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THE DEPARTMENT FOR CHILD PROTECTION

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***Bridging the Gaps between Family Law and
Child Protection***

***Is a unified family court the key to improving services for
children and their families in the family law system?***

Julie Jackson

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Signed Julie Jackson

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The Child's Journey

"2 months of delay in the making of decisions in the best interests of a child or young person equates to 1% of childhood that cannot be restored".¹

Family Court parenting order proceedings between the parents of two children aged 4 years and 3 years (now almost 7 and 6 years) had been underway for 18 months. The matter had been case managed by a Magistrate in the Family Court of WA as part of the Child Related Proceedings Program. An Independent Children's Lawyer (ICL) had also been acting in the best interests of the children because of allegations by the mother that they were at risk from the father. A single expert had completed a recent interim assessment of the family and was in the process of preparing his final report. Following the interim report the Court ordered that the children live with the father and spend limited time with the mother on weekends on an interim basis.

The mother then raised similar allegations to the Department for Child Protection ("DCP"). In February 2009 DCP took the children into care, placed them into foster care and, three weeks later, commenced protection and care proceedings in the Children's Court.

The father made a successful application for the children to be placed with him pending the determination of the DCP application. The Magistrate indicated that he was influenced by the recent interim orders of the Family Court Magistrate who had been case managing the matter and the ICL's support for that decision. The children were placed in the father's care with supervised contact to the mother. The children were in foster care without physical contact with their parents for 4 weeks before they were placed in the care of the father.

In his application the father had to refer to the history of the Family Court proceedings and to file copies of substantial affidavit material and expert evidence that had been filed in the Family Court as none of this information was independently available to the Children's Court. The ICL was not appointed as the Child Representative in the Children's Court proceedings.

Over time the children's contact with the mother became unsupervised for periods of up to one week. In late 2010, following statements made by the older child about the father during school holiday contact with the mother, the Department placed the children in foster care again and made an application for them to be removed from placement with the father. The DCP application was dismissed after it was determined that the events described had not happened. The children were returned to the care of the father after a period of about 2 weeks. In March 2011, shortly prior to the trial of the protection application, DCP withdrew the application for a protection order in relation to the children on the basis that the children were safe in the care of the father.

The father now seeks an urgent change to the previous Family Court Orders because they allow the mother to spend unsupervised time with the children. He alleges that they will be at risk of emotional and psychological abuse in her care, because of her ongoing allegations of child abuse and what she says to the children about those allegations. The mother still wants the children to live with her. The father's Family Court documents will have to include an update on what has happened in the children's lives and in the Children's Court since February 2009 as the Family Court does not have independent access to the Children's Court file. It is likely that the ICL will be reappointed and that DCP will be required to participate in the proceedings as either a party or to give evidence. An updated single expert report may also be necessary.

The parents have now been in dispute for a period of almost 4 years, with DCP involvement for 2 years and there is still uncertainty about the long term arrangements for their care.

¹ Judge N Crichton (1 July 2010), Family Drug and Alcohol Court, Wells Street, London W1 as quoted in The Munro Review of Child Protection Part One: A Systems Analysis 1 October 2010

Executive Summary

A Unified Family Court

The journey of these children could have been different in a unified family court system and the potential for a more timely itinerary is described at the conclusion of this paper. For the purpose of this research, a “unified family court” is a court with jurisdiction in both family law and child protection matters, facilitating a “one judicial officer-one family” approach to the management of child welfare matters. The Courts visited were located in New Zealand, San Francisco, Baltimore, Washington DC, New York, Ontario and the United Kingdom.

The research identified that, in practice, what constitutes a “unified family court” differs from jurisdiction to jurisdiction, but generally a unified Family Court deals with child welfare matters in both family law and child protection and considers both to comprise ‘family law’. In most cases, the unified family court also manages family violence restraining orders (but not breaches).

What works well in the Unified Family Courts?

For children and their families

- the family only has to go to the one place and all the information travels together;
- intake and triage processes that identify risk issues at an early stage;
- on-site services (including drug testing) to link families to the services they require to meet their non-legal needs
- when individual case management (including problem solving courts) and the “one judge –one family” option is available;
- judges have a broad skill set which enhances their ability to deal with all types of family matters;
- the use of private family law orders as the long term placement arrangement for children in care proceedings;
- offending behaviour of children, with limited exceptions for serious offences, dealt with as a child protection issue, utilising a whole of family approach, including the capacity to offer parents the services they need or to be able to order them to do certain things.

For the judges

- judges have a broad skill set which enhances their ability to deal with all types of family matters;
- judges understand the criteria for the best interests of the child in all jurisdictions and the thresholds for the intervention of child protection authorities;
- whether or not judicial officers were located on the same premises, they considered themselves to be part of a Unified Family Court

system and meet regularly to discuss shared issues and attend related professional education;

- interdisciplinary education programmes which include judges and court associated services with responsibility for identification of required training, its provision and coordination on an ongoing basis;

For the courts

- the duplication of time, resources, information analysis and family assessments is minimised;
- problem solving courts in operation to holistically address issues such as drug and alcohol abuse, the needs of very young children and family violence;
- centralised intake for all unified family court matters with administrative staff having an understanding of intake related issues for all areas;
- transparent protocols and processes for sharing information between courts and associated services, including shared computer databases with appropriate confidentiality safeguards;
- on-site services, which provide support to unrepresented litigants and parent education;

For mediation

- available either on-site or through referral arrangements in family law and child protection proceedings, particularly where the mediators have knowledge of both areas;

For the system generally

- legislative options that provide timely and cost effective dispositions, removing the requirement for attendance in multiple courts;
- on site specialist services for assessment and referral in respect of family violence, mental health and alcohol and substance abuse (including drug testing) and for linking families to the services they require.

The challenges for Unified Family Courts

Unified Family Courts in the jurisdictions the subject of this research are dealing with similar challenges to those faced by the courts in Australia. These challenges include:

- a high percentage (in the USA 75% to 85%) of self-represented litigants in family law matters presenting with issues of family violence, drug and alcohol abuse, mental health issues and child abuse;
- limited resources and the need for improved triage processes at an early stage, to identify those cases which should be prioritised for individual case management;

- in some locations the jurisdictional arrangements of the courts managing family law and child protection matters are complex;

Other challenges

- the global financial crisis has had an impact on the budgets of Courts, legal aid and the budgets of related programs;
- where judicial officers are not appointed or elected to specialise in family law areas;
- no requirement for Family Dispute Resolution (FDR) before private family law children's proceedings commence which places an extra triage burden on the court to determine which cases need urgent attention and intensive case management;
- where there are multiple agencies providing front line child protection services with their own structures, processes, programs and data bases;
- where the protocols and processes for information sharing between the Courts, child protection agencies and other service providers are not timely and streamlined;
- where there is a lack of understanding between courts, lawyers, local authorities and other agencies working with families of their individual roles and responsibilities and the information that each require in their role.

Suggestions for Western Australia

Western Australia is well placed to implement a Unified Family Court. The structure and jurisdiction of the Courts and the collaborative working relationships that the Courts, the Department for Child Protection (DCP), Legal Aid WA and other stakeholders have developed mean that Western Australia should also be able to minimise the potential for the challenges that the unified family courts in other jurisdictions experience. The exploration of the potential to unify the management of family law children's matters and child protection is the logical next step in the collaborative journey that commenced with the introduction of the family law reforms in 2006. This view is based on the following:

What is already in place?

- The Family Court of WA and the Children's Court are both State Courts, their jurisdiction is limited and their structure is simple compared to some of the jurisdictions the subject of this research;
- Judicial officers have expertise in the areas that are the subject matter of their Courts and are appointed until retirement age;
- Magistrates and Judges (other than the Chief Judge of the Family Court of WA) in both Courts have the same judicial status, which, for Magistrates, they share with Magistrates of regional magistrates courts;

- In regional areas, Magistrates Courts are already dealing with family law, child protection and family violence issues, transfer matters to the Family Court and Children’s Court and could potentially transfer these matters to the unified family court as appropriate;
- Expansion of the Children’s Court child protection jurisdiction caused by recent permanency planning amendments to the *Children and Community Services Act 2004* (“the Act”), particularly the introduction of special guardianship and associated contact orders, which came into effect on 31 January 2011;
- Some of the Stakeholders have developed, implemented and regularly meet to monitor Memorandums of Understanding (MOU) to improve processes for the timely sharing of information in relation to child welfare and family violence issues to ensure “the best possible outcomes for children” and, in the latter, “to protect victims of violence”;
- Collaborative working relationships between DCP, the Family Court, and Legal Aid WA in relation to family law issues and between DCP, Legal Aid WA and the Perth Children’s Court in relation to child protection issues. These working relationships have the potential to be the strong foundation necessary for the successful development and implementation of a Unified Family Court;
- Processes in place for the provision of mediation (including lawyer assisted mediation) for families in family law and child protection matters, before and after proceedings commence;
- The Family Law Pathways Network (FLPN) has developed and expanded as a vehicle for the Family Courts and other organisations providing family law, mediation and support services including DCP, the Police and legal services to share information about services and build working relationships.

Recommendations

A Unified Family Court would:

- ensure that judges and magistrates dealing with child welfare matters:
 - identify shared issues,
 - have regular meetings to discuss and manage those issues,
 - improve their understanding of the work of each court, and
 - share judicial education.
- have intake and triage processes informed by the Cafcass experience that will identify risk issues at an early stage utilising the Family Court Counselling and Consultancy Service and appropriate referral arrangements to external service providers, including DCP, in both private family law and child protection matters;

- develop and implement a shared information database (court computer systems and data bases currently not linked), with appropriate confidentiality safeguards, to ensure timely, streamlined and transparent information sharing between courts;
- provide individual case management for families in relation to child welfare issues that arise in both family law and child protection-one judicial officer-one family;
- maximise the potential for timely and streamlined “collaborative use of scant resources”² whilst also minimising the duplication of court judicial time and resources;
- minimise delay, duplication and inconsistency in case management and court orders, through processes and legislative amendment that provide timely and cost effective dispositions, removing the requirement for attendance in multiple courts, ensuring the safety of children and other family members;
- facilitate the implementation of problem solving Courts to address issues such as alcohol, substance abuse and family violence issues in child protection and family law, utilising the infra structure of the Family Court Counselling and Consultancy Service and referral arrangements with relevant external service providers;
- utilise the benefits of mediation (including lawyer assisted mediation) available before and after the commencement of family law and child protection proceedings, with the capacity to refer both to off-site mediation after proceedings commence;
- have the capacity to identify, coordinate and provide judicial education and develop and evaluate new programs;
- act as a catalyst to explore, develop and enhance the current use of both child focused and child inclusive practice in family law and child protection matters.
- be well placed to determine Applications for Violence Restraining Orders between parties who have “a family relationship” when they have children.

Next Steps

The stakeholders in Western Australia are currently consulting with each other to build on the collaborative work that has already been done, to better integrate the management of child welfare issues in family law and child protection in Western Australia, including exploration of the option of unification of the child welfare jurisdictions of the Family Court and the Children’s Court.

This research suggests that the development and implementation of a Unified Family Court facilitates the capacity of the Courts to articulate a shared vision in relation to the management of family matters. The opportunity to integrate and potentially unify court processes should provide the necessary foundation to bridge the current gaps in the family

² Anthony Douglas CEO Cafcass Family Law Pathways Network Conference June 2009

law system to improve outcomes for children, to ensure their safety and should energise those involved for the work ahead.

Consideration should also be given to reviewing the current approach to the management of some less serious juvenile offending behaviour, including the age of criminal responsibility. The Signs of Safety Pilot and other whole of family processes such as family group conferences and the family treatment model (Red hook) could be used as a model for an alternative approach which balances the need to address the causes underlying the child's or young person's offending behaviour with appropriate accountability for that behaviour. This approach could also be utilised in relation to the management of some violence restraining order applications by parents and other family members, against children.

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Introduction

The need to identify children at risk and keep them safe is a community responsibility that has a high political, social and media profile. In Australia, we have different Courts dealing with child welfare issues. The Family Courts deal with disputes between parents and family members (private family law). The Children's Courts of each State and Territory deal with child protection matters in circumstances where child protection authorities, (in Western Australia, DCP), consider that children are not safe with their families (public family law). Challenges are increasingly arising when those child welfare issues involve an overlap between the family law and child protection jurisdictions and the responsibilities of these Courts.

This Churchill Fellowship research that has recently been completed in New Zealand, the United States of America, Canada and England seeks to answer the question "Is a unified family court the key to improving services for children and their families in the family law system?"

As Van Horn and Hitchens have suggested "Although courts are sometimes viewed as coercive systems set apart from more traditional service organizations, family courts can also be natural collaborative partners with other agencies and with community based organisations. First, courts are among the institutions in society where troubled children and families are most likely to be found. Children who are abused and neglected, who are delinquent, or who witness domestic violence are more likely than children who do not face similar stresses to need advocacy and mental health services. Their parents also need services to improve their parenting skills, to deal with their own mental health or substance abuse issues, and to help them escape from dangerous environments or to minimize the danger in their current environments."³

Challenges for families involved in the family law and child protection systems include the difference in court processes and terminology and the lack of protocols in place between the Courts to facilitate timely information sharing in respect of the families moving between them. Orders may be inconsistent and families can find themselves the subject of a number of assessment processes and referrals to different agencies.

Family Courts have become more proactive in seeking relevant information independently of the parties, whilst Children's Courts have retained the more traditional approach of relying on the parties to provide the evidence to be the subject of their consideration and determination. There is also the difficulty of working out which jurisdiction is appropriate for the needs of the family and the difference in approach in the two jurisdictions in relation to what constitutes a child welfare (protection) concern that requires DCP investigation and intervention.

For the purpose of this research a "unified family court" is defined as a court with jurisdiction in both family law and child protection matters (private and public family law), facilitating a "one judicial officer-one family" approach to the management of child welfare matters. The meaning of what in practice constitutes a "unified family court" differed from jurisdiction to jurisdiction, but generally child welfare matters in family law and child protection could be dealt with in the same court and both were considered to comprise family law. It is also noted that, in most cases, applications for family violence restraining orders between people who had been in a "family relationship" (but not breaches) were managed by these courts.

³ Patricia Van Horn and Judge Donna J Hitchens Partnerships for Young Children in Court *How Judges Shape Collaborations Serving Traumatized Children in Young Children and Trauma Intervention and Treatment edited by Joy D Osofsky (2007) p246*

The research also identified that the needs of juvenile offenders must be appropriately addressed in association with the introduction of such a model. Approaches such as that used in Signs of Safety Pre-hearing Conferences in the Perth Children's Court, family group conferences in all of the jurisdictions, and the family treatment model used in the Red Hook Community Court in New York, may be informative, in ensuring that juvenile offenders are managed appropriately to minimise the risk of further offending behaviour. These processes are all child inclusive.

