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CHALLENGES FACING THE FAMILY COURT

Judge Peter Boshier*

This is a revised version of a public address given as part of the Public Officer Holders Seminar Series, New Zealand Centre for Public Law, Victoria University of Wellington, 22 April 2008.

I INTRODUCTION

The Family Courts Matters Bill (the Bill) is presently at its committee stage before Parliament.[1] This very important piece of legislation will consolidate and expand on change within the Family Court. Perhaps the single most important theme that it continues is one of openness. The work of the Court will be accessible to the public through the right of the media to be present, a development that was first signalled with the introduction of the Care of Children Act in 2004. As the Principal Family Court Judge, I welcome changes that enhance the public accountability of the Court, as well as embracing the need for further efficiency.

When I commenced my term in this position in 2004 I gave a lecture in this forum on my role as I saw it.[2] At the time, I greatly applauded the work being done to demystify the Family Court by increasing its transparency, and I strongly advocated for greater media access to the Family Court itself. The greatest challenge was undoubtedly to restore and retain public confidence in the Court.

Things have changed a great deal since then. We are now faced with new and emerging challenges, which are at the same time both demanding and rewarding, as we search for a more robust and credible Family Court service.

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* Principal Family Court Judge.

1 Since this address was delivered the Family Courts Matters Bill has been enacted as twelve amendment Acts: see Family Courts Matters Bill "Motion to Divide Bill" SOP 202 (16 April 2008). Where this article refers to clauses in the Bill, the equivalent reference in the enacted legislation has been given in the footnote.

2 PF Boshier “Judicial Leadership and the Family Court” (Public Office Holders Seminar, New Zealand Centre for Public Law, Wellington, 1 September 2004).

II CHALLENGES THAT HAVE BEEN OVERCOME TO DATE

A More Openness

As I saw it, the critical challenge when I took on my current role was to address the oft-expressed concerns about the so-called "secrecy" of the Family Court. There was a perception, fostered by the critics of the Court, that we were biased (principally against men) and that all kinds of injustice and wrongdoing were being perpetrated behind closed doors. This view was maintained, in particular, by the men's groups and their supporters in Parliament, and found a ready audience in the media. It seemed irrelevant that a 2003 Law Commission report had found the allegations of gender bias could not be substantiated.[3] A myth repeated often enough can acquire the status of fact.

At the height of the attacks, the damage wrought to public confidence in the Court was considerable. It was claimed that the Family Court was a "mommy's" court that was prejudiced against males, was not accountable and conducted its proceedings in secret. To the media and the public's perception, the Family Court was an iniquitous "Star Chamber".

The public mood at that time, as gauged by the tirades of talkback radio and newspaper editorials, was that the Court urgently required radical political surgery, even if the prescribed treatment might possibly be fatal to the patient. As I began my new role as the head of the Court, I saw that something clearly had to be done.

From its inception in 1981, one of the Family Court's governing considerations was to maintain the privacy of the parties through laws that effectively prevented the concerns of individual families being published in *New Zealand Truth* and like-minded organs in the media. This was a dramatic change but one that found favour at the time. However, these prohibitions were to expose the Court to claims, made chiefly by dissatisfied litigants, that the Court was biased, inefficient and unjust. Without the ability to be present in Court or to publish accounts of proceedings, the media were all too susceptible to giving prominent headlines to inflamed and clearly one-sided accounts. The Court was unable to respond.

It is a fundamental principle of the courts that justice must not only be done, but it must also be seen to be done. The compromised position of the Court – of trying to maintain the privacy of families while still performing as a court whose decisions were a matter of record and could be reviewed – was under sustained attack. In a philosophical sense, the balance between open justice and protecting the privacy of the parties became out of kilter with public opinion earlier this decade. This situation needed to change. I saw it as a priority that, where possible, the Family Court must allow the media to be present in proceedings.

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3 New Zealand Law Commission *Dispute Resolution in the Family Court* (NZLC R82, Wellington, 2003).

