the Australian CCP from which it was derived to validly claim that the success of the CCP (which itself can be debated), would equally apply to the PHP process. This is aggravated by the fact that the Australian process is part of a much wider development that fundamentally changed all agencies dealing with parenting matters, not just one aspect of the court process.

The suggestion of advantages of inquisitorial process over adversarial methods is not supported by studying an inquisitorial jurisdiction, which actually displays very similar problems with difficult and intractable cases. In addition, it is unlikely that by copying some techniques from an entirely different legal system into an environment that is alien to the principles underpinning these techniques will bring about the perceived advantages of that other system.

Conflict theory does not support the idea that an additional mediative and therapeutic intervention, now under the coercive authority of the court and executed by the judge, will have any better chance of sustained success than the interventions to which the parties and their dispute have already proven to be resistant, and which were executed by experienced and trained experts. When considering the PHP process in the context of ADR methodology it becomes apparent that the innovation is inappropriately mixing fundamentally different approaches to dispute resolution, which is likely to lead to unsustainable outcomes and further problems with natural justice.

The pilot process cannot withstand methodological scrutiny and was executed poorly, with a lack of clear purpose and insufficient independence between those executing and those evaluating the trial. As a result, serious doubt must be cast over the relevance of the official evaluation outcomes. The result of my own empirical evaluation indicates a few positive outcomes, including the speed of the process, stronger case management and positive effects of direct interaction between parties and the court. There are doubts whether such benefits can be maintained if the process is introduced on a larger scale. It is argued that the advantages of the process are mostly neutralized by its disadvantages, particularly the concerns over natural justice, the variability between judges and between the actual process and its prototype. A wider introduction would require significant work in creating a comprehensive rule system to achieve some level of standardization. As it stands, a valid complaint can now be made that the process is too discretionary and does not provide the procedural safeguards that we must expect from courts of law.

Although I could not demonstrate this empirically beyond doubt, it would appear that the process fails to reach its most important objective, to create an environment that will guarantee better outcomes for the children by focusing the issues and creating an intervention that manages to change the parents' conflict attitudes and behaviour.

The most permeating issue that results from my empirical research is that those with experience in the family court system are not convinced that the existing process is fundamentally flawed. While they acknowledge some of the disadvantages of adversarial process, the general consensus appears to be that the real reasons for the existing difficulties are resourcing and the court's efficiency. The overwhelming

impression that results is that the first and paramount effort should go towards making the existing process work to its standards by giving the Family Court the resources and administrative control required to enable it to operate efficiently and effectively before deciding that there remain problems that can only be fixed by radical and systemic change. That sentiment is supported by the lack of any cogent argument or empirical analysis of the actual problems and how they are allegedly caused by the adversarial system.

The official evaluation, which was published after this thesis was written, largely confirms the conclusions that I have drawn throughout. Although its conclusions are cast in positive phrases, it acknowledges that the pilot and evaluation methodology were flawed, that cases going into the system were highly pre-selected for suitability, that resources were assigned to the pilot that would not be available upon wider implementation, that the process hugely underachieved in respect of its timing parameters, and that, even within the trial period, PHP cases were significantly more likely to return to court. The evaluation discloses substantial problems with the court's information systems and the consistency of its administrative organisation. Although some parents were interviewed and surveyed, there are no quantitative details about the impact of the process on those for who it was designed: the children and parents involved in the cases before the court. In summary, the official evaluation does not support the statements used to promote the PHP at the time of its introduction, or the enthusiastically announced interim results.

It is noted in passing that, while the PHP pilot was still underway, yet another pilot process was started, with the title "Christchurch Early Intervention Model". From a recent speech by the Principal Judge,<sup>1264</sup> it may be concluded that this model (that has been lauded as extremely successful, but which does not appear to be formally evaluated), will be re-baptized into the "Early Intervention Programme", which shows similarity with the characteristics of the PHP.

Instead of concentrating on executing the processes and jurisdiction for which they are responsible, and doing so in an efficient and professional manner, it would seem that the New Zealand Family Courts are destined to remain a laboratory for procedural experiments of doubtful merit.

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<sup>1264</sup> Boshier PF "Grandparents and the Family Court" Speech to the Grandparents Raising Grandchildren Trust NZ Conference, 28 October 2009, Auckland, 3-4. For a further discussion see also *Dadelszen von P* "Mediation and Other Forms of Court Assisted Negotiations in New Zealand" Paper presented at the Children's Issues Forum: The Resolution of Disputes Relating to Children in Hong Kong, Hong Kong, 25 September 2009.