The six elements identified by Professor Barbara Babb as integral to a unified family court structure provided a useful starting point for comparison between the Courts that were the subject of this research. It is her view that a Unified Family Court should consist of:

1. A specialised court structure that is either a separate court, or a division or department of an existing court, and that is established at the same level and receives the same resources as a generalist court;
2. Comprehensive subject matter jurisdiction over the full range of family law cases, including juvenile delinquency and child welfare;
3. A case management and case processing system that includes early and hands on contact with each family law case;
4. A judicial assignment system that results in the family appearing before one judge for the completion of one case or before one case management team for subsequent court appearances;
5. An array of court-supplied or court connected social services to meet litigants' non legal needs that contribute to the exacerbation of family law problems; and
6. A user friendly court that is accessible to all family law litigants, including the large volume of self-represented litigants.⁴

Background

Significant family law reform in Australia, including the introduction of Family Relationship Centres, commenced on 1 July 2006. As a consequence of the limited exceptions to the requirement for compulsory family dispute resolution before Family Court proceedings, the "core child related business" of Family Courts across Australia are families who present with multiple issues including family violence, child abuse, mental health issues and drug and alcohol abuse. Many of these families also have involvement with their local child welfare authorities. Sometimes families find themselves "falling between the gaps" of both jurisdictions. Although the child protection legislation may differ, families in other States and Territories can have a similar experience.

As Chief Justice Thackray of the Family Court of WA has recently said "Unfortunately families and children do not realise that it would be very convenient for all concerned if they would fit themselves neatly into one or other of these systems and stay there". Instead, some families find themselves bouncing back and forth between the two systems."⁵ Chief

⁴ Professor Barbara A Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blue print to Construct a Unified Family Court*, 71 S.CAL.L.REV.469 (1998);

⁵ Chief Justice Stephen Thackray *Child Protection Bridging the Commonwealth/State Divide* Speech at the National Family Law Systems Conference Canberra July 2010

Justice Bryant of the Family Court of Australia has described this as the “veritable San Andreas fault of our system.”⁶

Statistics reveal that grandparents and extended family members are increasingly taking on the care of children due to protection concerns with either or both parents. Recently it was reported⁷ that each year about 200 children in Western Australia are placed in informal relative care, with approval from DCP, when their relatives are unable to care for them. The Minister for Child Protection announced a new financial scheme to enable grandparents to be eligible for a one-off payment of at least \$1,000 per child where the Department for Child Protection has had previous involvement under a financial aid scheme, “as unlike registered relative carers who care for a child pursuant to a protection order, informal carers do not receive a subsidy and it is important that they are recognised for the important foster roles they play, she said.”⁸

Often these people go to the Family Court seeking orders that children live with them, generally at the instigation of DCP. The challenge for these family members is the question of which Court is more appropriate. Often they find themselves having to appear in both Courts before the arrangements for the children are finally determined.

Western Australia is uniquely placed, as the only State Family Court in Australia with a single court for family law matters, to be the first State in Australia to develop and implement a unified Family Law/Child Protection Court to manage all cases involving the welfare of children, with the same judicial officers able to determine both public (child protection) and private family law matters.

The experience of families and professionals of the reforms to Family Law and Child Protection law since 2006 and the unique jurisdictional arrangements of the Family Court of WA demand that the potential to integrate the jurisdictions of the Family Court and the Children’s Court into a unified Family Law/Child Protection Court, to manage all cases involving the welfare of children, be explored as a matter of the highest priority in the best interests of children and their families.

Overseas Jurisdictions

General overview

Courts exercising private family law jurisdiction in the locations the subject of this research are dealing with similar challenges to those faced by the courts in Australia. These challenges include:

- increasing numbers of self-represented litigants in family law matters presenting with issues of family violence, drug and alcohol abuse, mental health issues and child abuse;
- limited resources and the need for improved triage processes at any early stage, to identify those cases which should be prioritised for individual case management.

In the United States and Canada it is less common for children to be represented in private family law proceedings. In New Zealand all children are currently represented in family law

⁶ Chief Justice Diana Bryant Speech Inaugural Family Law System Conference 19-20 February 2009

⁷ Boddy,N “Grandparents to get carer cash” West Australian Newspaper 9 February 2011

⁸ Minister Robyn McSweeney *Grandparents to get carer cash*” The West Australian Newspaper 9 February 2011

proceedings and children are also regularly represented in family law proceedings in the United Kingdom.

In New Zealand, the United States, Canada and the United Kingdom all parents and children have representation in child protection proceedings. In addition, in these jurisdictions, other than the United Kingdom and Ontario, Courts have an ongoing responsibility to monitor the progress of permanency planning, for children in care. This means that there is often a crossover between the jurisdiction of juvenile justice and child protection courts for older children in care. Crossover also occurs as a consequence of jurisdictional arrangements and cultural attitudes towards the management of the offending behaviour of children and young people.

The global financial crisis has had serious ramifications for the funding of family courts and related programmes in all jurisdictions.

In 2009 in New Zealand, there was a review of the legal aid system⁹ which was required to take into account “the projected fiscal environment of future years” and had a key focus of “developing alternative approaches to manage or reduce costs”. The recommendations of that review to change the focus, structure and management of the legal aid system are in the process of being implemented and may impact on the current approach to the management of family law in that jurisdiction. In this regard it is noted that lawyers representing children in family law and child protection proceedings are currently appointed and funded by the Family Courts and not the Legal Services Agency (legal aid).

In California, the State budget deficit for 2010/2011 was approximately US \$19 billion and family law, child protection and juvenile justice are all primarily state funded. Budget cuts were also having a significant impact in Maryland.

In the United Kingdom, major reviews of the Family Court system for family law and child protection, the child protection system itself and Legal Aid are currently being undertaken in the wake of the global financial crisis, with the government budget predicament presenting as a major complicating factor.

⁹ *Transforming the Legal Aid System-Final Report and Recommendations* (November 2009)-
Dame Margaret Bazely

New Zealand

Overview of the Jurisdiction

In New Zealand the Family Court exercises jurisdiction under both the *Care of Children Act 1989* (private family law) and the *Children Youth and their Families Act 2004* (child protection or public family law). The Court also has jurisdiction to make Violence Restraining orders, although breaches are dealt with as criminal matters in the District Court. The jurisdictional issues in respect of Commonwealth and state law which arise in Australia do not arise as New Zealand is a unitary system and is not divided into States and Territories.

The Family Court is a division of the District Court of New Zealand. There are in 58 Family Courts in New Zealand and 43 warranted Family Court Judges. Some of these Judges may also sit in the Youth Court and the Family Violence Courts.

The child protection authority is the Department of Children Youth and Family Services(CYFS).

Criminal proceedings can only be commenced against a child in the Youth Court in New Zealand in very limited circumstances.¹⁰ Generally the offending of children and young people under the age of 14 years is managed as a child protection issue through the family group conference process (managed by CYFS), which addresses the accountability of the child, but also develops a care and protection or safety plan for the child, the emphasis of the process being the need to address the welfare issues that underlay the child's behaviour. Some of these children may become the subject of care and protection proceedings in the Family Court.

The principles of the *Children Youth and their Families Act 1989* include that "any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending."¹¹ Another principle requires that any measures for dealing with offending by children or young persons should be designed to strengthen the family and family group of the young person concerned and to foster the ability of families and family groups to develop their own means of dealing with the offending (*paraphrased*).¹²

Youth Court deals with offences committed by children between the ages of 14 and 16 years. Most young people are diverted away from appearing in Court, and the family group conference process is the basis for decision making in the Youth Court. Recent amendments to the *Children Youth and their Families Act 1989* which took effect on 1 October 2010 are likely to result in some 12 to 13 year old children being dealt with in the Youth Court.

Case Management in the Family Court

A major challenge for the Judges of the Family Court is the workload associated with the Court's broad jurisdiction. The jurisdiction includes family law, child protection, domestic violence, adoption, estates and testamentary promises, maintenance and areas of health and disability legislation, including mental health and the compulsory care and rehabilitation of people with a mental disability that have been charged with or convicted of a criminal

¹⁰ Section 272- where the child is over 10 and the offence is murder or manslaughter, if aged 12 or 13 and the offence (other than murder or manslaughter) has a maximum penalty of at least 14 years or life, or where they have previously committed such offences, the maximum penalty is at least 10 years, but less than 14 years.

¹¹ Section 208(fa)

¹² Section 208(c)

offence. The Court also deals with powers to act on behalf of others where individuals do not have the capacity to manage their own affairs.

Families benefit from the broad skill set and experience of the Judges dealing with their family law, child protection and domestic violence issues. The workload impacts on the ability of the Court to offer a “one judge-one family” approach but the families cases are managed together in the one Court. To the extent possible, the same Judge will deal with the family law, child protection issues that arise within a family. If the judicial officer changes, the Court files are still managed together, the Court has access to both files at each hearing, and is able to make both family law and child protection orders, as appropriate, at each hearing¹³. Applications for violence restraining orders will be managed with these proceedings. A lawyer appointed to act for a child in either family law or child protection proceedings will have standing if proceedings are commenced in relation to the other, and may be directed to appear in those proceedings.

There is a joint protocol in place between the Court and CYFS to ensure the safety of at risk children¹⁴. If the Family Court believes that a child may have been, has been or is at risk of harm, it may make a referral to Department of Child Youth and Family Services (CYFS) pursuant to section 15 of the *Children Youth and their Families Act 1989* for investigation (similar to the Form 4 procedure used in the family courts in Australia).

An application for a protection order can be made by the lawyer for the child, police and other agencies providing care for children in addition to CYFS. Pursuant to section 19 of the *Children Youth and their Families Act 1989*, where such an application is made to the court in family law proceedings, or where the judge believes a child is in need of care or protection, they can refer the matter to a care and protection coordinator who is required to convene (with some exceptions and options) a family group conference. A declaration that a child is in need of care and protection cannot be made until there has been a family group conference and input from CYFS. A report in respect of the outcome of the process has to then be provided to the Court within a limited time frame. In some circumstances a declaration that a child is in need of care and protection will be considered appropriate, in others safety plans and supports will be developed to address the issues that have been identified. The number of children declared to be in need of care and protection as a consequence of the joint protocol has not been problematic for CYFS as such a declaration cannot be made without CYFS input.¹⁵

The Court also has the option to make the child a ward of the Court pursuant to the *Care of Children Act 2004* until such time as CYFS is able to provide assistance to determine the appropriate care arrangements for the child.

Anecdotally, CYFS lawyers, seem to consider that the skill set of judges and lawyers have been enhanced by the combined family law and child protection jurisdiction, including their understanding of what meets CYFS thresholds for a child protection concern, and, in the case of CYFS, their understanding and associated use of family law options and processes.

An example was provided of the benefits which flow to children and their families as a consequence of the jurisdictional arrangements of the Family Court. Circumstances were described in which CYFS might have commenced child protection proceedings and the outcome of the family group conference is that it is appropriate for a grandparent to obtain Family Court orders. In these circumstances, CYFS would fund the necessary application on the basis that it would be the most cost effective way to ensure the safety of the child. As the

¹³ Meeting with Family Court Coordinator Wellington Family Court 28 September 2010

¹⁴ Joint Protocol Ministry of Justice and Department of Child, Youth and Family Services 1 July 2000

¹⁵ Meeting with Principal Judge Peter Boshier 29 September 2010

proceedings are in the same Court, it is also possible that CYFS might stay involved as a “special guardian” to do such things as organise contact visits a few times each year. Information was also provided about a new CYFS initiative called “Home for Life” designed to encourage foster carers to seek family law orders for children so that they would no longer be in the care of CYFS. This initiative includes the provision of financial incentives such as a \$2500 up-front payment for clothing and other costs, free necessities such as a cot and pushchairs, assistance with the legal costs of the Family Court application, CYFS support, seminars and time- out "respite breaks”.

Lawyers for parents and children were also supportive of the combined family law and child protection jurisdiction of the Family Court.

Mediation

Currently there is no requirement for participation in mediation (family dispute resolution) prior to the commencement of private family law children’s proceedings under the *Care of Children Act 1989*. All such cases have been managed in the Family Court under the National Early Intervention Scheme (NEIS) since April 2010 (**Appendix 1**). The scheme is currently in the process of being evaluated by The Ministry of Justice.

In the NEIS a case coordinator (social work or counselling background) triages each application that is filed and refers it to either an urgent or standard track. If a matter is placed on the standard track, parties will be required to attend a parenting through separation course and counselling (confidential) followed by Judge or lawyer led mediation as part of the process. Principal Judge Boshier has said “The emphasis in the standard track is to ensure that dispute resolving steps are undertaken more speedily and more meaningfully. The urgent track is reserved for cases that have indicators of complexity or intractability, such as family violence cases. Such cases cry out for prompt judicial oversight; for if they are allowed to proceed through counselling and mediation the defaulting or abusive parent may gain an advantage to the detriment of the child. This emphasis on urgent, robust judicial intervention is vital for those parents who separate and have immediate, serious issues.” He also indicated that “Specialist mediation is unquestioningly one of the most important steps in NEIP; it is conducted by lawyers appointed to assist the Court who have specialist training. They bring not only mediation skills but also expert knowledge of the legislation to their work and the mediations are conducted in a robust manner with a view to an agreement being secured.”¹⁶

A committee chaired by Principal Judge Boshier conducted a review of the Family Court in 1993 and considered that Judges mediating cases was not an efficient use of Judge time, nor did it amount to proper mediation.¹⁷ The New Zealand Parliament passed the *Family Law Matters Bill* in 2008 which included provisions for the creation of family mediation. This legislation has not yet been implemented. Principal Judge Boshier has expressed the view that “the early intervention process with its hallmark Lawyer- to-Assist mediation is one of the most fundamental reforms created in the Family Court since its inception in 1981.” He has also said that he favours “the early intervention process model being extended to care and protection cases and subjecting virtually all of our casework to mediation.”¹⁸

¹⁶ “Mediation in the Family Court: Where to Now?” Speech to the Arbitrators and Mediators Institute of New Zealand 23 February 2011

¹⁷ *Getting it Right in the Family Court* speech of Principal Judge Boshier 18 November 2010

¹⁸ *Ibid.*

Summary of New Zealand

In the Family Court in New Zealand:

- There are no Commonwealth/State jurisdictional issues because the system is unitary;
- the Court deals with family law, child protection and family violence protection order issues and manages these together when they arise in the context of the one family;
- judges have a broad skill set and a well-developed understanding of the overlap between the multiple issues that arise in families, including juvenile offending behaviour and the associated implications for children and victims of family violence;
- all children are represented in family law and child protection proceedings and, in the case of the latter, all parents are also represented;
- There is a Joint Protocol for the Family Court to refer matters to CYFS if they feel that the child is unsafe;
- There must be a family group conference before an order for child protection can be made and the offending behaviour of most children and young people is also managed in this way.

