

PROPOSALS FOR IMPROVING THE FUNCTIONING OF THE FAMILY COURT THROUGH PROVISION OF AN EARLY INTERVENTION FAMILY RESOLUTION PROCESS

s 9(2)(a)

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1. SUMMARY OF PROBLEMS AND SOLUTIONS IN THE FAMILY COURT

I filed a Submission to the Panel in its earlier deliberations. It is my submission that the current proposals of the Panel will not address the issue, that there are too many cases for the number of judges to deal with, at a rate which enables access to justice for adults, and meets the legal and human rights of children.

The current restrictions on the functioning of the Family Court has resulted in inefficient administrative processing of Care of Children Act (COCA) and other applications to the Court, and too little Judge time to enable access to justice, through early, effective Judicial intervention. It is generally acknowledged there is some work which does not need to be undertaken by Judges, as Courts struggle to cope with the volume of work, and the consequent delays which deprive many, including children of access to justice. Delays of 6 months for Judge led settlement/mediation conferences are not unusual.

There are too few resources available to the Family Court to address the issues faced by families through addictions, violence and mental health, or resources for children such as counselling, and early resolution of interim contact, and guardianship difficulties.

The Panel recommendations will not solve the problems of access to Judges to make prompt decisions, within children's time frames.

The FDR system is a failed system, which has too many problems to remedy, including the qualifications and knowledge of the facilitators.

The proposed solution is to establish an early intervention tier within the Family Court in which trained senior lawyers are appointed as Counsel to Assist the Court to provide mediation/determination of interim contact and guardianship issues. This would provide for early access to justice for parties and children, and reduce the Judges' work-loads, so they could attend to more complex matters. Other matters could also be added into the early intervention process, once it is trialled and established.

The early intervention process does take into account intimate and family violence.

There is precedent for limited jurisdiction, alternatives to Judge decision-making through the Masters in the High Court, and mediation/determination by qualified lawyers in many different fora from civil, and employment, and for relationship property. There may be international precedents. Senior lawyer led mediation is not new, and the addition of a limited determination role will be well within the senior lawyer's skills. It will reduce the work load of Judges and delays in the Family Court, and associated costs, and will facilitate access to justice for parties and children.

2. PROPOSALS TO IMPROVE THE FUNCTIONING AND QUALITY OF THE FAMILY COURT

Each of the current issues which impact on timely access to justice, will be addressed below with proposed solutions. The early intervention proposal will address the issues.

2.1 Issue: Limited available Judge time, meaning long delays in pre-trial matters and hearings

Outcome: The current delays in accessing Judge time for preliminary matters and hearings are prohibitive. The early intervention proposal process would release Judges from dealing with interim issues, including some which are currently filed as without notice applications/e-duty applications. It would be a significant saving in Judge time and cost. It would stop unwarranted without notice applications being made, to subvert the current restrictions on access into the Court system, and the delays in the system.

The current proposals of FDR, and penalties for inappropriate without notice applications, will not mean access to timely Court decisions, as the number of applications are, and were increasing before the 2014 changes.

2.2 Issue: Delays in administrative processing of applications

Outcome: The early intervention process would have a simple focussed application, and administrative process. This would reduce the Court's administrative load of without notice applications being made, to avoid the current requirements, before being able to access the Court process.

Having designated Court officers for files generally, is more effective and efficient for the parties and Court, and more satisfying for the case officer. Training must be provided to ensure staff know how to utilise all available Judge time.

Court staff numbers, training, career pathway, and retention needs consideration in the Court generally. The "Super Registrar" in each main court, or for a group of smaller Courts, who can oversee, and assist and train staff, would reduce some of the current difficulties, suggested by the Panel will help, but is not a solution to the increasing number of applications.

2.3 Issue: Lack of effective Court processes, such as follow through with Court time when with-out notice Orders are made

Outcome: The early intervention process will reduce the need for so many without notice applications, reduce Judge work-load, and delay in accessing assistance from a Judge. A review of a number of Court processes are needed, such as how rapidly the Court provides Court time for the Respondent after Orders are made on a without notice basis. The early intervention process will reduce much of the difficulty in limited Judge availability, and provide early access to justice.