This was also the view of Parliament and in the Care of Children Act 2004 we saw the first significant step to restore the balance. Accredited news media were permitted to be present in proceedings brought under this Act,[4] while details of the proceedings that might identify the parties would remain confidential.[5] Decisions could be posted on the Family Court website but were also appropriately anonymised.

Since the Care of Children Act has been passed the media have been surprisingly blasé about their new-found freedom. Independent research has shown that the media have rarely exercised their right to be present in court and report proceedings.[6] Only a few feature reporters, who have written some excellent and informative articles, have shown an interest in exploring what happens in the Court. Perhaps the principle the media fought so vigorously to uphold was merely the right to be in court – if they chose to do so. The Court has turned out, after all, to be a court that does its job fairly, professionally and, on the whole, uncontentiously and yielding few stories that might be considered sensational or even newsworthy.

But there are still exceptions. The 2007 case of *Xian Xue*,[7] popularly known as the "Baby Pumpkin" case, was just such an example. There was widespread media and public interest, including from overseas. The case involved the dramatic abandonment of a vulnerable small child by her father after the alleged homicide of her mother. It presented real difficulties for the Court. There were issues of practical importance to decide for the child and the remaining members of her family but the law imposed serious restrictions on what the public could be told. I believed that in view of the justifiable public interest in this case, the media should be able to be present and report proceedings. A careful formula was devised that permitted this, while remaining within the restrictive provisions of the law.

This case demonstrated, however, that the Court still needed a more comprehensive approach to enable openness and an appropriate transparency in proceedings. The Family Courts Matters Bill is another milestone towards achieving that.

The Bill will open to the public many of the other types of cases that come before the Family Court.[8] It will do so along the lines provided under the Care of Children Act, so that the media are permitted access as of right. I support the ability of the media to report identifying details of some

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4 Care of Children Act 2004, s 137(1)(g).

5 Care of Children Act 2004, s 139(1).

6 Ursula Cheer, John Caldwell and Jim Tully *The Family Court, Families and the Public Gaze* (Blue Skies Research Report No 16/07, Families Commission, Wellington, 2007) 56.

7 *QXX* (4 October 2007) FC FAM 2007-964.

8 See in particular Family Courts Amendment Act 2008, s 7.

cases, but with the presumption that there should be no identifying information published where children or vulnerable people are involved, unless there is a real need to do so.

One of the virtues of the Family Courts Matters Bill will therefore be to further open up the work of the Family Court to the public and reinforce just how broad the range of work is that we do. I hope it will further diminish any remaining perception that the Court is a clandestine jurisdiction.

While work under the Care of Children Act undoubtedly consumes the majority of the Court's time and thus publication provisions already allow for a high degree of reporting, 18.3 per cent of the Family Court's workload between March 2007 and February 2008 was occupied by the Children, Young Persons and their Families Act 1989, and over 7,770 substantive applications were heard pertaining to the Domestic Violence Act 1995; making up 11.8 per cent of the Family Court's workload.[9] Revision of the publication provisions in these statutes should thus allow the public to better exercise their legitimate interest in obtaining access to the processes of the Family Court.

With the increasing openness of the Family Court we must accept that there will always be a tension in the relationship between the media and the Court. That is as it should be; neither is the servant of the other. It is not the function of the Court to provide news and neither is it the role of the media to uncritically endorse everything we do. But if we get the balance right between us, and I think we are moving in that direction, then we both, in our respective ways, increase our ability to serve the proper administration of justice.

B Becoming a More Child Inclusive Arena

Another challenge that the Care of Children Act introduced was to require a more child-inclusive practice that reflected the conceptual shift that was occurring both in New Zealand and internationally.[10] The Care of Children Act embodied much of the research and many of the attitudinal shifts that had occurred in this field. Just how children's views could be fed into hearings in a sensitive, appropriate fashion while upholding natural justice, fairness and transparency was a considerable yet rewarding challenge.