What works well

- the family only has to go to the one place;
- all the information travels together;
- judges have a broad skill set which enhances their ability to deal with all types of family matters;
- less time involved;
- the duplication of resources, information analysis and family assessments is minimised;
- judges understand the criteria for the best interests of the child in all jurisdictions and the thresholds for the intervention of CYFS;
- the joint protocol, particularly that when the Court makes a referral to CYFS a family group conference must be held and a declaration that a child is in need of protection cannot be made until it has occurred and there has been input from CYFS;
- a private family law order is regularly the outcome of care proceedings as the long term placement arrangement for a child and CYFS encourages, supports and often funds extended family members to obtain these orders.

- most juvenile offending behaviour for children up to the age of 14 years is dealt with as a child protection issue with limited exceptions in respect of serious offences.

The challenges

- the jurisdiction of the Court is very broad and this means that the workload is too much to provide a “one judge - one family” approach. Information travels together, but matters are often not managed by the same judicial officer;
- there is no requirement for participation in mediation (family dispute resolution) before private family law children’s proceedings commence which places an extra burden on the court in terms of triage to determine which cases need urgent attention and intensive case management;
- the mediation that does occur after proceedings commence is judge or lawyer led. This impacts on the availability of judges for court hearings. Could benefit from the use of trained mediators to conduct mediation in the early stages of both family law and child protection proceedings;
- Child protection matters are not referred to mediation after proceedings commence;
- the global financial crisis and the impact on Court budgets and the budgets for related programs;
- The potential impact of the review of legal aid funding arrangements.

United States

Overview

In the USA, since the 1990's, Court reform in relation to the management of family law matters (public and private) has steadily increased. Family law and child protection in the United States is state law, and, as of 2006, there were only 13 States without a specialised or separate system to handle family law matters.

Family law matters in the USA can include jurisdiction in relation to divorce, annulment, property, live with and spend time with arrangements, maintenance and child support, termination of parental rights (care matters), domestic violence, juvenile causes (juvenile delinquency, child abuse, child neglect and other family issues).

The structure and jurisdictional arrangements of the Courts including processes for appointment of judicial officers can vary not only from State to State, but from county to county, within States.

San Francisco

Overview of the Jurisdiction

The Unified Family Court in San Francisco was created in 1997. It has four branches which are family law (including family violence), juvenile dependency (child protection), child

support and juvenile delinquency. Although the Court is administratively unified it does not have a “one family-one judge” approach except in limited circumstances. Family Law and child protection courts are located on the same premises, with juvenile delinquency dealt with in a separate court building.

Most Judges are elected to the Superior Court. Their role is not defined as Unified Family Court specific, and they do not usually have a family law background. There are some judicial officers, called Commissioners, who are appointed and these judicial officers are generally more likely to have a family law background and are more stable in their tenure.

Unified Family Court programs with a variety of structures were also commenced after 1997 in the counties of Butte, Napa, Del Norte, Los Angeles, Orange and Sacramento. Although the evaluation of these programs indicated that they had been successful, many of them have been significantly affected by recent budget cuts.

Juvenile Court generally deals with the offending behaviour of children between the ages of 14 and 17 years. Children can be tried as adults for some offences when they reach the age of 14 years.

The Center for Families, Children and the Courts

In California the Office of Administration of the Courts Center for Families, Children and the Courts works directly with the Courts, legal services and other associated family service providers in relation to monitoring and improving the operation of the Courts, identifying and addressing associated issues. The Center has a role in state-wide planning, performance analysis, and funding including the funding, education, technical support and evaluation associated with the introduction of new programs and pilots. It is also responsible for the associated rules of Court. The broader educational role of the Center includes the provision of training programs for judicial officers, court staff and court experts and public information and education.

For those at the Center involved with the development and implementation of the unified family court programs, of particular benefit, was the fact that the relevant stakeholders regularly met together and identified issues of common concern, which they were subsequently able to address in collaboration with each other¹⁹. A guide for unifying and coordinating family and juvenile matters was developed from the state-wide planning process which occurred during 2002, called the *Unified Courts for Families Deskbook*.²⁰ That planning process identified several important concepts including “the necessity of addressing domestic violence issues in both family and juvenile matters, the value of cross training for judicial officers and court staff in all divisions handling cases involving families and children and the importance of implementing systems that allow for appropriate information sharing and coordination throughout the courts”²¹.

Case Management and Information Sharing

The rotation of judges to the Family Court is historically of very limited duration due to the challenges associated with working in an unfamiliar area and excessive workloads, in circumstances where 70% to 80% of litigants are self-represented. Children are only represented in “high conflict” cases, although from 1 January 2011 all children over the age of 14 years will have the right to be heard in family court proceedings as a consequence of

¹⁹ Meeting with Deborah Chase and Julia Weber Center for Families Children and the Courts San Francisco October 2010

²⁰ Administrative Office of the Courts Center for Families, Children and the Courts 2004

²¹ Ibid.

the *Elkins Task Force*²². Other significant changes arising from the recommendations of the Task Force include that a case should be kept with the same judicial officer through to final judgement and that the Judicial Council should set a minimum length for the family law judicial assignment to try to avoid judicial officers being required to take over cases mid stream without personal knowledge of the previous history²³. All parents and children are represented in dependency proceedings.

Currently, if dependency proceedings commence during the course of Family Court proceedings, it is not usually the case that the Family Court Judge will retain the matter. It is understood that this is a consequence of the frequent rotation of family court judges and the heavy workload of the Court. It is usually the case that the same Judge that dealt with the family in the dependency court will also deal with the family in relation to any family court proceedings that follow the dismissal of the dependency proceedings. The content of the dependency file except for any exit order does not become evidence in any subsequent Family Court proceedings without the leave of the Court.

The judicial officer in family law children's matters and child protection (known as juvenile dependency) proceedings is provided with details of any "relevant proceedings or orders" from other Courts including violence restraining orders and criminal offences. In circumstances where both family law and child protection proceedings arise, a decision is made as to which court (family law or child protection) should deal with all matters depending on the history of the particular case, including which court is most familiar with the family.

A protocol also exists for the management of young offenders who may be the subject of an open dependency case. Depending on the nature of the offence, it is possible for a Juvenile Court Committee for Assessment and Status Evaluation (CASE) to be called to assess the child's family, educational, medical, emotional and behavioural history to make recommendations to the Juvenile Court as to whether the dependency or delinquency jurisdiction will best serve the child's interests and the protection of society.²⁴

Currently the search for "relevant cases" (defined by statute) is the full-time role of an administrative clerk who has the support of another worker for relief or extra assistance in urgent circumstances. Related cases include any cases between the parties or involving the children, family violence and certain criminal proceedings involving the parties and/ or the children. It can also involve health and safety and substance abuse matters and some small claims.

The work involved in extracting and producing the relevant data for the consideration of the Court is very labour intensive because the different Courts do not share the same computer system. The administrative clerk is required to search several different computer systems for the necessary information. These systems are searched 3 days before the hearing and then again on the day before the hearing and provided to the Judge. The Judge reviews the information and then refers it back to the case management clerk for shredding after the hearing. This procedure is repeated prior to every hearing of the matter. If arrest warrants are identified during the course of the searches these are executed following the court hearing.²⁵

²² See *Elkins Task Force Final Report and Recommendations* April 2010 and AB 1050 which amended Family Code Section 3042

²³ AB 939 amendment to Family Code Section 2330.3

²⁴ Protocol for Implementation of Welfare and Institutions Code 241.1 (updated January 2008).

²⁵ Meeting with Ramoncito Borneo administrative clerk responsible for searches of "relevant cases" October 2010

A project to develop, design and implement a shared computer system has been completed, but budget cuts as a consequence of the State budget deficit have delayed the implementation of the new integrated computer system.

Mediation and Parent Education

Services located at the Court include Family Court Services (FCS) which provides mediation for custody and visitation (live with and spend time with) disputes and juvenile dependency cases. FCS also provides free orientation programs for parents involved in family law children's matters that include education about mediation, what to expect in court, the developmental needs of children, the impact of separation, conflict and violence on children and how to work with the other parent to help the children. Parents must attend these 3 hour sessions (separate sessions) and mediation prior to their dispute being heard by the court.

In violence restraining order applications where the parties have children, court orders may be made in relation to the care arrangements for the children. If both parties attend Court for the hearing they will be ordered to attend a domestic violence related orientation (there is a separate session for protected and restrained parties) even if they have previously attended the family law orientation, followed by confidential mediation, which is conducted by shuttle. The Court will then make any orders agreed in mediation and hear any outstanding issues relating to the restraining order and the care arrangements for the children.

The family law and dependency mediation offered by FCS is confidential, with only the agreements reached being provided to the Judge. In San Francisco, unlike other counties, parties do have the option of attending more than one session of mediation and very detailed and informative database records suggest that this mediation is very successful²⁶. In the event of agreement not being reached in family law mediation, with the parties consent, the Court can be advised of their final positions at the mediation, in relation to the issues. After this mediation (Tier 1), the Court does have the option of ordering Tier 2 mediation which involves the appointment of a new mediator who gathers information from the parents, teachers and other professionals working with the family and provides a report to the Judge. The report does not contain recommendations and the coordinating mediator will conduct a further mediation once the report is published and distributed. The Court also has a Tier 3 option which involves FCS organising a custody evaluator to do a custody evaluation and make recommendations in relation to the matters in dispute.

In dependency matters the case can be referred to mediation at any stage in the proceedings in an effort to plan for the care of the child. The issues addressed can include jurisdictional issues, such as whether the matter should proceed as a juvenile dependency or private family law matter.

All dependency cases must be referred to confidential mediation before the case is dismissed when both parents have a significant relationship with the child and the parents are not living together, or where one or both of the parents have custody of the child and the child has a significant relationship with a former caretaker.²⁷ Lawyers acting for the parents and the children can attend the mediation along with the child welfare workers and their lawyers. Those attending discuss whether agreement can be reached in relation to the proceedings being dismissed and the plans for the future care of the children, including how risk issues are going to be managed and whether any custody and visitation "exit orders" are appropriate. If such an order is made, it goes on to the family court file for the family, or, if one does not exist, a family law file is created. If agreement is not reached in relation to the

²⁶ Meeting with Donna Guillary Supervising Mediator Family Court Services San Francisco Unified Family Court October 2010

²⁷ San Francisco Local Rule 12 (Dependency) effective 1 January 2007.

long term care arrangements for the child and family court proceedings are commenced, the same mediator will become the mediator for the family law mediation that follows. A family law mediation may also be ordered to monitor the arrangements that have been put in place.

Self-represented (Pro Se) Litigants

There is a Facilitators Self Help Centre located in the San Francisco Unified Family Court to provide assistance to parties to family law proceedings who do not have legal representation. As previously indicated, 70% to 80% of litigants in family law matters are unrepresented. Originally the Centre was funded to provide assistance to parties in child support matters. The funding has been broadened to include other children's matters on the basis that parents involved in the lives of their children are more likely to pay child support. Staff of the Centre do not provide legal advice or legal representation in court, but do provide assistance with the completion of court documents. Their role is a neutral one with the test for whether the assistance sought is appropriate being "would you say the same thing to the other party".²⁸

The availability of legal aid in family law matters is limited to low income people who have been the victims of domestic violence. There are a number of pro bono programs that can also provide legal assistance in some circumstances for financially disadvantaged people.

Problem Solving Courts and Integration with Community Services

A number of problem-solving courts have been developed within the dependency jurisdiction including drug dependency courts, which focus on addressing the drug use issues of parents and "zero to three courts" which focus on the particular issues of families with children under the age of three years in the care system. These Courts also work closely with community agencies providing the relevant support services for parents in these Court programmes.

When the Court orders supervised visitation in family law matters FCS facilitates visitation services at the Rally Family Visitation Services programme by providing the necessary orders and related information to the programme. The Rally program has professional staff and trained volunteers who supervise visits and handovers and is the only one of its kind in San Francisco. The services are designed for children who may be at risk of emotional or physical harm following their parents' separation or divorce.²⁹

The Court also contracts agencies to do DNA and drug testing and provides rooms at the Court for this purpose so that any orders in respect of testing can be carried out immediately, without cost to those involved.

Outcome of Unification

From discussions with professionals working in the system, it seems that the benefits of the Unified Family Court include that family law and dependency court judges are located in the same building and meet regularly with each other and the juvenile court judges to share information and discuss overlapping issues. The administration of the family law and dependency courts is integrated, staff, including the mediators, have an understanding of both jurisdictions, and families and professionals can be confident that related cases information will be identified. In addition families with overlapping family law and dependency matters attend court in the same location for both matters.

²⁸ Meeting with Kristen Hoadley Manager Facilitators Self Help Center San Francisco Unified Family Court October 2010.

²⁹ see http://www.saintfrancismemorial.org/Who_We_Are/195762

In relation to the San Francisco experience, Van Horn and Hitchens have stated that “moving in the direction of placing the necessity of the understanding of the needs of the individual families on the same level of importance as the necessity of ruling on the legal issues involving members of the family has opened the door for the possibility of creating a court that will act as a collaborative partner to support the individuals before it, even as it exercises the necessary restraints on their behaviour.”³⁰

Baltimore City

Baltimore is the home of the University Of Baltimore School Of Law's Center for Families Children and the Courts and Professor Barbara Babb, who developed the “*Blue print to Construct a Unified Family Court.*”³¹ Professor Babb and the Center have been national leaders in advocating for the development and implementation of the concept of a unified family court system designed to address family related legal issues in a holistic way. The Center also provides technical support and evaluation services for jurisdictions implementing unified family court programs. In 2007 the Center hosted the Second Summit on Unified Family Courts, at which Professor Babb presented her updated survey on how each State of the United States was handling family law matters.³² In 2010 the Center hosted the Families Matter Symposium³³ which was attended by judicial officers, lawyers, social scientists, financial experts and policy makers who called for an interdisciplinary approach to improving family law systems.

Overview of the Jurisdiction

Maryland has family divisions in the 5 largest circuit courts in the State, including Baltimore City. The Courts dealing with family matters in Baltimore City are unified, in that juvenile justice and dependency are included in the jurisdiction of the Family Division, however juvenile justice and child protection are managed in a different court building to private family law matters (the latter includes violence restraining orders, called protection orders). It is understood that the intended aim is still to bring both the Family Court and Juvenile Court together because the related issues are so intertwined.³⁴ Judicial Officers rotate between the Courts, meet together on a regular basis to discuss shared issues, including the coordination of the management of families with multiple cases. They also participate in the same professional development. Circuit Judges are required to spend at least 1 year of their rotation in the Family Court, with 2 years being the preferred minimum period in both Courts as continuity is considered to be important for families.³⁵

The Family Division of the Court “exists to serve families” and recognises that it is often social issues that are the basis for the legal disputes that bring families to the court. The focus of the Court has been described as “assisting families in crisis with obtaining necessary services, whilst simultaneously adjudicating their legal disputes. The ultimate objective of the division is to use programs, services, community resources, and specialised personnel to address underlying issues that occur in families in order to obviate the need for further legal intervention.”³⁶

³⁰ Ibid 1

³¹ Ibid 5

³² Professor Barbara Babb *Reevaluating Where we Stand: A Comprehensive Survey of America's Family Justice Systems Family Court Review, Vol 46 No 2, April 2008 230-257*

³³ University of Baltimore ,24-25 June 2010

³⁴ Administrative Judge of the Family Court Yvette M Bryant, who has also been a Juvenile Court Judge, Meeting October 2010

³⁵ Administrative Judge of the Juvenile Court Edward R.K. Hargadon-Meeting October 2010

³⁶ Annual Report of the Family Division of Baltimore City Fiscal Year 2010.