Other administrative processes such as those which inhibit contact with the Court staff through lack of direct phone contact needs review.

2.4 Issue: Delays in addressing children's urgent issues including contact with parent/whanau and basic guardianship issues

Outcome: The early intervention process would provide fast, effective and efficient resolution of interim contact between children and parents/whanau, including where there is low-level violence, and basic guardianship issues such as short overseas holidays, Christmas Day contact, and which school a child should attend. This would ensure children can see both parents in a child's time-frame, partake in holidays, and attend a school in a timely manner, and reduce the escalation of the dispute.

There would be more Judge availability to follow up matters in a more timely way, after interim issues are resolved. It would also give more time for Judges to deal with more complex matters.

2.5 Issue: Limits on access to justice in cases involving family violence

Outcome: The decision-maker in the early intervention process could assess the seriousness of the family violence, and transfer/refer where necessary to the Family Court with a recommendation on the level of urgency. There would be more Judge time available to address serious family violence issues in a comprehensive manner, when basic interim applications, including those with low level violence, are removed from the Judge's work-load.

There needs to be Court approved expert and appropriate individual therapy and programmes provided free of charge, to address the individual causes of family violence. Some of these issues are raised by the Panel, but without sufficient detail to show if they address all issues.

2.6 Issue: Changes are needed to the S5 (a) principle to add protection of children against adverse impacts of parenting, as well as violence

Outcome: Children need to be protected from violence, and seriously harmful parenting or caregiving, under s5 (a).

"s 5 (a) a child's safety must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) and from aspects of caregiving and /or parenting that may have significant adverse impacts on the child, including that which the child may be exposed to from all persons including members of the child's family, family group, whanau, hapu and iwi."

This will enable expert report writers such as psychologists to assist the court on the impact of parenting practices on the child.

2.7 Issue: Limited appropriate resources to address issues of addiction, violence, and mental health

Outcome: Resources need to be provided to deal with the impact on families of problems such as addiction, violence and mental health, through rapid and effective assessment and individual therapy/treatment for each of the issues. Court funded drug testing for non-legally aided parties should be available.

2.8 Issue: Counselling must be available for children

Outcome: Counselling for children is often recommended by experts report writers, but is not available except if privately funded. The availability of counselling for some children is essential.

2.9 Issue: No state-funded contact change-over facility

Outcome: It is essential for parents who cannot, or should not have contact with each other, that there is a safe and inexpensive supervised change-over place for transfer of children between their parents, for the benefit and safety of the children.

2.10 Issue: Review of Judge Numbers, Selection Processes, and Judicial Rostering

Outcome: The number and quality of Judges' selected impacts on the amount and quality of work they can undertake. How Judges are rostered needs review.

2.11 Issue: Review of Expert Witness Availability

Outcome: There are recruitment issues for psychologists to write Family Court reports, and work-load issues for social workers, leading to long delays in expert reports from psychologists and social workers. The reasons for the delays needs to be addressed, including the complaint process under the Health and Disabilities Act for psychologists, which reduces the willingness of many to undertake Family Court reports. The delay in social work reports is due to Ministry for Children Oranga Tamariki (OT) staffing, retention and conditions.

This issue is raised by the Panel, but too little detail is provided to ascertain its likely success.

2.12 Issue: Limited Use of Professional Experts to advise on changes for the Family Court

Outcome: Ministers could establish an informal panel of experts in various areas involved in the Family Court, such as Family Court processes, family violence, therapy, mental health, addiction and so on, to provide fast expert comment on proposals.

2.13 Issue: Increased Use of Technology

Outcome: The Family Court should utilise technology, including video/phone conferencing, to reduce the time and cost for all pre-trial matters including Judicial Conferences, and some short course "submissions only" hearings.

The use of technology will decrease the cost to clients in time off work, and travel to Court, and reduce the cost of Legal Aid, Lawyer for Child and Counsel to Assist, by enabling lawyers to attend all pre-trial matters from their office.