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# APPENDICES

## TABLES OF SURVEY RESULTS

The following tables present the quantitative results from the 2007 and 2008 surveys. The questions within each block were presented in random order. The following tables provide information about the number of respondents answering them and the percentages of respondents providing the answers indicated.<sup>1265</sup> Mean values of the responses have been included where relevant.

### SPECIALIZED EXPERIENCE

*“For how long have you been a specialized family law practitioner?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
1-3 years	16	11	8	7	24	9
4-7 years	20	14	23	19	43	16
8 years or more	110	75	88	74	198	75
Total	146		119		265	

Table 1: Family law experience of the survey respondents.

### PARENTING DISPUTE WORKLOAD

*“Can you indicate what part of your professional work involves parenting matters?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
0-25 %	22	15	20	16	42	16
26-50 %	47	32	39	32	86	32
51-75%	46	31	35	29	81	30
76-100%	32	22	28	23	60	22
Total	147		122		269	

Table 2: Respondents’ parenting issues work as percentage of total work.

### RESPONDENTS’ KNOWLEDGE OF THE PHP PROCESS

*“How would you describe your knowledge about the Parenting Hearings Programme (PHP) Pilot?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
This is the first time I have heard about it	0	0	1	1	1	0
I have heard or read something about it, but that’s all.	17	12	8	7	25	9
I have got an idea, but would have to look into it if I got a PHP case.	44	30	41	34	85	32
I am acquainted with it.	32	22	33	27	65	24
I am confident that I know enough about it.	51	35	36	30	87	32
I am an expert.	3	2	2	2	5	2
Total	147		121		268	

Table 3: Respondents’ knowledge of the PHP process.

<sup>1265</sup> Due to rounding, percentages do not always add to one hundred. Absolute numbers vary, as not all respondents answered all questions.

# INFORMATION SOURCES ABOUT PHP PROCESS

*“By what means have you gained knowledge of the PHP pilot and the process involved in PHP hearings? (Tick any number of boxes)”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
Briefing paper 6 September 2006, issued by Judge Boshier.	111	76	72	60	183	69
Family Court brochures.	80	55	60	50	140	53
Family Court DVD.	64	44	51	43	115	43
Family Court website.	18	12	22	18	40	15
Law Society meeting or seminar.	70	48	50	42	120	45
From other practitioners.	92	63	61	51	153	58
By acting in PHP cases.	61	42	52	43	113	42
By studying the Australian CCP pilot and evaluation	13	9	10	8	23	9
Other (please specify)	21	14	13	13	34	13

Table 4: Sources of PHP information.

PHP experience = Yes / No Expressed as % of respondents	2007		2008		2007-2008 combined	
	Yes	No	Yes	No	Yes	No
Briefing paper 6 September 2006, issued by Judge Boshier.	83	70	60	65	72	68
Family Court brochures.	73	39	70	32	72	36
Family Court DVD.	84	10	75	18	80	13
Family Court website.	17	6	19	18	18	11
Law Society meeting or seminar.	52	43	51	35	52	39
From other practitioners.	65	60	57	47	61	54
By acting in PHP cases.	94	0	98	0	96	0
By studying the Australian CCP pilot and evaluation	13	5	13	5	13	5
Other (please specify)						

Table 5: Sources of PHP information for those with/without PHP experience, as %

## PHP EXPERIENCE

*“Have you been involved as counsel in PHP cases?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
Yes	63	44	53	46	116	45
No	81	56	63	54	144	55
	144		116		260	

Table 6: Experience in PHP cases, 2007, 2008 and combined.

### NUMBER OF PHP CASES / RESPONDENT

*“How many PHP cases have you been involved in?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
1	16	27	9	17	25	22
2	13	22	8	15	21	19
3	13	226	6	12	19	17
4	8	137	7	13	15	13
5	5	83	3	6	8	7
6	4	74	4	8	8	7
7	0	04	4	8	4	4
8	1	22	2	4	3	3
9	0	02	2	4	2	2
10 or more (provide number)	0	07	7	13	7	6
Total	60		52		112	

Table 7: Number of PHP cases / respondent, 2007, 2008 and combined.

### ROLE IN PHP CASES

*“What has mostly been your role (in terms of who you represented) in the PHP cases in which you were involved?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
I mostly acted as lawyer for the child.	13	22	12	24	25	23
I mostly acted as lawyer for a party.	35	59	27	53	62	56
My role was more or less equally divided.	11	19	12	24	23	21
Total	59		51		110	

Table 8: Respondents' role in PHP cases, 2007, 2008 and combined.