The Juvenile Court deals with children and young people from the age of 0 to 21 years involved in juvenile delinquency and juvenile dependency (including guardianship and adoption) matters. They will be committed either to the care of the Department of Social Services (CINA children) or to the care of the Department of Justice Services (delinquents). Children in the delinquency jurisdiction are managed as “delinquents”, not criminals. Children charged with crimes are dealt with as adults in the criminal court. Sometimes the charges are reviewed and the children are then dealt with as delinquents in the juvenile court.

Case Management

If juvenile dependency (CINA) proceedings are commenced during family court custody proceedings, the family court proceedings are generally stayed until the juvenile dependency proceedings are determined, although there have been occasional cases that have been dealt with in the Family Court.

Prior to trial in juvenile dependency matters the Juvenile Court will advise the parents as to which Court will determine the custody issues in the event that the children are not found to be in need of assistance. It is noted that where the related allegations are proved against only one parent and “there is another parent available who is able and willing to care for the child, the court may not find that the child is in need of assistance, but, before dismissing the case, the court may award custody to the other parent.”³⁷ The overriding standard in both proceedings is “the best interests of the child.” If the juvenile court makes a custody order in favour of one parent, the other parent needs to demonstrate that there had been a material change in circumstances to be able to reopen the custody proceedings in the Family Court.

When there are proceedings pending in both courts, the two courts are required “to communicate with each other in expeditious fashion to determine the more appropriate court to take further action consistent with the best interest of the child and then advise the parties of the decision and the basis for the decision.”³⁸

Sometimes the District Court hears initial protection order (violence restraining order) applications in circumstances where there is a family relationship and the Family Court is not readily accessible, but they are transferred to the Family Court following that hearing. Sometimes temporary custody is given to the applicant at the time of the ex parte protection order hearing and the orders may not allow visitation. The Protection Order file and the Family Law file travel together until the proceedings are concluded³⁹.

Family Court proceedings (including protection order matters) are not confidential so there is no issue in relation to information being shared with the Juvenile Court. Juvenile Court proceedings are confidential which means there is a requirement of “good cause” for information to be shared with the Family Court.

Matters can come to the Family Court after juvenile dependency proceedings have been terminated, but as dependency proceedings are confidential the Family Court does not have automatic access to Court orders or documentation. Parties are required to file a copy of the relevant “exit orders” with their application for children’s orders (custody and visitation complaint). In the event that there have been previous dependency proceedings, the Family Court must give consideration to whether the child or children are likely to be abused or neglected if custody or visitation is granted. Unless the Court finds that there is no likelihood of further child abuse or neglect the court will deny custody or visitation other than “a

³⁷ Maryland Code (2002,2009 Supp.) Courts and Judicial Proceedings (CJP) Article 3-819(b)(10)(e)

³⁸ Ibid, Article 3-803(b)(3)(ii)

³⁹ Meeting with Robin Travers Case Manager Family Court Baltimore City October 2010

supervised visitation arrangement that assures the safety and the physiological, psychological and emotional well being of the child.”⁴⁰ In these circumstances the Family Court may refer the case to Medical Services and deny visitation (supervised or unsupervised) until a report can be prepared in respect of the risk to the child. The Medical Services Office of the Baltimore City Family Court is unique in Maryland. Psychiatrists, social workers and other mental health professionals work in the Office and the services offered include custody and/or visitation evaluations, a supervised visitation program and a child exchange program.

In family law, all contested children’s matters are listed for a scheduling conference. Any risk issues are addressed at that Conference. If substance abuse issues are raised the parties can be sent to a substance abuse evaluation and ordered to do urinalysis which is done on the court precinct. Parties may also be referred to Medical Services for an evaluation.

Sometimes as a consequence of child risk concerns the custody or visitation matter will be referred to the Adoption and Custody Unit (an adjunct of the Medical Services Office) of the Court for a home study evaluation. This is a specialised unit under the direction of the Department of Social Services (DSS), the child protection authority, with access to DSS (including Child Protective Services) staff and records for relevant information.

Notifications of child risk concerns from the Family Court are treated as a priority by Child Protective Services (CPS). Where the concern relates to abuse the response is required within 24 hours, and, in the case of neglect, 5 days. The worker assigned to the case attends Court to provide a report in relation to the findings of the CPS investigation. The CPS computer system has access to Maryland criminal records as well as the families DSS/CPS history.

When a family is referred to supervised visitation, the parents and child/ren attend an orientation. The parent being supervised and the children see each other in the Medical Services Office playroom and are observed by a social worker either in the room or via a two way mirror. Initially 8 visits are scheduled and a report prepared by the social worker for the court. If appropriate, the Court can order 4 more visits. Following the final visit the Court may hold a conference to discuss progress and the prognosis for unsupervised visitation. Medical Services also offer supervised handover services called Neutral Child Exchange.

Since 2007 the Juvenile Court has taken a one judge-one family approach in respect of dependency and delinquency issues. Each child has one file containing details of both the dependency and the juvenile delinquency proceedings and same judge or master will deal with both issues. A major motivation for this approach has been the desire of the Court to facilitate the potential for the Department of Social Services (DSS) and the Department of Justice Services (DJS) to make joint or at least consistent case plans for the “cross over children”, the most troubled children in the juvenile system, to avoid silos, so that there is one holistic plan for the affected child.⁴¹ Judge Hargadon considers that an understanding of the dependency history gives the Court the context for the delinquency matter. He does not consider knowledge of the previous history of a child and the child’s family to be inappropriate in the context of ensuring a fair hearing as judicial officers are required to rule on the facts of a particular case and are able to do that. The option of an appeal is also available if there is concern in this regard.

In the delinquency jurisdiction it is also open to the Court to make an order “controlling conduct” requiring parents to do certain things. If parents fail to comply with these orders the

⁴⁰ See Annotated Code of Maryland Family Law Title 9 Child Custody and Visitation Subtitle 1 in General 9-101 (a) and (b)

⁴¹ From meeting with Administrative Judge of the Juvenile Court Edward Hargadon- October 2010

Court is able to use its contempt powers as a sanction. In circumstances where a Court is dealing with a delinquency matter and there is no DSS complaint (application) it is also open to the judicial officer to request that a complaint be listed when there are child welfare concerns. The Court cannot require DSS to file a complaint, but the Department is very unlikely to refuse.

Information Sharing

In recent years a shared computer database has been developed for the Circuit Courts (including the Family Court) other than the Juvenile Court (dependency and delinquency). It is understood that the inclusion of the Juvenile Court in the database is planned for the next phase in the near future, but budget restrictions may impact on the timeframe.

When custody and visitation matters are commenced in the Family Court, the applicant must file a Complaint and a Domestic Case Information Report which includes information as to whether there has been previous juvenile dependency (Child in Need of Assistance or CINA or child in need of supervision-CINS) or juvenile delinquency proceedings. The same report is filed by the responding parent when an Answer is filed. When proceedings are contested the Family Court Case Manager also searches Case Search on the shared computer database for records of any protection orders issued in relation to the family in the state of Maryland. This search will also reveal criminal charges and will be repeated by the Judge's law clerk before every hearing of the matter.

The Juvenile Division uses the Quest case management system. It is web based and provides an integrated tracking system which is used for the electronic filing and processing of court forms and documents relating to a case, including immediate generation of court orders. It also enables court related agencies appropriate access to case specific information to ensure effective case management of the matters in which they are involved.

Self-Represented (Pro-Se) and Low Income Litigants

In family law proceedings at least one litigant (pro se) was self-represented in 86 % of cases in 2010. The Family Court has an in-house Self Assisted Litigant Project with legal staff who provide assistance with selection and completion of forms and procedural advice, but not legal advice or representation. Pro bono legal advice and representation is available to victims of domestic violence through a number of not for profit agencies in family law and protection order matters.

Maryland Legal Aid is a private non-profit law firm which provides free civil legal services to low income people. The firm receives funding from Federal, State and local governments, the United Way (a charitable organisation focused on improving the education, health and financial stability of disadvantaged people) and other private sources. It has a specialist programme that focuses on the provision of representation and assistance to children who are victims of abuse and neglect. Some assistance is also available for child custody matters. Legal Aid has to compete with other law firms for contracts to provide legal services such as the representation of children in care proceedings.

Integration with Community Services

The Family Court has a Social Services Coordinator whose job is to link parents in with the support they require. The Coordinator is experienced at performing mental health and substance abuse evaluations, makes referrals for treatment and financial counselling and can provide follow-up in relation to compliance and outcomes. The person can also facilitate and participate in community agency meetings.

Mediation and Parent Education

Family Court children's matters can be referred to mediation, which can be either in house or external depending on the parties ability to pay. Mediation is not attended by lawyers for the parties. There is a uniform protocol for Court referral of contested custody cases to community mediation centres. Preliminary data is suggesting that this community based mediation is proving to be very successful⁴².

Mediation is not ordered when domestic violence has been identified as an issue unless the allegations relate to an incident that occurred a long time ago and it is considered that safety is not an issue. Case Search is checked for protection order/family violence matters before a formal order is made for mediation. Court Ordered Settlement Conferences are also an option. These conferences are convened by a member of the bar (attorney) with demonstrated experience and interest in family law who meets with the parties (and their lawyers if they have them) to attempt to either reach agreement or narrow the issues for judicial determination.

The Court offers a number of educational parenting seminars on-site including Co-Parenting Education (COPE) for divorcing parents and Shared Parenting Education Seminars (SHAPE) for parents who have never been married. There are also specialised education classes for children created to complement the COPE and SHAPE classes. There is also a day care centre at the Court.

Since early 2010 some juvenile justice cases have been referred to community conferencing at community mediation centres, a form of alternative dispute resolution which involves a restorative justice approach. The offender and their support people, the victim and their support people and others adversely affected by the offender's behaviour attend a meeting which is facilitated by an independent facilitator. The victim discusses how they have been affected by what has happened and the offender is required to accept responsibility and make restitution. Early statistics suggest that agreements are reached in 90% of cases that in 80% of offenders make restitution, and that recidivism rates are much lower for this group than for those who are dealt with using traditional court processes.⁴³

Washington DC

Overview of the Jurisdiction

The mission statement of the Family Court Division of the Superior Court of the District Court of Columbia ("the Court") is *"to protect and support children brought before it, strengthen families in trouble, provide permanency for children and decide disputes involving families fairly and expeditiously while treating all parties with dignity and respect."*⁴⁴

The Family Court Division and the associated unified court model were established as a consequence of the enactment of the District of Columbia Family Court Act of 2001 ("the Act")⁴⁵. Judges are appointed to the Superior Court by the President of the United States.

⁴² Chief Judge Robert M Bell *Maryland's Chief Judge Calls for Innovative Legal Approaches to Address Family Matters* Keynote Speech at Family Matters Symposium as reported in Unified Family Court Connection Winter 2011 edition, University of Baltimore School of Law, Center for Families, Children and the Courts, page 9.

⁴³ Ibid 40.

⁴⁴ *Family Court 2009 Annual Report* Superior Court of the District of Columbia 31 March 2010

⁴⁵ Pub.L107-114 (D.C Official Code, 2001 ED 11-1101 *et seq.*)

Newly appointed judges are required to serve a minimum of 5 years in the Family Court. The Judges are specifically trained in relation to child welfare issues.

The jurisdiction of the Family Court Operations Division includes domestic relations (such as divorce, custody, visitation, adoption, international family law issues), child abuse and neglect, juvenile justice, domestic violence, paternity and child support, mental health and mental disability treatment issues.

To the extent that it is practical to do so the Unified Family Court in Washington DC takes a “one judge-one family” approach to the management of family law and child protection issues. The same Judge may also deal with family violence and juvenile justice issues. The intention is that “to the greatest extent practicable, feasible and lawful, cases involving members of the one family are heard by the same judge in order to minimise court appearances, reduce the risk of conflicting court orders and ensure quality decisions based on the full knowledge of the issues affecting the family.”⁴⁶

The Unified Family Court -Implementation and Judicial Education

The Court has received considerable technical assistance in relation to the development, implementation and evaluation of its unified family court programs and the education of judicial officers and associated professionals from the National Council of Juvenile and Family Court Judges

The Court has a Training and Education Subcommittee which consists of judicial officers, court staff, attorneys, social workers, psychologists and other experts in child welfare which oversees the training program for judicial staff. There is a Director for Judicial Education and a Center for Education and Training. Judges attend induction training, weekly lunch meetings to discuss issues involving family court cases and to hear guest speakers on a range of topics relating to the work of the Family Court. There is mandatory monthly training, together with regular seminars involving judicial officers and stakeholders in the child welfare system and an annual Family Court Interdisciplinary Training program. In 2009 the subject of the interdisciplinary training program was “*Domestic Violence in Families: Strengthening the Community Response*”. In 2010 the subject was “*Child Sexual Abuse and Exploitation: Educating, Empowering and Transforming Lives*”.

Case Management

There is a Central Intake Center (Centre) for the filing of all Family Court matters and the staff are trained to process all matters and to identify and consolidate related matters.

The Court has an integrated case management system to avoid the potential for inconsistent or inappropriate orders in relation to a family, such as orders prohibiting contact in a protection order (violence restraining order) and orders allowing visitation in a domestic relations (parenting order) matter. It also avoids duplication of services, such as an order for a psychological evaluation when there is a recently prepared one available in a related Family Court matter. From the perspective of the Presiding Judge William Jackson, the Judge that best knows the family is responsible for placement and services decisions. The social workers and probation officers understand all of the services that are available, avoiding work duplication and budget issues and attorneys are trained and familiar with both systems. Judicial officers have chosen their roles and been specifically trained for them.