The Court went about addressing this in two ways. First, a new Code of Conduct Practice Note was negotiated with the Family Law Section of the New Zealand Law Society that sought to re-align the duties of lawyers acting for children.[11] This reinforced the important parts of the Care of Children Act, principally section 6, as well as providing more exacting domestic adherence to the principles encapsulated in the United Nations Convention on the Rights of the Child, to which New

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9 Internal Ministry of Justice statistics, on file with the author.

10 In particular see Care of Children Act 2004, ss 6 and 7.

11 Family Court of New Zealand *Practice Note – Lawyer for the Child: Code of Conduct* (Family Court of New Zealand, Wellington, 2007) www.justice.govt.nz/family/practice/notes (accessed 14 January 2009).

Zealand is, quite rightly, a signatory.[12] The effect of these instruments is to emphasise a child's right to be heard in the Court.

Secondly, Family Court judges met to address how natural justice could be respected when judges undertake discussions with children in their chambers. They produced written guidelines regarding interviews with children and the admission of transcripts, which now allow the judiciary to approach the task on a principled basis. It has taken time and enormous effort. However, yet again, the end product has been well worth the effort involved.

III FUTURE CHALLENGES

While these challenges occupy us in the present we must also look to the future and the challenges that lie ahead. One of the most fundamental objectives must be to minimise delay in the Court.

A Minimising Delay

Everyone who comes to the Family Court wants their particular issue resolved as quickly as possible and rightly demands rapid access to justice. The issue of delay is much more pressing for the Family Court than for some other jurisdictions, where delay may not have the same heavy personal cost. For many users of the Family Court, from young children to older infirmed people in need of protection, mentally ill persons who might be detained while they are being assessed, or parents who disagree on child care, delay in having a case addressed can have severe personal consequences.

Another area where statute requires the Court to act promptly is in the international abduction of children. The Hague Convention on the Civil Aspects of International Child Abduction forms part of our domestic law,[13] and the Care of Children Act requires that such return applications be dealt with within six weeks unless there is an explicable reason.[14] Although the Court must act in accordance with the principles of natural justice, child abduction is a grave wrong – with consequences for the child that are very difficult to reverse unless the response is immediate – so we are required to act summarily. That means paying concerted attention to the Court's business in regard to processing and scheduling, and ensuring that this is organised in the most effective way.

The real challenge is to cope with our broad workload and be able to address those cases that require a decision to be made quickly. Traditionally, courts have not been tailored for speedy disposition. The history of scheduling in New Zealand is no different to overseas and, if the matter

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12 United Nations Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.

13 Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) 19 ILM 1501, adopted by sections 94–124 of the Care of Children Act 2004.

14 Care of Children Act 2004, s 107.

is to be defended, the case when presented will usually be deferred and scheduled as a defended hearing. With the ability of both sides to raise issues before the Court as they arise, this process can be very protracted. It follows that, if the Family Court is to meet the challenges required of it, we must successfully prioritise the work that we as judges need to spend time on against those aspects of work that can, and should, be done by others. I refer in particular to the introduction of Senior Family Court Registrars to undertake a range of uncontested or interlocutory work and others such as counsellors and mediators settling issues where this is at all possible.

B Senior Family Court Registrars

I have previously proposed that one of the ways to balance the desire for speedy resolution with the effective delivery of justice is to allow registrars to expand their existing role, as well as through creation of a new position, which will be known as Senior Family Court Registrar. The legislation giving effect to this proposal is a very welcome move. It is envisaged the position of Senior Family Court Registrar will attract suitably qualified persons with appropriate levels of experience and training, to bridge the divide between the operations of registrars and judges. The role captures elements of each, taking on some of the administrative workload of judges as well as some of the non-contentious judicial work. It has been proposed that such persons could preside over pre-trial and directions conferences, possibly make interlocutory orders and directions, and even make interim and final consent orders.[15]

Such a proposal is in conformity with natural justice and smart court management. The right to appeal any decision to a judge would be retained, in accordance with fundamental principles of justice. Registrars already greatly assist judicial functioning by granting most dissolutions of marriage. To utilise their considerable skills in non-contentious areas would minimise delay in the receipt of justice for these administrative applications. The flow-on effect from this would equally be felt in legally complex cases. With a reduced administrative workload, judges could turn their early attention to these latter cases, focusing on delivering prompt justice.