### COURTS IN WHICH RESPONDENTS ACTED IN PHP CASES

*“In which family court have you experienced PHP cases (Tick all boxes that apply)?”*

	2007		2008		2007-2008 combined	
	n	%	n	%	n	%
Auckland	22	37	23	46	45	41
Palmerston-North	4	7	5	10	9	8
Tauranga	13	22	12	24	25	23
Wellington	13	22	10	20	23	21
Rotorua	5	8	5	10	10	9
Dunedin	6	10	2	4	8	7

Table 9: Courts in which respondents acted in PHP cases.

### *DEVELOPMENT OF THE PHP PROCESS AS THE PILOT PROGRESSED*

*“This question asks you to consider developments during the 2-year PHP pilot.” (Question only presented to respondents with PHP experience)*

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	n	Mean
As the pilot progressed, the speed of the process increased	3	18	25	3	0	49	2.57
As the pilot progressed the quality of the process increased	3	7	22	16	1	49	3.10

Table 10: Development in speed and quality as the pilot progressed.

### *RESPONDENTS' VIEWS ON CONTINUING THE PHP PROCESS*

*“This question evaluates your views whether the PHP process should be continued and in what format. Please answer the questions based on your experience with the PHP process.” (Question only presented to respondents with PHP experience and only in 2008 survey).*

	Absolutely NOT	Only with MAJOR changes	Only with MINOR changes	Definitely YES	n
The PHP process should be introduced the Family Court as the COMPULSORY process in all parenting matters	25	4	12	10	51
The PHP process should be available, but only as a voluntary option with consent of both parties	17	5	16	10	48

Table 11: Respondents views on whether the PHP process should be continued.

QUALITY OF INFORMATION ABOUT PHP PROCESS AND PILOT

*“How would you rate the information you have received about the PHP pilot from the following sources, for the criteria given? (Leave the answer open if you have not received the relevant information)”*

2007, 2008 and combined (C)	Very poor			Poor			Average			Good			Very good			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
Clarity of Family Court information	3	3	6	11	9	20	43	31	74	53	40	93	10	9	19	120	92	212	3.47	3.47	3.47
Comprehensiveness of Family Court information	3	4	7	15	12	27	47	32	79	44	33	77	7	7	14	116	88	204	3.32	3.31	3.31
Availability of Family Court information	2	3	5	17	8	25	33	30	63	43	35	78	18	12	30	113	88	201	3.51	3.51	3.51
Clarity of Law Society information	4	4	8	15	13	28	48	33	81	37	24	61	2	2	4	106	76	182	3.17	3.09	3.14
Comprehensiveness of Law Society information	4	4	8	19	14	33	45	36	81	35	23	58	1	1	2	104	78	182	3.10	3.04	3.07
Availability of Law Society information	4	5	9	15	15	30	53	36	89	28	24	52	4	0	4	104	80	184	3.13	2.99	3.07
If you are a member of the NZLS Family Law Section, how do you rate the ‘value for money’ of their services in general?		1	1		5	5		32	32		52	52		15	15		105	105		3.71	3.71
How do you rate the consultation between the family Court and the profession about the PHP initiative		12	12		28	28		37	37		16	16		5	5		98	98		2.73	2.73
How do you rate the role of the profession in the official evaluation of the PHP pilot (as it is undertaken by the Ministry)		2	2		14	14		45	45		17	17		1	1		79	79		3.01	3.01

Table 12: Quality of information about PHP, 2007, 2008 and combined results.

*AGREEMENT WITH ASSUMPTIONS UNDERLYING THE PHP*

*“Without specific reference to the PHP pilot, how would you generally rate your agreement with the following statements:”*