⁴⁶ <http://www.dccourts.gov/dccourts/superior/family/index.jsp>

There has been a very strong “buy-in” from lawyers for the unified court model and many of the initiatives that have been implemented have been brought to the Court by them.”⁴⁷

The Family Court’s Social Services Division (CSSD) is responsible for assessing, screening and presenting new referrals, managing cases, serving and supervising most young people involved in the District of Columbia’s juvenile justice system. These include those newly arrested on juvenile delinquency charges, those eligible for diversion, status offenders (in need of supervision and truants) and those on post sentence probation. CSSD is also responsible for conducting psychological, psycho-educational, comprehensive risk assessments and, as necessary competency evaluations on these young people as well as home studies on all families involved in contested custody disputes.⁴⁸

The Division also facilitates family group conferences for the purpose of structured decision - making with families with young people in the juvenile justice system, to develop service and supervision plans prior to the development of pre-trial plans for youth under CSSD supervision. CSSD has found that the use of family group conferences, combined with coordination of services and supervision during the adjudication phase of juvenile case processing, results in shorter periods of post sentence probation supervision.⁴⁹

Self-represented (Pro-se) Litigants

A significant proportion of people (75% to 80%) involved in family law proceedings, in contrast to juvenile dependency) are unrepresented (pro-se), a situation similar to the other jurisdictions visited in the United States.⁵⁰

The Court has a Family Court Self Help Center which was originally established by the DC Bar Association, but in 2005 the Court obtained funding to run the program itself. The Center is a free service that provides unrepresented parties to family law proceedings with legal information, assistance with selection and completion of appropriate court forms and court processes, but not legal advice. The forms that are used were created by the DC Bar Association and are designed to be user friendly, with the language at 4th grade level. They can be completed, but not filed, on line. The Center does refer clients to other programs and legal clinics in the community that can provide legal advice, as appropriate, including the divorce clinic and custody clinics run by the DC Bar Association Pro Bono Programme. Law schools and law firms also provide pro bono services and volunteer at the Self Help Center.

Mediation

The Multi Door Dispute Resolution Division offers alternative dispute resolution in a range of matters from family to civil and small claims. The services include mediation, arbitration, evaluation and conciliation. Family law and child protection matters are referred to mediation and can be referred at any stage in the court process.

There is a screening process for family law mediation which involves a high proportion of unrepresented parties.

The Program for Agreement and Cooperation in Custody Cases (PAC) was created in 2007. The cases selected for the program involve children under the age of 14 years, parents and

⁴⁷ Judge William Jackson Presiding Judge Family Court Superior Court Washington DC- Meeting 18 October 2010

⁴⁸ Ibid 40 page 96

⁴⁹ Ibid 40 page 99

⁵⁰ Meeting with Avrom Sickel Branch Chief Family Court Self Help Center Family Court Washington DC 18 October 2010

children attend mandatory educational seminar and mediation sessions in an effort to reach agreements. In 2008 in collaboration between the Court, the American Psychological Association and the Family Law Section of the DC Bar, the Office of the Parenting Coordinator was developed for low income families involved in high conflict parenting disputes. The Office provides parenting coordination services and a specialised form of dispute resolution for parties in high conflict involved in court proceedings.

The Child protection mediation program commenced in 1998 and was evaluated as successful in 2004, with less cases returning to court within 12 months of closure and, for those cases that proceeded to trial, issues presented being more carefully identified. The program reports that mediation survey results have consistently revealed that 95% of the participants conclude that mediation is helpful in reaching agreed upon case goals.⁵¹

Parties involved in child protection mediation attend with their lawyers. Guardian ad litem (who are lawyers) attend on behalf of the children and can request that the children also attend. The service has a process for determining whether or not this is appropriate, and, in the event that this is to occur, the arrangements that will be suitable.

Problem Solving Courts

The Court has implemented a number of specialist problem solving courts in areas including family violence (Domestic Violence Unit), child abuse and neglect (the Family Treatment Court for drug abuse) and child support (Fathering Court).

The Domestic Violence Unit deals with protection orders (violence restraining orders) in circumstances where those involved are related (including where one party has custody), have been in a relationship, have shared a residence, have a partner in common or claim they have been stalked. The Judges also hear cases involving breaches of the orders and related misdemeanour criminal cases. In appropriate matters they will also deal with divorce, custody, visitation, paternity and support cases involving the same people, and some civil matters. The Rules governing the proceedings of the Domestic Violence Unit provide for such cases to be consolidated and heard in the Domestic Violence Unit, but the Judge can certify the matter to another division of the Court (with the agreement of the judge in the other division) to “avoid undue delay or when another judicial officer is handling or has handled a related matter.”⁵²

The Family Treatment Court is designed to achieve successful reunification for mothers who have substance abuse problems whose children are the subject of child protection proceedings. It was created as a result of a partnership between the Court and the Office of the Deputy Mayor for Children, Youth, Families and Elders working with District health and human services stakeholders. The 15 month voluntary programme (including 6 months residential treatment) is designed to help participants overcome their substance abuse issues and learn parenting and coping skills. The Court works in partnership with other agencies to provide drug treatment and education and other services including counselling, therapy, parenting skills, anger management and vocational and educational training. Children can live with their mothers in residential facilities during the course of the programme.

The Fathering Court is a voluntary, court supervised program, for prisoners re-entering the community who are involved in child support cases which includes a broad variety of support

⁵¹ <http://www.dccourts.gov/dccourts/superior/multi/child.jsp>

⁵² Rules Governing Proceedings in the Domestic Violence Unit of the Superior Court of the District of Columbia (12 June 2000) Domestic Violence Unit Rule 2 (c) Consolidation with Other Matters

services. The Court reviews the compliance of the fathers with the requirements of their probation, the progress of their referrals to training and employment services and whether they are making child support payments. Other aspects of the program are designed to enhance their parenting skills and re-integrate the fathers as responsible parents in to the community.

Integration with Community Services

The Act which created the court also established the Mayor's Services Liaison Office ("MSLO"). The objectives of the MSLO are to support the professionals working with families in Family Court proceedings (including judges, social workers and attorneys) to identify and access client-appropriate information and services from District and Community agencies (including service availability), to provide information and referrals to families, and to facilitate the coordination of services being provided by multiple agencies to the one family.

Government agencies have staff present in the MSLO on designated days each week. These agencies include Child and Family Services, Mental Health, the Housing Authority, Public Schools, Youth Rehabilitation Services, the Prevention and Recovery Administration of the Health Department and Disability Services. Other agencies do not locate staff at the MSLO, but have designated liaison officers who respond to queries from the Court. They include the Income Maintenance Administration, the Youth and Preventative Services Department of the Police, the Strong Families and Maternal and Family Health and Youth Prevention Services Divisions of the Department of Health and Human Services and the Department of Employment Services. Generally service requests are assigned upon receipt to the appropriate agency liaison person who immediately meets with the family and provides the necessary services to resolve the presenting issue within 24 to 48 hours.⁵³ The MSLO also provides drug tests for juveniles and for adults involved in abuse and neglect cases.

The experience of the Unified Family Court in Washington DC seems to be demonstrating that, in relation to the multiple issues faced by the families who appear before them, family courts can be natural collaborative partners with other agencies and with community based organisations, providing services to meet the needs of the same client base.

New York

The Family Court of the State of New York is a specialized court that deals with cases involving children and families that include child protection, adoption, custody and visitation, domestic violence, guardianship, juvenile delinquency, paternity, persons in need of supervision, and child support. Divorces are determined by the Supreme Court of New York.

Red Hook Community Court

For the purpose of this research the Court that was visited in New York was not the Family Court, but a community court called the Red Hook Community Justice Center ("Red Hook") in Brooklyn, because of an innovative programme that the Court is using in relation to the management of young offenders.

Red Hook, the first multi-jurisdictional community court in the United States, provides an example of the role that Courts can play as a collaborative partner in addressing community issues which are adversely impacting on the health and safety of children and their families. From early planning stages the Judge, prosecutors and staff have continued to meet regularly with the local community and attended local community events, in an effort to

⁵³ Ibid 40 page 72.

understand community needs and interests, identify local resources and to build strong working relationships.

When Red Hook was established it was located in an old school building in a low income, neighbourhood with serious crime problems and associated social issues. Since its inception, the Court has had one Judge, Alex Calabrese, who has jurisdiction over a number of civil matters, some family matters, criminal misdemeanour cases (including drug possession, minor assault, traffic and trespassing), landlord and tenant matters, family violence and juvenile delinquency cases. All of the cases have arisen within the community, but previously would have been dealt with in different courts.

In addition to traditional sentencing options, Red Hook has a number of sentencing alternatives which the Center co-ordinates, including community service and restitution, educational workshops, GED classes (for high school graduation equivalency), drug and alcohol treatment, mental health counselling, family violence programs, defensive driving classes and vocational counselling. All of these programs are also offered to non-offenders in the community on a "walk-in" basis which has helped the programs to gain legitimacy amongst the community.

Juvenile Offenders

Red Hook uses a family court model for young offenders which gives them the option of entering into a 4 month contract as an alternative to traditional court processes. It is not necessary for the young person to plead guilty to be able to access this option.

The first stage of the process involves a computerised mental health and substance abuse screen. The young person is required to answer a number of questions which takes approximately 15 minutes. Depending on their response to particular questions they will be asked a number of follow-up questions. The questions can be read on the screen or the young person can listen to them in combination with the computer program if they have literacy issues.

The computer screening is followed by a strengths based assessment carried out by the clinical social work staff of Red Hook, which uses a process that has some similarity to that used as part of the DCP Signs of Safety risk assessment framework and within the Signs of Safety pilot currently underway in Western Australia.

The staff interview the young person and their family separately, and map out their social network with the aim of identifying family patterns and the support networks that exist, with a focus on the strengths that can be developed or heightened and family and other community members who could have a role in the implementation of the contract that is developed. They develop a contract or safety plan which includes other professionals, such as schools, (for example, the school agrees to contact Red Hook if the young person is absent) and services that will assist the parents to support the plan (for example, mental health or substance abuse counselling might be offered to a parent, in circumstances where it is identified that these issues are a contributing factor in the young person's offending behaviour). A Case Management Conference is then convened with the young person and the family to discuss and finalise the plan. The young person has the opportunity to discuss the plan with their lawyer. The contract is then signed by the young person, their parents, their lawyer and the Judge. It lasts for a period of 4 months and the young person, their family and Red Hook meet regularly to review progress. Members of the support network provide updates on progress to Red Hook to inform these meetings. The program is proving to be a successful option that is meeting the needs of young people and their families.

In 2007 it was reported that, according to an internal study, Red Hook had helped reduce low level crime (adult and juvenile) by 62% in its neighbourhood, strengthened ties between Police and residents and, social service compliance (including compliance with community service orders) had increased by 20% in the previous 2 years.⁵⁴

The Court has been used as a role model for the development of other community courts across the country and overseas (including Australia) because of its success in addressing community issues. Judge Calabrese has said of Red Hook, “Downtown, you feel like you’re an artist with only two colors (in jail or out of jail). Here I have the whole Crayola box. There are so many tools to bring to a problem.”

Summary of the United States

The structure and jurisdictional arrangements of the Unified Family Court varied in San Francisco, Baltimore and Washington DC. The Courts in San Francisco and Baltimore were administratively unified. In San Francisco family law and juvenile dependency child protection) were co-located, whilst in Baltimore juvenile dependency and juvenile delinquency were co-located. The Court in Washington DC most closely reflected the six elements identified by Professor Babb as integral to a unified family court⁵⁵.

The trend towards the implementation of problem solving Courts in the United States was identified during this research. Notably, a recent survey was conducted by Hora and Chase of 355 United States judges comparing the differences in judicial satisfaction between those assigned to problem solving courts—such as drug treatment and unified family courts and those in traditional family law and criminal courts. The survey found that problem-solving court judges were more likely to report believing that the role of the court should include helping litigants address the problems that brought them there and were more likely to observe positive changes in the litigants. They were also more likely to believe that litigants are motivated to change and are able to do so. They felt more respected by the litigants and were more likely to think that the litigants were grateful for help they received. The problem-solving court judges were also more likely to report being happy in their assignments and to believe that these assignments have a positive emotional effect on them.⁵⁶

What each jurisdiction visited in the United States had in common

- Whether or not the Judicial officers were located on the same premises, they consider themselves to be part of a Unified Family Court system;
- Judicial Officers meet regularly to discuss shared issues and attend judicial education together;
- Judges rotate between the Courts;
- Recognition of the need for specialised education programs for judicial officers working in Unified Family Courts. In some jurisdictions there are specialist centres which coordinate and provide this education which includes child development and attachment, family violence, drug and alcohol abuse and mental health issues.

⁵⁴ *A “Simple Concept” Goes Global* The Back Page New York Law Journal 19 January 2007.

⁵⁵ *Ibid* 2

⁵⁶ Deborah Chase and Hon. Peggy Fulton Hora *The Best Seat in the House: The Court Assignment and Judicial Satisfaction* Family Court Review, Vol. 47 No. 2, April 2009 pp 209–238

- There are processes for information sharing between the family law, juvenile dependency and juvenile justice courts and to ensure that each Court is kept informed of relevant orders and proceedings in other Courts, to the extent that this was appropriate;
- Processes for deciding which Court should deal with both family law and juvenile dependency applications when families have proceedings in both jurisdictions;
- Courts dealing with private family law also generally deal with family violence protection orders (but, with the exception of Washington DC) not the breaches of those orders. Initial applications are sometimes made in local courts, but are referred to the Family Court when there is a “family element”.
- No requirement for FDR prior to the commencement of private family law proceedings;
- There is a high percentage (in excess of 75%) of self-represented (pro se) litigants in private family law matters;
- There are court sponsored Self Help Centers for self-represented litigants which provide information and assistance with the completion of court forms, but not legal advice and representation;
- All children and parents are represented in juvenile dependency matters;
- The Court has an ongoing role in relation to monitoring and compliance in respect of permanency planning arrangements after care orders are made;
- There are problem solving Courts to deal with specific issues such as Drug and Alcohol abuse, Family Violence and the needs of very young children in care matters(child protection);
- Court provided or court referred mediation services in family law and child protection proceedings, with mediators often having experience in both family law and child protection;
- On-site parent education and drug testing services;
- On-site staff providing social service support or referrals to social service support providers, for example, employment and accommodation services;
- protocols for the Family Court to refer matters to child protection authorities if there are concerns that children are unsafe ;
- most juvenile offending behaviour for children is dealt with as a child protection issue with limited exceptions in respect of serious offences.

What works well

- When Judges have a family law background, choose to sit in the Unified Family Court and agree to preside there for a substantial period (as in Washington DC);
- Regular meetings and ongoing judicial education involving judges sitting in all jurisdictions of the Unified Family Court;
- Judicial and Interdisciplinary education programmes which include judges and a court associated service with responsibility for identification of required training, its provision and coordination on an ongoing basis;
- Services providing relevant resources including education programs, technical expertise and evaluation tools such as The National Council of Juvenile and Family Court, The Center for Families, Children and the Courts (California), the Center for Families Children and the Courts (Law School, University of Baltimore) and The Center for Court Innovation (New York)
- When the family only has to go to the one place;
- Centralised intake for all unified family court matters with administrative staff having an understanding of intake related issues for all areas;
- Shared computer data bases with appropriate confidentiality safeguards and transparency of information sharing processes.
- Processes to ensure that relevant and regularly updated information about other Court orders and proceedings is available to judicial officers each time they deal with a family;
- Individual case management and the “one judge–one family” option when it is available;
- The use of problem solving courts to address issues such as drug and alcohol abuse, the needs of very young children and family violence.;
- The use of mediation in family law and child protection proceedings, particularly where the mediators have knowledge of both areas;
- Self Help Centres and Parent education programs;
- Social Service Coordinator or liaison officers who link parents with the services they require;
- On site staff who can do mental health and substance abuse evaluations;
- Free drug testing services provided on site;

- Contact supervision services available on-site or referral arrangements in place with off-site services which ensure that relevant information is shared and reports provided to the Court;
- Legislative options that provide timely and cost effective dispositions, removing the requirement for attendance in multiple courts;
- Offending behaviour of children dealt with as a child protection issue with a limited number of exceptions, utilising a whole of family approach such as the family treatment model, family group conferencing including the capacity to offer parents the services they need or to be able to order them to do certain things.

