Family Files

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Family Court Review – Part 4 – Review released

With the Family Court Review released, it is right to reflect on why the reform spotlight is on the Family Court.

Fiscal reform in recessionary times is the focus. As the second busiest Court in New Zealand, the Family Court has its costs and efficiency scrutinised. That is the primary purpose for reform, and why a remarkable six reform processes are being executed contemporaneously:

1. Centralisation of long cause fixtures.
2. Auckland Service Delivery Programme. (A restructuring of the Auckland Regional Registries led by the Ministry of Justice (MOJ), ongoing since February 2012. Noted for well-publicised systemic failure requiring months of ongoing, major remedial expenditure and staffing effort, and latterly, major crisis management and systems review by MOJ. Despite recent notable progress, still not fully remediated. Intended for national rollout.)
3. Fixed fees for family legal aid.
4. Filing fees for proceedings and hearings under the *Care of Children Act* 2004 (COCA) and *Property (Relationships) Act* 1976 (PRA).
5. Changed eligibility for legal aid (ie reduced).
6. Family Court Review.

Only changed legal aid eligibility is paused. The Review's barring representation by lawyers from classes of cases has removed the need for reduced legal aid eligibility.

This context is crucial. All six reforms represent a major, novel structural change. The likely effects of these changes have not been projected or assessed, individually or collectively. What will be the effect of this multiple reform?

What are the likely synergistic effects of multi-reform on the separating families of New Zealand, particularly the vulnerable children and adults who need the protection of the Family Court?

Setting this context, this article will look at the proposed Family Court reforms.

Education and counselling

- *Parenting through Separation*: An existing voluntary parenting education programme, within the framework of the Family Court. Proposed compulsory and free of charge. This is positive and beneficial to newly separated parents.
- *Family Court Counselling – six pre-court counselling sessions state funded*: Proposed reduction to one hour. A significant loss to families who were able to reconcile or conciliate without further need to recourse to the Court.

Pre-Court Family Dispute Resolution (FDR)

Proposed FDR is compulsory pre-Court, at a joint party cost of $897 (GST inclusive).

FDR is available for:

- COCA matters (parenting and guardianship disputes);
- relationship property (PRA);
- maintenance (spousal and child; *Family Proceedings Act* 1980 (FPA)).

Exempt are matters with:

- domestic violence or child abuse;
- parties' safety at risk;
- significant power imbalances;
- illness or disability.

Who provides: "Qualified and skilled professionals approved by the Secretary of Justice"?

What sort of FDR? Currently unclear: "diverse range of processes, culturally diverse models".

A commendable initiative promoting alternative dispute resolution (ADR) prior to Court. ADR is preferable to litigation, when suitable. Self-determined resolutions often 'stick' better than those 'imposed' by an expert stranger – a judge.

The Minister's FDR model has some issues that will need to be resolved.

The lack of clarity as to what is meant by FDR is concerning. Is it mediation, counselling-style conciliation, or something else? This is reflected in public statements, such as a recent *Sunday Star Times* article, "A less intrusive path for family disputes" (7 October 2012). There, Justice Minister Judith Collins suggested an estimated fee of $897 "will cover up to six sessions with a mediator". That model appears to be a counselling model, rather than an FDR model. ADR models such as mediation and similar models might not fit the multiple, single-session model suggested.

FDR models must be credible internationally as dispute resolution models. Mediation is one leading model, with internationally recognised training bodies, accreditation methodologies, ethical codes, and continuing education obligations associated with the leading organisations who are the recognised providers.

Another issue is *how* screening for vulnerability of adults and children occurs, and *who* will do it, to 'scythe out' those cases that should not be part of a pre-court dispute resolution process. Another is establishing an effective triaging process to allocate appropriately qualified practitioners to different disputes.

The absence of legal advice for parties when accessing FDR, and the absence of a voice for the child in the ADR room is concerning. Who will be able to check that agreements reached and recorded in FDR are in the best interests and welfare of the child, and within the law (COCA, PRA (including certification requirements), or FPA)?

A fee of $897 is significant and a likely barrier to participation. Currently, FDR is state funded as Counsel-led mediation. The costs of FDR could also become a barrier if one party tactically elects not to pay, sabotaging FDR.

FDR fees appear to be a *fixed fee*, which will not assist if the parties go over time – highly likely if children, property, and maintenance are part of a 'one-stop-shop' ADR approach – disincentivising FDR provider involvement.

New court model

Proposed is a three-track system for court proceedings:

- Fast Track;
- Standard Track; and
- Simple Track.

Fast Track is classified as:

- without notice applications/urgent matters;
- parties are permitted to have lawyers on the record and legal aid; and
- Lawyer for the Child may be appointed after a defence is filed.

Standard Track is classified as:

- multiple or more serious issues, such as daily care arrangements/international relocation (to b defined);
- no lawyer on the record or legally aided until point of hearing; and
- Lawyer for the Child will only be appointed afte a defence is filed and if there is a *serious issue*.

Simple Track is classified as:

- single issue matters;
- no lawyer on the record or legally aided until point of hearing; and
- no Lawyer for the Child will be appointed;

No consultation on 'no lawyers'

The removal of lawyers from the Family Court was a surprising reform proposal in Collins's Cabinet Paper, *Family Court Review – Proposal for Reform*. NZLS and ADLS Inc and the Expert Reference Group (ERG) were never approached to consult on 'no lawyers in Family Court'.

The consultation Collins undertook appears to have been an online survey of 121 consumers. Was this a representative sample? Were there issues with the questions? No doubt this will be scrutinised.