Kiosk IT computer systems would need to be made available to parties in Court offices to enable parties without computers to file electronically. The option of filing across the counter should remain.

3. THE EARLY INTERVENTION COURT PROCESS -

It is proposed that there be appointment of Counsel to Assist the Court to undertake an early intervention Court process with limited jurisdiction, to reduce delays, and enable access to justice, and equity in the Family Court. A time frame from filing to determination of 3 weeks is envisaged.

3.1 The Early intervention Court Process

The mediation/determination, early intervention Court process could operate as follows:

The process would:

- Be a voluntary process, for both parties;
- Provide rapid and affordable access to resolve interim issues;
- Provide time-limited hearings, 2 to 3 hours;
- Provide for a mediation/determination decision making process from which interim Consent Orders or Interim Orders by determination would be made;
- Have limitations on appeals;
- Have no ability to order costs;
- Have time-limited Orders, 6 months or such shorter time as determined; and
- Be a process which is a part of the Family Court.

3.2 The Decision-Maker

The decision-maker would:

- Be an approved and trained senior or former Family Court lawyer;
- Be selected for a panel, based on skills, experience and ability;
- Agree to receive initial training, and continued training; and
- Be available on a regular rostered day/s per week.

3.3 The Jurisdiction

The jurisdiction would be for:

- Interim parenting issues of care and contact, including where there is minor violence alleged;
- Basic guardianship applications on health, name, education, and holidays overseas, and "special day" contact; and

- Any other applications referred by a Family Court Judge under Care of Children Act, or other Acts at a later stage.

3.4 The Law

The law applied would be:

- The Care of Children Act; and
- The Family Court Rules.

3.5 Decision-Makers Powers

The decision-maker would have power to:

- Assist the parties to make mediated agreements and Interim Orders by consent;
- Make a determination to transfer the matter to the Family Court with recommendation for priority;
- Have the ability to make referrals to appropriate agencies, such as MCOT, CADS etc.;
- Make directions for S132 and recommendations for 133 Reports if urgent;
- Recommend the appointment of Lawyer for Child at any time in the process;
- Make oral decisions with written reasons to follow, or written determinations with reasons in special circumstances, within 21 days; and
- Make time-limited determinations and interim Orders, for 6 months or less.

3.6 The Level of Violence

The level of violence which can be dealt with by the decision-maker is critical to ensure the safety of children and victims during and after the process. The violence dealt with should be in the mild to moderate range, involving situational violence in particular, which needs to be dealt with promptly to avoid escalation, or entrenchment. Good background information could be obtained through a specifically drafted psycho-metric form. Particular consideration needs to be given to risk factors associated with psychological abuse.

Consideration should be given to declining cases for the mediation/determination early intervention Court process if the level of violence is sufficient for a final Protection Order. The principles used would be those set out in *Surrey v Surrey* [2008] NZCA 565. A well drafted check-list could be applied.

3.7 Commencing the Process

The process would be commenced by:

- A prescribed and minimal filing fee of say \$50 for applications;

- A short standardised application form, available on line, which sets out what the problem is e.g. contact for 2 children aged 2 and 6 and suggested solutions, such as Wed from 4 to 6pm and Sat 10am to 4pm alternate weeks, with reasons such as because 2 year old is unable to cope with overnight stays away from home;
- A short standardised response form, available on line, which sets out a response to the problem, and suggested solutions with reasons; and
- Both forms could be filed on line, with fees paid by internet banking.

3.8 The Registrar's Role

The Registrar would:

- Receive the application, by internet, if available to the Applicant, or in person if not;
- Receive the filing fee by internet banking if available to the Applicant, or in person if not;
- Serve the application on the Respondent by email, if available to the Respondent, or if not by other means;
- Provide a time, date and room number at the Court for the hearing, and serve that on both parties, and the rostered Counsel to Assist; and
- Receive and serve the Respondent's response;
- Receive and file Directions made, or seal Interim Orders made.