The challenges

- The global financial crisis and the impact on Court budgets and the budgets for related programs;
- Very limited access to legal aid or pro bono/low cost services in private family law matters;
- Attracting judges to preside in private family law matters on a long term basis;
- The workload in private family law has an adverse impact on the use of a “one-judge –one family approach”
- Do not have a requirement for participation in mediation (family dispute resolution) before private family law children’s proceedings commence which places an extra burden on the court in terms of triage to determine which cases need urgent attention and intensive case management;
- When Courts do not use shared data bases information sharing becomes more complex and time and labour intensive.

Ontario

Overview of the Jurisdiction

In Ontario there is separate family law and child protection legislation, which is provincial rather than federal legislation. The *Children’s Law Reform Act 1990* deals with children’s family law matters whether or not their parents have been married. The Act that deals with child protection issues is the *Child and Family Services Act 2005*. Courts can consolidate both family law and child protection issues. It is also noted that the *Child and Family Services Act 2005* allows the court to make a custody order in a child protection matter that is deemed to have effect as though it was a family law order.⁵⁷

The jurisdictional arrangements for the management of family law issues in Canada vary from province to province. In 1974 the Federal Law Reform Commission of Canada recommended the implementation of a Unified Family Court model for family law with the Court to have jurisdiction to hear all family law matters (including child protection), court affiliated services such as mediation and co-ordination with local agencies to assist families

⁵⁷ Section 57.1 *Child and Family Services Act 2005*

dealing with family breakdown. Some Canadian provinces have unified family courts in a limited number of locations. These include Ontario (17), Newfoundland (1), New Brunswick (8), Nova Scotia (3), Prince Edward Island (3), Manitoba (4) and Saskatchewan (3).⁵⁸

In Ontario the family justice system is complex. There are 3 Courts that hear family law cases depending on the location of the matter. They are the Superior Court of Justice, Family Branch of the Superior Court of Justice (originally the Unified Family Courts) and the Ontario Court of Justice.

The Family Court of the Superior Court of Justice can deal with all family law matters including divorce, custody, access, restraining orders, division of property, adoption and child protection. These Courts currently service approximately 40% of the population of Ontario⁵⁹. In communities that do not have access to this Court people who want a divorce, or want a divorce and custody, access or support as part of the divorce or division of property have to go to the Superior Court of Justice. If the person does not want a divorce, but seeks support or to resolve issues related to custody or of access they can go to the Ontario Court of Justice. This Court also deals with adoption and child protection and most criminal matters. Both the Superior Court of Justice and the Ontario Court of Justice can make restraining orders.

In September 2010 the Law Reform Commission of Ontario published a report entitled "*Voices from a Broken Justice System: Sharing Consultations Results*" which explored the early stages of solving family law problems. The responses to this consultation will influence the last phase of the research which has now commenced, the making of recommendations for family justice reform in Ontario.

The Child Welfare Secretariat of the Ministry of Children and Youth Services is responsible for child protection policy development and funding and monitoring the compliance of the children's aid societies with government child protection standards.

There are 53 children's aid societies that provide front-line child protection services which receive their funding from the provincial government of Ontario. These societies also have a role in providing services for young offenders in the juvenile justice system. Each society has its own structure, processes and programs, and in-house lawyers and their client base is not necessarily defined by their geographic location. They use 7 different data-bases, however the development of a shared data system is being progressed.

There is a separate Office of the Children's Lawyer (OCL) in the Ministry of the Attorney General which provides representation for children in relation to custody, access, child protection, civil, trust and estate matters, which was established in 1826. This includes representation in mediation processes. The Office also has clinical investigators who prepare reports for the courts in custody and access proceedings and may assist the lawyers who are representing children in these matters. The OCL also has a panel of private lawyers who are trained to work as lawyers for children.

In relation to juvenile justice, the legislation, which applies to children between the ages of 12 and 17 years, is the *Youth Criminal Justice Act 2002*, and it is federal legislation. Juvenile justice matters that are not diverted from court are dealt with in the Ontario Court of Justice. Criminal offending behaviour for children under 12 years is managed under the *Child and Family Services Act 2005*, the child protection legislation.

⁵⁸ *The Family Court in Ontario* Paper presented by Jane Long, Senior Counsel Family Policy and Programs Branch Ministry of the Attorney General Ontario Canadian-Irish Family Law Conference Ireland, October 2010

⁵⁹ *Ibid* 51

Unified Family Courts

The first Unified Family Court in Canada was started as a pilot court in Hamilton Ontario in 1977. There are now 17 Family Courts in Ontario with Superior Court Judges. When the Family Court model was first developed it was anticipated that the judges would be family law specialists with a background in family law and a particular interest in these cases. Although some judges have been specifically appointed to the Family Court and are specialists, there are not enough designated Family Court judges to hear all of the cases. In most of the other courts dealing with family matters, judges are not necessarily family law specialists and their work includes the broader non-family related cases heard in their respective courts.

The Unified Family Courts in Hamilton and London, which do have specialist family law judges, were visited for the purpose of this research. The Unified Family Court model requires these courts to have a Community Liaison Committee and Community Resource Committee. For family law matters they are also required to have arrangements for on-site and off- site voluntary mediation, Family Law Information Centres which have an Information and Referral Coordinator and provide parent information sessions. The sessions are usually presented by a lawyer and social worker and include information about the impacts of separation and divorce on children, family violence, the benefits of co-operative parenting, the court system and alternatives to going to Court. From 1 April 2011 these sessions have become mandatory at all Family Court sites.

Case Management

In London Ontario, family court and child protection files are not specifically cross referenced, but court orders and other documentation are readily accessible as appropriate, or court ordered, as both files for the family are located in the same place. It is understood that the files usually travel together when proceedings are protracted or where there are child protection proceedings in circumstances where the family court orders that are in place are not final orders.

In Hamilton the files are internally cross referenced on the computer system and generally also on the file jacket. The Judge dealing with a family law or child protection matter can request access to the other file, which can then also be viewed by counsel for the parties and the parties, themselves.

There is no memorandum of understanding for the sharing of information between the Courts exercising family law jurisdiction in Ontario and the children's aid societies in relation to their involvement with families. Parties applying for parenting orders who are not related to the child are required to provide details of any children's aid societies which have had involvement with the child. As the client base of the children's aid societies is not necessarily based on their geographic location, it can be very difficult for checks to be made on the reliability of any information that is provided.

Legal Aid duty lawyers provide representation in both family law and child protection matters.

Integration with Community Services

The Community Liaison Committee is made up of judges, lawyers (including legal aid and the children's aid societies), court administrative staff and community members that meet on a regular basis to monitor the operations of the court, discuss issues and make recommendations for improvements.

The members of the Community Resource Committee include Judges, lawyers, court administrative staff, agencies providing social services and other community agencies who identify resource and education needs, develop referral processes and initiate and run education programs for court related service providers, including lawyers and judges. The aim of these committees is to build and maintain collaborative working relationships to ensure appropriate management of both the legal and non-legal problems of families appearing before the courts.

The Community Liaison Committees and Community Resource Committees of both Courts are very active, which has been of benefit to both the families and professionals involved in the courts.

An example of one of the community based services other than legal aid and the children's aid societies that is represented on the Community Liaison Committee in London, is the Centre for Children and Families in the Justice System (CCFJS), formerly known as the London Family Court Clinic. The Centre is a non profit, registered charity which is partially funded by the government of Ontario. The CCFJS has an "ADR-Link" service to connect children's aid societies to family group conference, child protection and first nations mediation services in child protection matters. It also offers family law mediation, custody and access assessments and parenting co-ordination to assist with the implementation of parenting plans. It carries out parenting capacity assessments in child protection matters and youth justice assessments to assist in the sentencing and management of young offenders. Other services include the Youth Therapeutic Court Service which identifies and supports the mental health needs of youth in the justice system and the Clinical Supports program who provide individual and family counselling to youth living in residential care, community programs and youth justice facilities in the local area. The CCFJS also prepares and supports child witnesses in criminal proceedings and provides training services and resource materials for families and other professionals.⁶⁰

Mediation

Family Law Information Centres located at the Unified Family Courts offer family law mediation both on-site and off-site, along with referrals for family law advice and other family related services. On site mediation is usually free and limited to one issue or simple issues. The Court can make a same day referral to this service. Off-site mediation involves a fee for service (which can be waived) and is usually used for more complex matters with mediators spending approximately 8 hours per case including intake interviews.⁶¹ Matters are referred to voluntary mediation of this kind after proceedings have commenced and the parties are all screened for issues such as family violence. During 2008/2009, 81.5% of cases referred to mediation by the Court achieved full or partial settlement.⁶²

Section 20.2 of the *Child and Family Services Act 2005* obligates the children's aid societies to consider alternate dispute resolution (ADR) when a child is, or may be, in need of protection, that is both before and after child protection proceedings are commenced. Three different models of ADR are used. Child protection mediation, family group decision making, (based on the New Zealand model) and aboriginal approaches which may vary depending on the community involved, but include "talking circles" and "community councils." Children attend family group conferences and can be legally represented in all of these processes. The children's aid societies are required to notify the Office of the Children's Lawyer (OCL)

⁶⁰ www.lfcc.on.ca

⁶¹ Ibid 51

⁶² Ibid 51

when a child protection matter is referred to ADR. The OCL then decide whether a lawyer should be assigned in the circumstances of the matter.

The use of mediation in child protection after proceedings have commenced is a developing area. Mediators conducting child protection mediation get information from the children's aid societies and counsel for the children. Currently it is not widely used in Hamilton, which is understood to be a consequence of local issues. In Hamilton, Legal Aid has been running settlement conferences co-ordinated by local lawyers in child protection matters which use processes similar to mediation and are proving to be very successful in reaching agreements about care plans for children.

It is noted that the Hamilton Children's Aid Society has implemented the use of signs of safety as their risk assessment framework⁶³ and, as a consequence, was very interested in the "Signs of Safety" child protection mediation pilot implemented in Western Australia in 2009. From their experience, the "signs of safety" framework seems to be reducing the number of children being taken into care and increasing requests for information from the Court in family law proceedings.⁶⁴

Outcomes of Unified Family Court

Justice Steinberg, who was the senior judge of the first Unified Family Court (UFC) in Hamilton, has written about the benefits of specialist judges sitting full-time in a case managed family law system (including child protection) , the latter being "a procedural prerequisite for a successful court."⁶⁵ Initially the jurisdiction of the UFC at Hamilton included juvenile justice. When the federal government introduced the *Young Offenders Act* (subsequently replaced by the *Youth Criminal Justice Act 2002*) described by Justice Steinberg as "primarily a code of criminal law with respect to young persons that stresses accountability" and "not a good fit with the Family Court"⁶⁶, the judges of the Family Court considered it was no longer appropriate for these cases to be dealt with in the Family Court. The Ontario government subsequently removed the juvenile justice jurisdiction from the UFC.

Registry staff, lawyers, judges and other service providers working in the Unified Family Courts in London and Hamilton confirmed the benefits of the model and the associated collaborative working relationships with other professionals providing support to families. They considered that specialist judges bring a different, more holistic perspective to their understanding of the family and the way they manage cases. In Hamilton it was suggested that the atmosphere of the court was much more positive than other courts because the focus of the jurisdiction is on assisting families to manage their problems, in contrast to Courts dealing with criminal matters where those involved are more likely to be "guilty of something."

From discussions with lawyers from the children's aid societies in Hamilton it seems that the unified court system is thought to be more efficient, with proceedings able to be consolidated when a family is involved in both family law and child protection proceedings. The

⁶³ *Signs of Safety* Turnell A and Edwards S, 1999

⁶⁴ Jacalyn Walters Manager Legal Services Hamilton Children's Aid Society 29 October 2010

⁶⁵ Justice David M Steinberg *Developing a Unified Family Court in Ontario* Family and Conciliation Courts Review, Vol37 No4, October 1999 454-459. He confirmed these views when I met with him on 29 October 2010 at the Hamilton Unified Family Court.

⁶⁶ *Ibid* 52 p 457

jurisdictional arrangements of the Unified Family Court have not increased the workload of the children's aid societies and referrals from the Court are rarely the primary basis for the opening of a children's aid file.⁶⁷

In March 2009 the federal Department of Justice published an evaluation of the Unified Family Courts in Canada, comparing them to non-unified courts.⁶⁸ Amongst other findings and conclusions the Report found that "a specialised bench was reported to be of primary importance to the overall performance of the Unified Family Courts in meeting objectives" and "if implemented as intended, the Unified Family Court model can facilitate co-ordination between the courts and family justice services." Despite the findings of the evaluation and widespread support for the model from judges, litigants and service providers, there has been no expansion of the model since 1999.⁶⁹

Summary of Ontario

The family justice system is complex. There are 3 Courts that hear family law cases depending on the location of the matter. They are the Superior Court of Justice, Family Branch of the Superior Court of Justice (originally the Unified Family Courts) and the Ontario Court of Justice. These Courts can all deal with family law and child protection issues.

Family Law and Juvenile Dependency is provincial law. Juvenile Justice is Federal Law.

There are 53 children's aid societies that provide front-line child protection and juvenile justice services which receive their funding from the provincial government of Ontario.

Legal Aid provides advice and representation for low income parents. There is a separate Office of the Children's Lawyer.

The Unified Family Courts in Hamilton and London have:

- Judges who are family law specialists;
- Jurisdiction over both family law and child protection matters;
- A Community Liaison Committee;
- A Community Resource Committee;
- Arrangements for on-site and off-site mediation in family law matters following the commencement of proceedings (from April 2011 this will be available from all of the other Courts hearing family law cases);
- Option of referral for child protection mediation (also from all Courts hearing juvenile dependency) - legislation requires the children's aid societies to consider alternate dispute resolution (ADR) when a child is or may be in need of protection;

⁶⁷ Jacalyn Walters Manager Legal Services Hamilton Children's Aid Society and Mona V Anis Associate Senior Counsel Catholic Children's Aid Society Hamilton

⁶⁸ *The Unified Family Court Summative Evaluation, Final Report, March 2009*, prepared by the Evaluation Division, Office of strategic planning and Performance management, Department of Justice, Canada <http://canada.justice.gc.ca/eng/pi/eval/rep-rap/09/ufc-tuf/index.html>

⁶⁹ Ibid 51

- Family Law Information Centres with an Information and Referral Coordinator (parent education will become compulsory and available at all of the other Courts hearing family law cases from April 2011);
- protocols for the Family Court to refer matters to a local Children's Aid Society if they feel that the child is unsafe (also applies to the other Courts hearing family law cases);

Offending behaviour of children under 12 years is dealt with as a child protection issue.