Collins's 'no lawyers in Family Court' proposal applies to all lawyers – legally aided, privately funde and lawyers who represent the voice of children. Th state not being obliged to fund lawyers – legally aid or for those representing separated parents' childre is a singular cost saving to the state, without the ne to reduce the eligibility of legal aid – an undoubted thorny political issue.

No one denies the right of New Zealanders to elect to self-represent. Equally, all New Zealanders in a court of law surely must have the right to be represented by a lawyer if they so choose.

'No lawyers' is a loss of efficiency

Lawyers assist both the Court and parties.

The ability of a party to make fully informed choices in law and fact is crucial – particularly thos unwilling or unable to represent themselves.

Legal representation helps to right power imbalances in a relationship which could have devastating consequences in a 'simple or standard'

case on a litigation track.

A lawyer's ability to provide accurate and up-to-date knowledge of the law, tailored to the facts of the case, reality testing of a client's case, exploring settlement options, drafting orders, all assists the parties and the Court with the proceedings.

The benefits of competent legal representation which notes lawyers' obligations under section 8 of the FPA, are myriad – well beyond those noted briefly for the purposes of this article.

Pragmatically, they go to the smooth operation of a case and parties in Court.

Inefficiency and inequality with 'no lawyers'

Is this reform potentially inefficient and costly?

In July 2009, the MOJ reported on Court inefficiency and unrepresented litigants: *Self Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdiction* (2009 Report).

Chief District Court Judge Doogue, in submissions on the Legal Assistance (Sustainability) Amendment Bill 2011, devoted three to five pages to the negative impact of unrepresented litigants on the Court, quoting extensively from the 2009 MOJ report. The MOJ noted the relatively low level of self-represented litigants created these problems:

- Cases take *significantly longer* (extra guidance, frequently adjourned) – hearings "take at least three times as long" (at 12.1.5 of 2009 Report).
- May increase judge's level of frustration;
- Judges mentioned unease at being expected to take on the role of counsel when a litigant was doing a poor job at cross-examining;
- Frustrated court staff – self-represented litigants are very time-consuming (explaining court processes, procedures, and court legal terminology), but "the issue was not serious because the numbers of self-represented litigants were low" (at 12.1.2 of 2009 Report).

It is proposed that unrepresented litigants will become a majority of Family Court users. Ordinary people are not seasoned litigators, have varying literacy levels, and are likely to continue to find court a 'foreign land'. The law and Family Court judges, its registries, and rules will be confusing and perplexing – no matter how 'simplified'.

Standardised questionnaire affidavits and court forms, and downloading parenting plans online are supported. But forms flummox parties – even the simple current DIY-focused dissolution forms. Given the fact that simple and standard track proceedings will be a step up from dissolution packs, parties will find those challenging.

Unrepresented litigants will inevitably seek legal advice on court processes/substantive law from judges and Registry officials. Varying literacy levels and limited access to information technology (a luxury in these recessionary times) is counter-efficient. Many, if not most, court users will need explanation/guidance with written documents and processes.

Delay, consumption of registry time, frustration of parents/parties, judges, and Registry staff is likely to be high as the numbers of self-represented litigants will be high. Savings in costs by the state not funding legally aided parties in Court and lawyer for the child may well be lost in the possible 'trebling of time' for simple and standard matters, as they are delayed, adjourned, and take expensive/limited judge resource to manage in Court. Lawyers who provide this advice and management are barred from doing so.

How time and cost efficient will this reform be? Does this reform have potential discriminatory impacts?

Wealthier litigants can compensate for 'no lawyers' by privately funding lawyers to 'ghost write' documents, rehearse them for Court, and provide shadow advice in negotiation and settlement strategy also. This shifts the playing field considerably to their side for a 'win' come their day in court.

Poorer and otherwise eligible for legal aid litigants miss out. A discriminatory economic power imbalance is built into the model.

A power imbalance is permitted by the model where one party is shy/not a public speaker, or ridiculed in their relationship, or petrified of the prospect of being in court. The other is articulate, is a bully, and dominates the attention of the judge.

With no lawyers, and no lawyer advocating for the child's best interests and welfare, the new court model potentially entrenches inequality, discriminating against vulnerable parties/children, while suppressing their voices.

Breach of international and domestic law obligations – 'no child lawyers'

The reform proposes Lawyer for the Child is only to be appointed in standard track cases, after a defenc is filed, if there is a serious issue. Serious issues include:

- domestic violence;
- allegations of child abuse;
- alienation of a parent;
- mental health issues; and
- alcohol and drug abuse.

An issue is that the major restriction of Lawyer for the Child in the Family Court is a breach of the United Nations *Convention on the Rights of Children* and COCA.

The welfare and best interests of the children must be a first and paramount consideration in determining care arrangements for children. In determining what serves the children's welfare an best interests, the child must be given reasonable opportunity to express views and any views expressed must be taken into account. This risks orders being made that should not be, and unsafe arrangements being made, particularly where the is an unequal balance of power between the parti

Interim v Final Orders and a two-year ban on new applications

It is proposed that:

- Interim Orders (one-year life span) are rejecte in favour of Final Orders;
- Any new application within a two-year period a final order being made is banned unless the is a material change in the child's circumstan

Issues

Collins, in *Law News* (19 October 2012), clarifies (for the first time that the writer is aware of) that "there will still be interim orders. No Final Orde will be made on a without notice application – th would be contrary to the rules of natural justice" It would be helpful if the Minister could further clarify the proposed scope of the 'no interim ord rule'.

This proposal was never consulted on with th NZLS or ADLS Inc in the consultation process, the consultative group.

Others

The PRA and protection order matters have als been proposed to be amended, but word limits prevent a consideration.