3.9 Stages in the Process

The stages in the process would be:

- Pre attendance filing of information on family violence if applicable;
- Opening and explanation of the process;
- Confirmation both parties are attending voluntarily;
- Undertake mediation;
- If agreement reached, make interim Orders by consent;
- If no mediated agreement reached, and/or no interim Orders agreed, then determination as to whether a direction, or a determination of the issues should be made;
- Directions may include referral;
 - Back to the Family Court:
 - With or without a recommendation for priority;

- To other organisations such as MOCOT, CADS, Living without Violence therapy, counselling, private mediation and so on;
- Counsel to Assist to advise the Court of the outcome, and Directions in standard form;
- If a determination is decided as appropriate, to make the determination orally with written reasons in most cases, or reserved and in writing within 21 days for more complex issues;
- Counsel to Assist to draft Interim Orders, in standard form, serve the same on the parties at the hearing, and file a copy of the Interim Orders, and standard acknowledgement of service in Court, by email;
- Family Court Judge to decide how to address final Orders, or if a defended hearing is to occur.

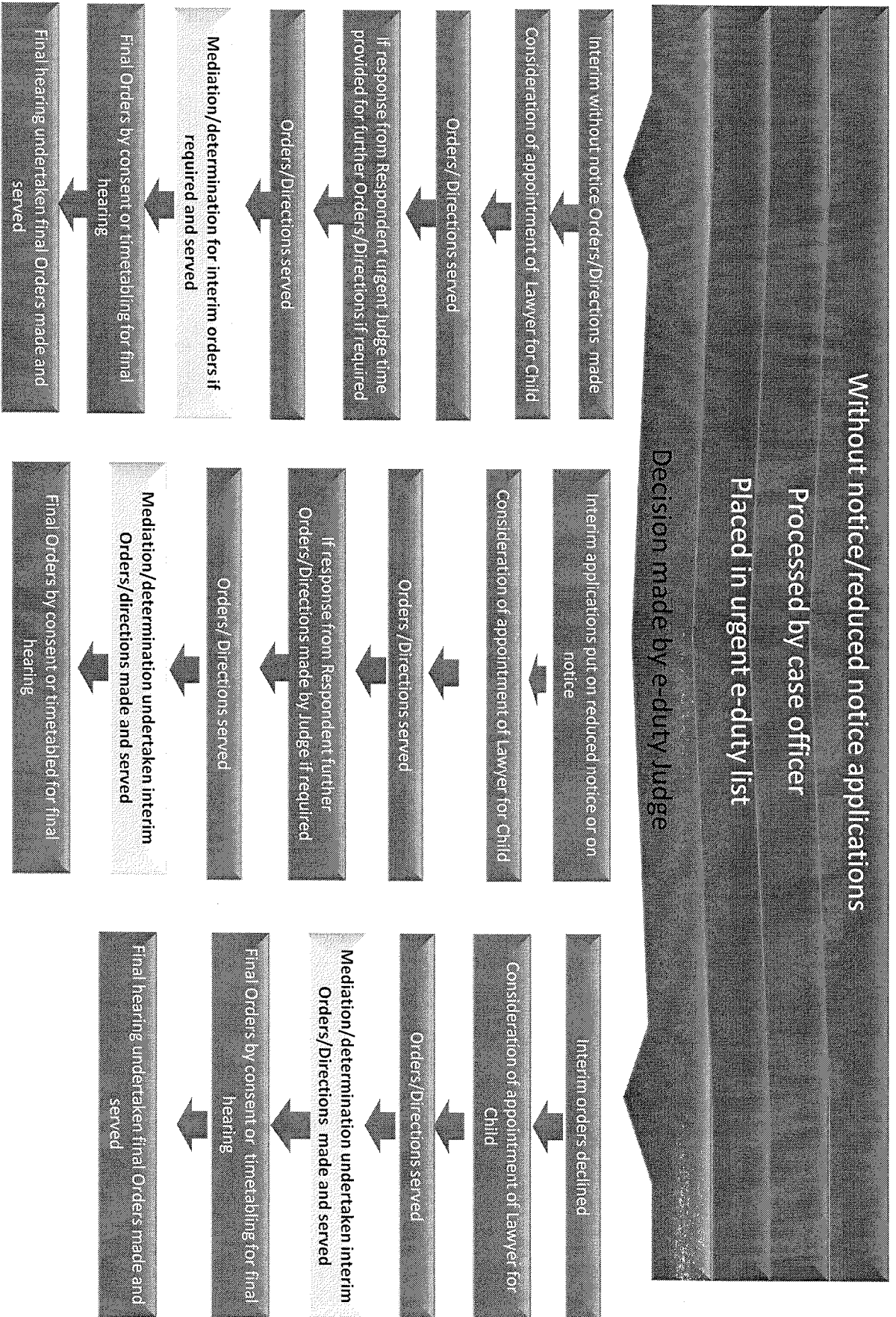
4. INTERIM SOLUTION

- 4.1 Some law changes will be necessary to set up the mediation/determination system proposed above, to reduce the length of Court lists, delays, and provide timely access to justice, and equity for parties and children.

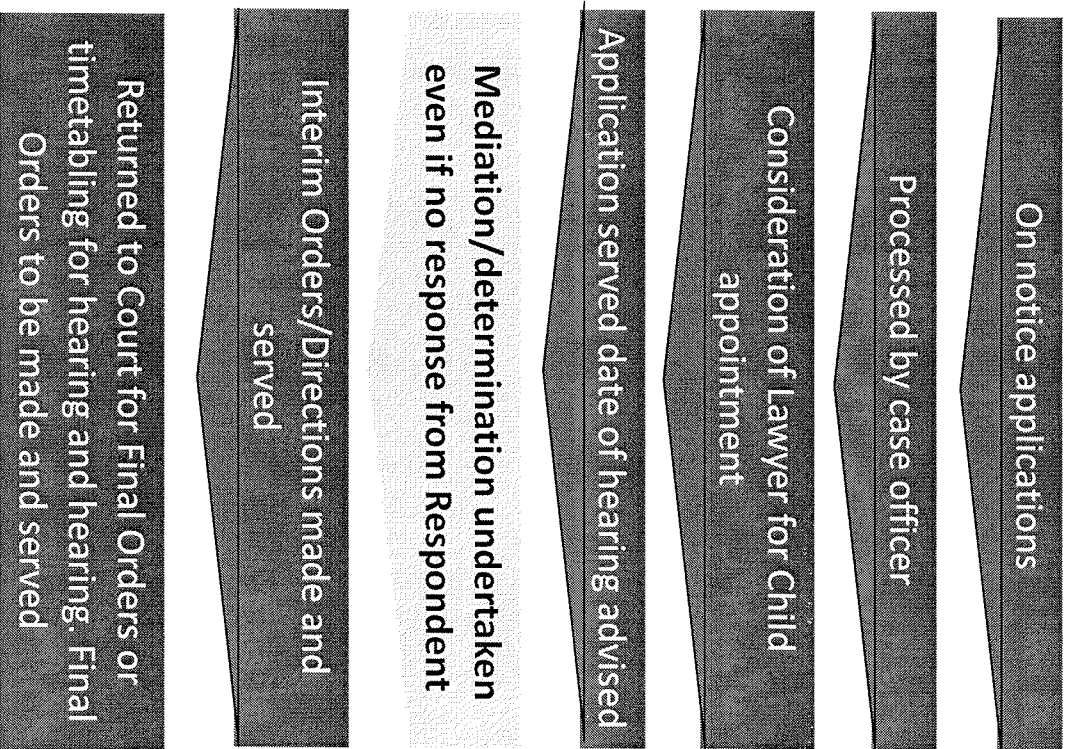
In the interim Counsel to Assist the Court could be appointed, and instructed to undertake the work with a specific brief of mediation only.

- 4.2 Many changes could be made to Legal Aid, and the functioning of the Court, administration difficulties, and Auckland's centralisation, by administrative direction until any law change is made.

FAMILY COURT PROPOSAL FLOW CHART



FAMILY COURT PROPOSAL FLOW CHART ... contd



FAMILY COURT PROPOSAL FLOW CHART ... contd