2007, 2008 and 2007-2008 combined (C)	Strongly Disagree			Disagree			Neutral			Agree			Strongly Agree			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
The adversarial court process often escalates conflict between parents.	0	0	0	9	10	19	16	23	39	85	62	147	31	21	52	141	116	257	3.98	3.81	3.90
The adversarial court process may seriously damage the relationship between children and one or both parents.	0	1	1	13	11	24	33	25	58	64	60	124	30	21	51	140	118	258	3.79	3.75	3.78
The adversarial court process often results in a worse relationship between parents, destroying any chance of the parents reaching agreement later on.	2	1	3	34	26	60	27	32	59	58	39	97	19	17	36	140	115	255	3.41	3.39	3.40
The way to resolve problems with adversarial process is by changing the court process, specifically the role of the judge.	13	12	25	35	38	73	44	34	78	44	30	74	2	2	4	138	116	254	2.91	2.76	2.84
Judges should have more control of proceedings, by way of case management.	2	1	3	24	12	36	35	31	66	69	67	136	10	5	15	140	116	256	3.44	3.54	3.48
Judges should have more power to decide what issues are relevant to the case and not leave this to the parties and their lawyers.	13	11	24	56	33	89	29	27	56	38	37	75	4	8	12	140	116	256	2.74	2.98	2.85
Judges should have more inquisitorial powers and decide what further evidence may be required.	13	6	19	20	11	31	18	29	47	72	60	132	17	9	26	140	115	255	3.43	3.48	3.45
There could be other ways to resolve problems with the adversarial process, for instance by providing more judicial and administrative capacity or increasing the use of modern technology, without changing the fundamentals of the process.	2	2	4	12	10	22	32	27	59	67	64	131	25	14	39	138	117	255	3.73	3.67	3.70
Parenting issues should not be dealt with in court at all, but by a social services agency.	52	53	105	70	58	128	11	4	15	5	0	5	2	1	3	140	116	256	1.82	1.60	1.72

Table 13: Assumptions underlying the PHP, 2007, 2008 and combined results.

# VIEWS ABOUT OUTCOME OBJECTIVES

*"When the PHP pilot was announced, a number of assertions were made to support the introduction of this new process. Based on your own experience, indicate to what extent you agree with each of the following statements." (Question only presented to respondents with PHP experience)*

2007, 2008 and 2007-2008 combined (C)	Strongly Disagree			Disagree			Neutral			Agree			Strongly Agree			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
The PHP represents a much better environment for deciding what is in the best interest of the children.	4	4	8	12	9	21	23	20	43	18	13	31	2	4	6	59	50	109	3.03	3.08	3.06
The PHP process will result in cases being decided much faster.	3	2	5	6	6	12	10	8	18	28	24	52	12	9	21	59	49	108	3.68	3.65	3.67
Because of the judges' direct control, the parties stay focused on the children rather than on the parents' issues.	3	1	4	13	17	30	13	9	22	27	18	45	4	5	9	60	50	110	3.27	3.18	3.23
The PHP process guarantees an outcome that will last longer.	9	4	13	20	21	41	28	22	50	2	1	3	1	2	3	60	50	110	2.43	2.52	2.47
The PHP process guarantees an outcome that is better accepted by the parents.	2	2	4	23	20	43	27	14	41	6	11	17	2	3	5	60	50	110	2.72	2.86	2.78
The PHP process guarantees an outcome that is better for the children.	6	5	11	19	18	37	25	22	47	7	3	10	2	2	4	59	50	109	2.66	2.58	2.62
Once parents have been through a PHP process they will in the future be better able to resolve issues between themselves without assistance	5	2	7	16	16	32	34	21	55	5	9	14	0	0	0	60	48	108	2.65	2.77	2.70
The PHP process complies with the rules of natural justice	14	7	21	16	19	35	20	12	32	9	9	18	1	3	4	60	50	110	2.45	2.64	2.54
The PHP process improves the parties' ability to have their say.	5	1	6	6	12	18	18	5	23	23	26	49	8	6	14	60	50	110	3.38	3.48	3.43
The parties appreciate the possibility to directly address the judge.	0	0	0	2	4	6	12	13	25	38	25	63	7	8	15	59	50	109	3.85	3.74	3.80
The direct interaction between the parties and the judge reveals that issues are often less extreme than they appear in their affidavits and written statements	2	1	3	14	10	24	15	9	24	25	25	50	4	4	8	60	49	109	3.25	3.43	3.33

Table 14: Views about outcome objectives 2007, 2008 and combined.