Further attempts to minimise delays exist within the Family Courts Matters Bill, including the expansion of opportunities for counselling offered by the conciliation arm of the Court, and introducing non-judge-led mediation. With regards to the former, of particular note is the expansion of the availability of counselling to children under the Care of Children Act.[16] This will not only bring this legislation in line with other family law Acts such as the Children, Young Persons and their Families Act,[17] but will also give pragmatic realisation to one of the philosophical

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15 Family Courts Amendment Act 2008, s 4.

16 Care of Children Amendment Act 2008, s 8. This introduces sections 46ZA, 46P and 46(T)(3)(c) to the Care of Children Act 2004.

17 Children, Young Persons and their Families Act 1989, s 74(1)(a).

underpinnings of the Care of Children Act – the right of a child to be viewed as an individual within society.

These moves minimise delays by encouraging successful mediation to be undertaken not by judges but by specialist mediators, reinforcing the distinction between the decision-making work of the judiciary and the conciliatory attitude of mediation. The "Family Mediation Pilot" was undertaken in four courts, with a very positive review of the pilot published in April 2007.[18] Participants noted that the process was seen to be faster than judge-led mediation, as they did not have to wait for a judge to be available.

Because of the success of the pilot, mediation by specialist non-judge mediators will become a feature of the Family Court, through the Family Courts Matters Bill.[19] I look forward to enhanced mediation being a constructive and useful part of the conciliatory arm of the Court.

C Parenting Hearings Programme: Less Adversarial Trials

Other programmes aimed at minimising delays are in response to the various statutes of the Court which require speed in disposition. A programme of particular significance is the "Parenting Hearings Programme: Less Adversarial Trials" pilot, which was initiated in November 2006. It was aimed at addressing the pressing problem of delay in those cases where the parties appear locked in unending and irreconcilable conflict. A case in the Family Court, which was taken to the United Nations Human Rights Committee in a highly publicised move last year because of complaints about delay, was an example of a case that really did take too long to resolve.[20] Although the delays in process could be explained, they were unfortunate and might have been avoided if the Court had been able to take a more pro-active role in managing the case. Wherever possible, Family Court cases should be resolved quickly. We must find a way to respond, and the Parenting Hearings Programme pilot shows one way it can be done. Judges control the hearing by asking the parties to state their position and by restricting cross-examination.

While we await formal evaluation of the Parenting Hearings Programme pilot, the informal feedback so far has been very positive both in quantitative and qualitative terms. Overall time-frames for the completion of cases have appeared to drop significantly when a case is channelled into the Parenting Hearings Programme; with the median disposal time for Parenting Hearings Programme cases from the date of application to the date of disposal being only 18.1 weeks.[21]

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18 Helena Barwick and Alison Gray *Family Mediation – Evaluation of the Pilot* (Ministry of Justice, Wellington, 2007) www.courts.govt.nz (accessed 14 January 2009).

19 Care of Children Amendment Act 2008, s 8 and Family Proceedings Amendment Act 2008, ss 12–19.

20 *FC Wang* (24 June 2003) FC FAM 2000-083-146.

21 Internal Ministry of Justice statistics, on file with the author.

On the presumption that most Parenting Hearings Programme cases would be defended, a telling comparison can be observed between the median disposal time of defended non-Parenting Hearings Programme Care of Children Act cases and Parenting Hearings Programme cases. The former was 38.1 weeks, some 20 weeks (or five months) more than Parenting Hearings Programme cases.[22]

While there are challenges integrating such a programme into the framework of the Court, the initial success of the Parenting Hearings Programme process has prompted the Ministry of Justice to begin drawing up guidelines for its permanent use.