What works well in the Unified Family Courts

- Judges are specialists in family law and child protection;
- the family only has to go to the one place;
- Centralised intake for all unified family court matters with administrative staff having an understanding of intake related issues for all areas;
- Collaborative working relationships of Courts with service providers enhanced by participation in the regular meetings of the Community Liaison Committee and Community Resource Committee;
- More holistic perspective of the Judges - understand the criteria for the involvement of the children's aid societies and best interests of the child in both jurisdictions and have knowledge of associated services in both areas;
- The family law and child protection court documentation is readily available to the Court and can travel together as appropriate;
- Family law and child protection matters can be consolidated and there can be one judge-one family approach to family law and child protection;
- Legislative options that provide timely and cost effective dispositions, removing the requirement for attendance in multiple courts (also applies to other family courts).

The challenges in Ontario

- 3 different Courts that hear family law and child protection cases depending on the location of the matter;
- not enough designated Family Court judges to hear all of the cases. In most of the courts (other than the Unified Family Courts) judges are not necessarily family law specialists and their work includes the broader non-family related cases included in their jurisdiction;
- there is no requirement for Family Dispute Resolution (FDR) before private family law children's proceedings commence which places an extra burden on the court in terms of triage to determine which cases need urgent attention and intensive case management;

- The challenges for information sharing of each children's aid society having its own structure, processes, programs, in house lawyers and different data bases;
- No MOU between the Family Courts and Children's Aid Societies in relation to information about past involvement with families and the challenges of identifying which agencies might have such information, because of the number of societies and the fact that their client base is not necessarily defined by their geographic location;
- The impact of the global financial crisis on the funding of Courts and associated services;
- The not yet published recommendations for family justice reform of Law Reform Commission of Ontario following the *Voices from a Broken Justice System: Sharing Consultations Results Report*.

United Kingdom

Overview of the Jurisdiction

In the United Kingdom there is one law for child welfare matters in both disputes between parents and disputes between the State and parents called the *Children Act 1989*. Divorce and property are dealt with in separate legislation.

In child protection matters the local authorities (equivalent of DCP) apply to the Magistrates Court for a care order. All people with parental responsibility for the child are automatically parties and family members can apply to become parties. The Court has the power to make private law "residence and contact" orders as well as public law "care and protection" orders. This means the Court can make "live with" orders, "protection and care" or "special guardianship orders" to the relatives along with supervision orders to enable the family to receive support without the need for the family members to bring an application against other family members. During child protection proceedings parties may bring applications for residence/ contact within those proceedings without formal application to the Court. Legal aid is also currently provided to all parties without any means or merit testing to ensure that family members are not financially disadvantaged.

The age of criminal responsibility in the United Kingdom is 10 years of age. The legislation that deals with juvenile offending is the *Children and Young Persons Act 1969*. Section 9 of this Act provides that where a local authority bring proceedings or are notified of an offence alleged to have been committed by a young person, it is *their duty* "unless they are of the opinion that it is unnecessary for them to do so" to investigate and provide the Court with information relating to the "home surroundings, school record, health and character of the person charged as appear to the authority is likely to assist the Court". It is understood that there is some level of concern at the lack of processes in place to transfer matters from the Youth Courts to be dealt with as care matters in circumstances where welfare issues are identified to be the catalyst for the child's offending behaviour.⁷⁰

There are 152 local authorities providing front-line child protection services in the United Kingdom. These local authorities receive funding from Central Government and by raising their own revenue through council tax and other local charges. They each have their own

⁷⁰ Meeting with Mary Ryan Consultant to the FDAC Evaluation 16 November 2011

service delivery structure but are subject to government inspection and regulation. The local authorities employ their own social workers and lawyers and provide a range of other support services for families in care matters and in private family law, including contact supervision services. They also have a role in relation to some juvenile offending behaviour, through processes such as family group conferencing. The current policy is that services should be made available to the families involved without regard to their financial means. The size of the communities serviced by the local authorities varies greatly both in a physical sense and in respect of the size of the population. There is also great variation in the socio-economic status of each community and the related social issues being experienced by community members.

The Children and Advisory Service (Cafcass) is a non-departmental public body that is “independent of the courts, social services, education and health authorities and all similar agencies”. Its role is to safeguard and promote the welfare of children, give advice to the family courts (in family law and care proceedings), make provision for children to be represented and provide information, advice and support to children and their families.”⁷¹ When it was established in 2001 it was responsible to the Lord Chancellor’s Department (now the Ministry of Justice) but it is currently sponsored by the Department for Education and works within the strategic objectives set by that Department.

The jurisdictional arrangements for the management of private and public family law in the United Kingdom are complex. Generally, all child protection matters (called care matters in the UK) commence in a designated part of Magistrates courts called Family Proceedings Courts. These Courts are presided over by 3 Magistrates who are lay people but have received specific training in family law. They are assisted by a lawyer who advises on law and procedure. At the first hearing of the matter, the Family Proceedings Court will decide whether the matter should be transferred to the County Court or to the High Court, based on their complexity. The rules setting out the criteria for transfer are the “Allocation and Transfer of Proceedings Order 2008”.

The County Courts have specialised “Care Centres” and “Adoption Centres” with District Judges who have similar status to Magistrates in the Family Court of WA and the Children’s Court, and Circuit Judges with similar status to Judges in the Family Court of WA, specifically allocated to hear care proceedings, who have what is colloquially known as a ‘care ticket’. District and Circuit Judges in County Courts also have jurisdiction to deal with divorce and the breakdown of de facto and same sex relationships including financial and property issues, the care arrangements of children, care proceedings and adoptions. The High Court has jurisdiction to hear all cases relating to children and exclusive jurisdiction in wardship proceedings. The High Court also hears cases transferred from the county courts or family proceedings courts and appeals from the Family Proceedings Courts.

Current Issues: The Family Justice Review and the Child Protection Review

Following the implementation of the *Every Child Matters* Policy in child protection, the death of *Baby P* in 2007 led to a review of the safe guarding systems of local authorities and a number of recommendations designed to ensure that local authorities were better equipped to prevent the repetition of similar tragedies. In his opening remarks in the enquiry Lord Laming said, “Children are our future. We depend on them growing up to become fulfilled citizens as well able to contribute towards family life and to the wider society. It is of fundamental importance that the life and future development of every child is given equal importance. Every child needs to be nurtured and protected from harm.”⁷² The enquiry

⁷¹ Section 12 *Criminal Justice and Court Services Act 2000*

⁷² Opening Remarks of Lord Laming in *The Protection of Children in England: A Progress Report* (March 2009)

recommended that the Ministry of Justice should “Lead on the establishment of a system-wide target that lays responsibility on all participants in the care proceedings system to reduce damaging delays in the time it takes to progress care cases where these delays are not in the interests of the child.”

An immediate consequence of the investigations into the death of *Baby P* and later, of the review, was an increase in applications for care proceedings. Cafcass reported an increase of 30% in applications for care proceedings for the April 2009/March 2010 financial year. In the second quarter of that financial year public law cases were taking on average 55.7 weeks, continuing a trend of increasing case duration.⁷³ At the same time there was an increase in the Cafcass private family law workload of approximately 16%.⁷⁴

Major reviews are currently underway of the family law and child protection systems with the reviews of the Family Justice system and the child protection system working closely together. The government has also released a consultation paper on *Proposals for the Reform of Legal Aid in England and Wales* which proposes a 23% decrease in the current legal aid budget (2 billion pounds) by 2014/2015, with the most significant cuts to be made in the areas of family and civil law.

The Family Justice Review is required to make recommendations in two core areas, being the promotion of informed settlement and agreement; and management of the family justice system. The review is examining the roles of the courts and the different agencies and professionals in the family justice system, including consideration of the extent to which governance arrangements, relationships and accountabilities are clear and promote effective collaboration and operational efficiency. The review is required to “take account of value for money issues and resource considerations in making any recommendations. Recommendations should be costed and have regard to affordability”⁷⁵. The review is examining both private and public family law cases and will explore whether better use can be made of mediation in both areas.

In the introduction to Part One of her review of the child protection system, Professor Eileen Munro has written “The context of this review is one of financial constraint across public services, increasing demand for children’s social care, and radical plans for the way government approaches public services. This review is timely, with the opportunity to advise Government, service leaders, and professionals across England where best to place our energies in order to meet the varied needs of vulnerable children and young people.”⁷⁶

Evidence to the Review has suggested there are major problems of delay in respect of the management of care matters by both local authorities and the Courts and that the professionals involved are challenged in their ability to keep their focus on the needs of children by the demands and rigidity created by the bureaucratic burden associated with the current system of inspection and regulation.

In the interim report on her review of the child protection system, Eileen Munro has identified, amongst other things, that “all who come in contact with families have a part to play in identifying those children whose needs are not being adequately met” and that “a

⁷³Ministry of Justice, Judicial and Court Statistics 2009

www.justice.gov.uk/publications/judicialandcourtstatistics.htm

⁷⁴The National Audit Office (July 2010), *Cafcass’s response to increased demand for its services*
www.cafcass.gov.uk/publications/care-demand-statistics.aspx

⁷⁵ from the Terms of Reference of the Ministry of Justice *Family Justice Review (England and Wales) 2010*.

⁷⁶ Professor Eileen Munro *The Munro Review of Child Protection Part One: A Systems Analysis 1* October 2010

good child protection system should be concerned with the child's journey through the system from needing to receiving help, keeping a clear focus on the child's best interests throughout."⁷⁷

The themes which are emerging from these reviews include the need for courts, lawyers, local authorities and other agencies working with families to collaborate to develop a shared understanding of their individual roles and responsibilities, the information that each require in their role, and to develop more streamlined and timely processes for the sharing of relevant information. There is concern about the disjointed nature of the current system, duplication of services and delay and about the need for judicial officers dealing with family law matters to be legally trained, rather than lay Magistrates as is currently the case in care matters.

Case Management and Cafcass

In response to increasing court demands in care proceedings and private family law the regulations which set out the procedure for the management of care proceedings called the Public Law Outline (2008) were replaced by the Public Law Proceedings Guide to Case Management with effect from 1 April 2010. The regulations for the procedures for private family law matters called the Private Family Law Programme were also replaced with a Revised Private Law Programme Practice Direction which also took effect from 1 April 2010.

Cafcass has also reviewed its case management processes and introduced a policy of "proportionate working in a proportionate organisation," requiring the work carried out to be proportionate to the risks to the child and the likelihood of safe dispute resolution within the time allocated.⁷⁸ Diagrams summarising the workflow process for the proportionate working of Cafcass in public and private law cases are included in ***Appendix 2 and 3***

Since March 2010 Cafcass has centralised its safeguarding enquiries in relation to private family law matters to one location in Birmingham. Enquiries in relation to care proceedings are still referred to local Cafcass teams and the relevant local authority for the family.

Private Family Law

Each new family law application is referred to the Cafcass Office in Birmingham by the Court in which it is filed, along with copies of affidavits and other documentation that has been filed. Cafcass is working with the Courts to achieve more timely referral processes and to ensure that all relevant information is provided (every page of court documents, dates of birth of the parties and the children, for example). Currently it is not possible for all of the information to be provided electronically. There are also issues associated with the interface between the computer systems of the courts, Cafcass and the other agencies (including local authorities and the Police) consulted for relevant information. It is understood that from mid December 2010 a Police officer with access to the Police computer systems (which are due to become a national database from March 2011) was to be co-located at the centralised Cafcass office to facilitate and improve information sharing processes. For as long as this arrangement is not in place it is necessary for Cafcass to check with the Police Office in the location that the conviction was obtained for confirmation of criminal records.

Cafcass workers conduct a telephone or Skype screening (the latter where possible) of the parties to private law proceedings. If the screening causes the Cafcass worker to be

⁷⁷ Professor Eileen Munro The Munro Review of Child Protection Interim Report: *The Child's Journey* 1 February 2011

⁷⁸ Anthony Douglas CEO Cafcass "*Proportionate Working in a Proportionate Organisation*" 28 October 2010

concerned that a child is at immediate risk a referral is made to the relevant local authority and the local Cafcass team. There is also a process for urgent referral of these matters back to Court in appropriate circumstances. The outcome of the Cafcass screening is provided to the Court prior to the First Hearing date of the matter and checks are repeated every 3 months in ongoing cases. Since the commencement of centralised screening, Cafcass has found that in a very small percentage of matters, (possibly as low as 1%) children are considered to be at immediate risk, with 25% to 50% of matters requiring an enhanced check involving enquiries to agencies such as the local authorities and Police. The most commonly identified issue is family violence.⁷⁹

The centralised Cafcass screening service has been well placed to identify and communicate with the Courts and other agencies about the issues caused as a consequence of missing information. As a consequence of this collaboration, a new family court application form is being designed to overcome these issues.

Pursuant to the *Children Act 1989* in private family law proceedings the Court can ask Cafcass and social workers for local authorities to provide them with what is called a section 7 report, which is used to inform the Court of the child's wishes and to provide information relevant to the matters set out in the welfare checklist in section 1 of the Children Act 1989.⁸⁰ Such reports are considered to be "welfare reports" and are usually prepared by Cafcass, but can be ordered to be provided by local authorities, generally in circumstances where they have had previous involvement with the family. This is not always the case because of the heavy work demands on Cafcass.

The Courts can also require local authorities to do a section 37 Report in circumstances where it considers that a care or supervision order may be necessary for a child. Where a section 37 Report is ordered the legislation requires that the local authority report within 8 weeks and consider whether they should apply for a care order, provide services or assistance or take any other action in relation to the child, including the reasons for their proposed action, and whether they intend to review the family in the future.

From a practical perspective, when the local authority makes an application for a care or supervision order during private family law proceedings, the proceedings will be consolidated and heard together, with the court documents in the private family law proceedings becoming part of the court documents in the care proceedings.

Care Proceedings-The Perspective of One Local Authority

As previously noted, there are 152 local authorities providing front line child protection services and support services in both family law and child protection matters in the United Kingdom. There is great variation in the socio economic status of each local authority community and the related social issues being experienced by community members.

The Royal Borough of Kensington and Chelsea ("the Borough"), a local authority located in an affluent area of London, was visited for the purpose of this research. In that meeting and their submission to the Family Justice Review, the Borough said that they consider that their early and comprehensive assessment and planning process (including legal planning meetings, family group conferences and child protection conferences) and implementation of creative packages of family support are the key to preventing care cases from entering the court system. In the Borough, cases only enter the court system after an alternative dispute resolution process has taken place. They consider that this should be a minimum standard

⁷⁹ Telephone meeting with Steve Kerr Head of Service and Julia Dark Central Intake Manager Cafcass Birmingham November 2011

⁸⁰ Similar to the provisions of section 68 F of the Family Law Act 1975

for cases entering the court system and that such an approach might reduce the need for further assessments and enable “fast tracking” of hearings in appropriate cases.