*VIEWS ABOUT PROCESS OBJECTIVES*

*"This question asks for your views about changes that the PHP process introduces. Please answer them based on your experience in actual PHP hearings." (Question only presented to respondents with PHP experience)*

2007, 2008 and 2007-2008 combined (C)	Strongly Disagree			Disagree			Neutral			Agree			Strongly Agree			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
The PHP process devaluates the role of the parties' counsel	2	1	3	17	23	40	20	13	33	16	13	29	3	1	4	58	51	109	3.02	2.80	2.92
The PHP process increases the role of the children's counsel	2	2	4	17	16	33	22	16	38	14	13	27	3	3	6	58	50	108	2.98	2.98	2.98
It is appropriate that the Judge can switch between different modes of operation, i.e. mediation and adjudication	5	5	10	18	7	25	3	8	11	26	24	50	6	7	13	58	51	109	3.17	3.41	3.28
The time limits imposed by the PHP process are adequate to deal with parenting disputes.	7	4	11	19	16	35	18	11	29	10	19	29	4	1	5	58	51	109	2.74	2.94	2.83
Other agencies or professionals, such as report writers, can comply with the time limits set by the PHP process	7	5	12	28	20	48	15	16	31	7	7	14	0	2	2	57	50	107	2.39	2.62	2.50
The legal services agency can adequately deal with the constraints set by the PHP process	6	3	9	17	9	26	22	21	43	8	14	22	0	1	1	53	48	101	2.60	3.02	2.80
The speed of the PHP process NEGATIVELY affects the quality of the court process		4	4		21	21		15	15		10	10		1	1		51	51		2.67	2.67
The speed of the PHP process POSITIVELY affects the quality of the court process		2	2		7	7		13	13		22	22		6	6		50	50		3.46	3.46
The PHP process is BETTER than the 'traditional' court process for parenting cases		5	5		8	8		17	17		17	17		4	4		51	51		3.14	3.14

Table 15: Views about process objectives, 2007, 2008 and combined.

*RESPONDENTS' VIEWS ABOUT THE PHP POLICY OBJECTIVES*

*"In order to investigate your views on the objectives underlying the PHP pilot, could you please indicate your agreement with the following statements:"*

2007, 2008 and 2007-2008 combined (C)	Strongly Disagree			Disagree			Neutral			Agree			Strongly Agree			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
The PHP process is a genuine attempt to provide better outcomes for parents and children	2	0	2	6	4	10	25	18	43	79	69	148	19	13	32	131	104	235	3.82	3.88	3.84
The PHP is an attempt to force parents to comply with government policy objectives	12	11	23	42	36	78	61	44	105	16	10	26	2	2	4	133	103	236	2.65	2.57	2.62
The PHP is an attempt to reduce the costs of the Family Court system	0	2	2	16	14	30	40	39	79	66	39	105	9	9	18	131	103	234	3.52	3.38	3.46
The PHP will provide better access to justice	7	4	11	28	22	50	57	37	94	36	38	74	5	3	8	133	104	237	3.03	3.13	3.08
The PHP process will lead to further dominance by social agencies and reduce the role of lawyers to the detriment of justice	9	5	14	44	37	81	44	40	84	30	17	47	4	5	9	131	104	235	2.82	2.81	2.81
Inquisitorial process should have no place in our common law system	28	16	44	88	67	155	12	18	30	4	4	8	1	2	3	133	107	240	1.96	2.15	2.05

Table 16: Respondents' views about PHP policy objectives, 2007, 2008 and combined.

*RESPONDENTS' VIEWS ABOUT PILOT PROJECTS AND THE PHP PILOT*

*"In order to investigate your views about the use of pilot projects in the Family Courts, could you please indicate your agreement with the following statements:"*

2007, 2008 and 2007-2008 combined (C)	Strongly Disagree			Disagree			Neutral			Agree			Strongly Agree			n			Mean		
	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C	07	08	C
There should be no place for experiments in the courts at all	16	14	30	88	64	152	17	19	36	6	7	13	5	2	7	132	106	238	2.21	2.24	2.22
Important rule changes should be brought about by legislation only	2	3	5	42	32	74	23	30	53	50	27	77	13	12	25	130	104	234	3.23	3.13	3.18
The PHP process affects substantive justice	0	4	4	32	21	53	47	40	87	41	35	76	9	4	13	129	104	233	3.21	3.13	3.18
The PHP pilot is well executed in practice	4	4	8	21	11	32	74	64	138	27	19	46	1	2	3	127	100	227	3.00	3.04	3.02
The PHP process and pilot have been introduced ultra vires	5	4	9	26	19	45	61	54	115	28	21	49	9	5	14	129	103	232	3.08	3.04	3.06
The pilot is a farce, a decision has already been made to introduce this process	6	9	15	28	19	47	55	37	92	33	31	64	9	7	16	131	103	234	3.08	3.08	3.08

Table 17: Respondents' views about pilot projects, 2007, 2008 and combined.