As I hope I have demonstrated, the need to minimise delay in the Family Court is a key priority. A number of highly successful initiatives have been introduced and certainly the Family Courts Matters Bill plays a vital role in moving us forward. But we must not rest on our laurels; a successful Family Court is one that adapts and remains open to necessary change. However, I add a note of caution. Reform should not be achieved at a cost to fairness and natural justice. There is a necessary balance between acting protectively and quickly and achieving fairness and natural justice.

D Tension Between Protection Through Ex Parte Orders and Natural Justice

A court cannot uphold natural justice without hearing both sides. The Domestic Violence Act 1995 requires judges to act protectively, without the requirement of hearing both sides. It is not always possible to hear both sides when urgency prevails. An immediate decision has to be made and in situations where violence or serious abuse is involved it may well be a life or death decision.

Nevertheless, it is sometimes claimed the Family Court does not grant enough temporary protection orders without notice and does not act protectively to the required degree. This was the view of the highly publicised and somewhat controversial research undertaken by Waikato University, *Living at the Cutting Edge: Women's Experiences of Protection Orders*,[23] which I commented on at the time. Yet the facts are that the vast majority of protection orders are made without notice and in the first instance. The countervailing criticism offered is that the Court is too ready to accept allegations of abuse made by one party against the other.

By being required to act on the basis of allegations and perceptions of risk, and without the benefit of all the facts, the Court cannot guarantee to always get it right. Because of the real risks to life, including those of children in the family, allegations of violence and abuse always have to be taken very seriously. But the Court must be conscious of the fundamental rights of the party that stands to be adversely affected by its decision.

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22 Internal Ministry of Justice statistics, on file with the author.

23 Neville Robertson and others *Living at the Cutting Edge: Women's Experiences of Protection Orders* (Ministry of Women's Affairs, Wellington, 2007) www.mwa.govt.nz (accessed 14 January 2009).

The solutions are not easy or certainly not obvious. The Court finds itself caught between Scylla and Charybdis. It is required to act with urgency yet with incomplete knowledge to protect the vulnerable, and then is condemned if events subsequently demonstrate it has been unable to achieve that. On the other hand, it will be criticised just as trenchantly by those who claim their rights have been unjustly overridden.

Ultimately, these are not questions for the Family Court alone to resolve. They require wider input and the Ministry of Justice discussion paper is a very appropriate and useful step that offers proposals to assist the Court in this, one of its most difficult roles.[24] While the goal of balancing protection or confidentiality against natural justice is a challenge in all jurisdictions, for the reasons I have outlined above it is a particularly sensitive issue in the Family Court. The challenge will be to continue to get the balance right between acting quickly where appropriate, and preserving natural justice and fairness to the greatest degree.

IV CONCLUSION

As we look ahead, I see the need for efficiency and good management becoming ever more important. The constant threat to fairness and natural justice must be addressed and accommodated. These are tensions that will always be there but the public of New Zealand and the Court's users are entitled to expect that the Family Court will be one of excellence. The Court can only achieve that if it constantly reviews its processes and is prepared to look at change to make sure that the balance is kept. Those who come before the Court are entitled to have their concerns dealt with speedily, fairly and properly.

The Family Court is part of society; the changes that we in the Family Court take on board must therefore be a reflection of what we recognise and require as a wider community. This requires that the community, for its part, be prepared to offer the support that is necessary to achieve the community's objectives for the Court. The guidance and support of Parliament is crucial, as is the role of the executive and social agencies engaged in the business of the Court.

The legal profession is part of that community and a critical player in the work of the Court. I would make this final and parting observation: the profession has a role to play in assisting change that will improve the speed and efficiency of the Court; it frustrates that role if it resists reform while complaining of delay. If we are clear about our objectives then I urge that we be consistent in our purpose. If we can do this, the robust and credible Family Court service that we all seek can be achieved.

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24 Ministry of Justice *A Review of the Domestic Violence Act 1995 and Related Legislation* (Wellington, December 2007) www.justice.govt.nz (accessed 14 January 2009).