Concern was expressed by the social workers about the organisational system problems in Courts, including the paperwork required, delays in allocation of children’s guardians (Cafcass workers) and the lack of timetabling for fact finding. Challenges were also identified in relation to the overlapping roles of Cafcass and the local authorities, particularly taking into account the current Cafcass workload. The Borough considered that there is a need to triage the cases which require the skills and resources of Cafcass, from those where the input of the local authority should be sufficient.

Examples were provided of expert reports being ordered in court proceedings in circumstances where local authorities had long standing relationships with clients and had completed a range of assessments over time. The need for further and alternative expert assessments was queried, particularly where (as in their case) the Ofsted (government) inspection body has consistently rated the relevant local authority’s safeguarding services as “outstanding.”

The Borough also reported “a notable increase in requests for section 7 reports in private family law matters... and that such cases have become more complex.” It is understood that requests for these reports can sometimes be received up to 4 weeks after the order was made, not accompanied by information from the Court file. The legislation does not provide for an extension to the deadline for the report in such circumstances. The suggestion was also made that local authorities be given powers to “introduce fees and charges for assessment work that falls below the statutory significant harm threshold.”⁸¹ such as requests for supervision of contact or handover arrangements in circumstances where the issue is the acrimonious relationship between parents.

Problem Solving Courts –The Family Drug and Alcohol Court

The interim evaluation report of the first pilot Family Drug and Alcohol Court (FDAC) in Britain located at the Wells Street Inner London Family Proceedings Court supports the benefits of specialist courts and collaborative management of family issues in the court context.⁸² The evaluation period of 3 years concluded in 2010 and the final report is due in the near future.

Eileen Munro has referred to the FDAC pilot and interim evaluation in her review of the child protection system and has said that the approach of the specialist team attached to the Court, combined with regular reviews by the court, is more successful than ordinary court and service delivery in engaging parents with lengthy substance abuse histories, many of whom had been known to children’s services for many years and had multiple psycho social problems.”⁸³

The court, which was visited as part of this research, is modelled on the family treatment (problem solving) drug courts used widely in the United States in care matters adapted for local law and practice. It was identified that substance abuse was rarely the only problem, with mental health, domestic violence, housing and income support issues usually arising in combination. The evaluation report included that statistics in the United Kingdom have

⁸¹ Submission of the Royal Borough of Kensington and Chelsea to the Family Justice Review call for Evidence 29 September 2011.

⁸² *The Family Drug and Alcohol Court (FDAC) Evaluation Project Interim Report Summary of Key Issues and Findings* FDAC Research Team Brunel University August 2009 Lead Investigator Professor Judith Harwin

⁸³ *The Munro Review of Child Protection Part One: A Systems Analysis* 1 October 2010 p36

identified that substance abuse accounts for 34 percent of long term cases in children's services in some areas and up to 60 to 70 percent of all care proceedings.⁸⁴

The features of the FDAC Court include two specialist District Judges (Judge Crichton and Judge Grant) who manage proceedings, frequent non legal (non lawyer) review meetings with the Judge to monitor progress and encourage parents to engage with the services being offered. If legal issues arise at these hearings a court date is set for lawyers to attend to deal with these issues. Prior to each of these meetings the FDAC team produces a short report (2 pages) which is circulated to the parties and their lawyers which includes a brief synopsis of the history of the matter and addresses two questions- "What is going well?" and "What is not going well?" The format and content of this report would be familiar for professionals and families involved in the Signs of Safety child protection mediation pilot in Western Australia.

Specialist Court Team

A specialist multi- disciplinary team which includes adult substance abuse workers, child and family social workers and adult and child psychiatrists use a variety of methods including motivational interviewing to engage parents, identify appropriate treatment programmes and monitor progress. Blood testing, hair sampling and urinalysis (as appropriate) is carried out by members of this team at Court, which has proved to be timely and cost effective.

The team also works closely with the support network around the family and other services that are providing treatment and support. Regular planning meetings ensure that everyone involved understands their responsibilities and duplication of services is avoided. A team of Cafcass children's guardians is appointed to the FDAC cases. It was also intended that parent mentors would be used to provide support and positive role modelling from their own life experience to parents, but it has taken longer than anticipated to select, train, support and retain this group.

Interim FDAC Evaluation

The interim evaluation indicates that the FDAC is effective as a problem solving court. The court is pro-active in its case management with a particular focus on the time scale of the child in decision making. Judges play an important role in motivating parents whilst focusing on parental responsibility and compliance with treatment requirements. The specialist multidisciplinary team provides timely assessments and regular updates to the Court, with the first such update available within 3 weeks of the first hearing. In addition to direct substance misuse services the team also facilitates access to community based services and a wide range of support services such as housing, income support and domestic violence services. In Court the team has the dual role of providing support to parents and independent advice to the judges.

Parents have placed a high value on the continuity of the involvement of the Judges and have valued the support of the FDAC team. Fewer parents are misusing drugs and alcohol at the end of care proceedings and their children are generally spending less time in care.

Clarification of the respective roles of the FDAC team, the 3 local authorities and Cafcass in assessing parenting and linking families with services are a few of the issues which the professionals involved found challenging in the period leading up to the interim evaluation.

It is understood that Cafcass workers now consider that their role has been simplified in that they are able to be much more focussed on the needs of the children while FDAC focuses on the needs of the parents. Local authority social workers have reported to the evaluators

⁸⁴ Ibid 70 page 1

that they have improved relationships with parents and that they feel very safe at the review hearings and appreciate the opportunity to be able to speak directly to the Judges. Some say that their report writing workload has reduced. They generally consider that they have a better understanding of drug issues as a consequence of their involvement in the pilot including the usefulness of particular tests, and the interpretation of results and their implications.

The need for a collaborative approach from lawyers was identified at an early stage and interaction with the FDAC team and regular meetings were scheduled to discuss their issues and concerns. At the beginning lawyers had concerns about potential human rights issues associated with the process, but this does not appear to have become an issue. Lawyers are generally positive about the pilot and are reporting a reduction of workloads in cases included in the FDAC pilot.⁸⁵

Benefits of Collaboration

The centralisation of the private family law screening at Birmingham and the FDAC Court pilot are both examples of initiatives that demonstrate the benefits of the use of specialist skills in private family law and care proceedings. They are addressing the identified need for courts, lawyers, local authorities and other agencies working with families to collaborate to develop a shared understanding of their individual roles and responsibilities, the information that each require in their role, and to develop more streamlined and timely processes for the sharing of relevant information.

⁸⁵ Meeting with Mary Ryan Consultant to the FDAC Evaluation 16 November 2011

Summary of United Kingdom

The concept of the Unified Family Court in the United Kingdom:

- One law for child welfare matters in both private family law and child protection disputes;
- Court has the power to make private law residence and contact orders as well as care and protection orders and proceedings are consolidated;
- Jurisdictional arrangements for the management of family law and child protection matters is complex, involving a number of different Courts and, in the case of care and protection, lay Magistrates;
- Cafcass is a specialist independent agency that provides safeguarding screening services in private family law and child protection proceedings, gives advice to the Family Courts, acts as children's guardians in court proceedings instructing lawyers for children in family law and child protection proceedings. Also provides advice, information and support to children and their families;
- 152 local authorities providing front end child protection, also have a role in juvenile justice matters and the provision of services and assessments in relation to private family law matters;
- protocols for the Family Court to refer matters to local authorities if it is considered that children in private family law proceedings are unsafe;
- family group conferences can be used in care matters and juvenile justice matters;
- the age of criminal responsibility is 10 years of age and where a local authority brings proceedings or are notified of an alleged offence it is their duty "unless they are of the opinion that it is unnecessary for them to do so" to investigate and provide the Court with information relating to the "home surroundings, school record, health and character of the person charged as appear to the authority is likely to assist the Court".

What works well

- When the family only has to go to the one place;
- When judicial officers can deal with both family law and child protection matters;
- When family law and child protection proceedings are consolidated and the information travels together;
- Courts are able to make both family law and child protection orders, removing the requirement for attendance in multiple courts;

- Private family law orders are regularly the outcome of care proceedings as the long term placement arrangement for a child;
- Alternative Dispute Resolution processes in care matters including legal planning meetings and family group conferences;
- The inclusion of children in family group conference processes in care and juvenile justice matters;
- The Family Drug and Alcohol Court (FDAC) for care matters and the collaboration between the FDAC Judges, the Multi-disciplinary Specialist team, local authorities, Cafcass and other service providers;
- The centralised safeguarding services provided by Cafcass in private family law matters which is being a catalyst for the development and implementation of streamlined processes for triage and information sharing in family law matters between Courts, the police, local authorities and other service providers;

The challenges

- The impact of the global financial crisis and the cost saving imperatives of the *Family Justice Review*, the *Munro Child Protection Review* and the consultation paper on *Proposals for the Reform of Legal Aid in England and Wales*;
- Increasing workloads, bureaucratic processes and associated delay in respect of the management of child protection issues for families, the Courts, Cafcass and the local authorities;
- No requirement for participation in mediation (family dispute resolution) before private family law children's proceedings commence which places an extra burden on the Courts in terms of triage to determine which cases need urgent attention and intensive case management;
- Limited use of mediation after family law and child protection proceedings are commenced;
- The challenges for information sharing of each local authority having its own structure, processes, programs, in house lawyers and data bases;
- Overlap of the roles of Cafcass and the local authorities and the need to determine which matters require the specialised expertise of Cafcass from those where reports from the local authorities should be sufficient, in both family law and care matters;
- The apparent duplication of resources, information analysis and family assessments, particularly in care matters;
- The disjointed relationship between the Courts and service providers and the need for courts, lawyers, local authorities and other agencies working with families to collaborate to develop a shared understanding of their individual roles and responsibilities, the information that each

require in their role, and to develop more streamlined and timely processes for the sharing of relevant information.

- Lack of processes for transferring matters from Youth Courts to be dealt with as care matters where welfare issues are identified as the catalyst for offending behaviour, in circumstances where the age of criminal responsibility is 10 years of age;

Western Australia

Western Australia is uniquely placed, as the only State Family Court in Australia with a single court for family law matters, to be the first State in Australia to develop and implement a unified Family Law/Child Protection Court to manage all cases involving the welfare of children with the same judicial officers able to determine both public and private family law matters.

The structure and jurisdiction of the Courts and the collaborative working relationships that have been developed between the Courts, the Department for Child Protection, Legal Aid WA and other stakeholders mean that Western Australia should also be able to minimise the potential for the challenges being experienced in Unified Family Courts in other jurisdictions. The exploration of the potential to unify the management of family law children's matters and child protection in the one jurisdiction is the logical next step in the collaborative journey that commenced with the introduction of the family law reforms in 2006.

Court Structure

The Family Court of WA and the Children's Court are both State Courts. Their jurisdiction is limited and their structure is simple compared to some of the jurisdictions the subject of this research. Judicial officers have expertise in the areas that are the subject matter of their Courts and are appointed until retirement age. Magistrates and Judges (other than the Chief Judge of the Family Court) in both Courts have the same judicial status, which, in the case of Magistrates, they share with Magistrates of other State Courts. For this reason the potential to transfer the management of applications for violence restraining orders for people involved in a "family relationship" from metropolitan Magistrates Courts to the unified Family Court following the granting of an interim order, should also be explored.

The development and implementation of a Unified Family Court acknowledges the overlap between the legal issues affecting family members and provides an opportunity for the stakeholders to articulate a shared vision in relation to the management of family matters. It also commits those involved to timely sharing of information and resources, to meeting regularly to monitor, address and be educated about shared issues. The courts in San Francisco, Baltimore and Washington DC provide examples of how this can be implemented in practical terms, even, as in the case of Baltimore, the courts are not co-located, or as in the case of San Francisco, the juvenile delinquency court is not located with the family law and child protection courts.

In regional areas Magistrates Courts are already dealing with family law, child protection and family violence issues. Family Law and child protection matters are transferred to the Family Court or the Children's Court for hearing at an appropriate stage, with these Courts travelling to regional areas on circuit, or as necessary for trials. In the case of child protection, trials are generally heard by Magistrates. In these circumstances it is suggested that the impact of the unification of the Courts would be minimised, with the potential that regional magistrates would be well placed to benefit from any associated judicial education programs.

Problem Solving Courts

Since the Family Law Reforms of 2006, the “core child related business” of Family Courts across Australia are families who present with multiple issues including family violence, child abuse, mental health issues and drug and alcohol abuse. Many of these families also have involvement with their local child welfare authorities and the Children’s Courts in child protection proceedings. Children who have been the subject of protection proceedings often subsequently become involved in the juvenile justice system and their parents have involvement in the criminal justice system.

In addition, as Judge Peggy Hora (Ret) has written “The misuse of alcohol and other drugs is one of the most important areas to address in crime prevention. Substance abuse fuels most offending in the community. Mental health problems often co-occur with dependence on alcohol or other drugs, and many cases of child abuse and neglect involve parents with substance dependence. Evidence-based programs that help people address their substance dependence will be effective in reducing re-offending; this has been demonstrated time and again in many programs throughout the world.”⁸⁶ It is also her view, supported by the successful use of drug court processes in family courts in the USA and the FDAC Court in the United Kingdom, that “Family reunification rates could be increased and the length of stays in foster care reduced if courts became more involved in supervising and supporting families to address underlying issues such as substance abuse, mental illness and domestic violence.”⁸⁷

Western Australia is well placed to cost effectively utilise limited available resources to develop and implement problem solving court programs in family law and child protection in a unified family court. The use of such therapeutic jurisprudence has the potential to break the inter generational cycles of behaviour which cause affected children to repeat the experience of their parents with involvement in the family law, child protection, juvenile justice, adult criminal justice and prison systems.

Computer Systems

The Family Court, Children’s Courts and Magistrates Courts currently use different computer systems and their data bases are not linked. There is a need to develop a shared information data base, with appropriate confidentiality safeguards, to ensure transparent, timely, streamlined and information sharing between courts to minimise delay, duplication and inconsistency in respect of case management and court orders, to ensure the safety of children and other family members.

Child Protection Authorities

In contrast to the challenges experienced in some of the jurisdictions the subject of this research Western Australia has the benefit of one government department, the Department for Child Protection (DCP) that is responsible for both policy and the delivery of frontline services in child protection.

DCP already has strong collaborative working relationships with the Family Court of WA, the Children’s Court and Legal Aid WA.

The Family Court has processes for referring families to DCP in circumstances where there is concern that children may be at risk. There are also arrangements in place between the

⁸⁶ Judge Peggy Fulton Hora (Ret) *Smart Justice Building Safer Communities; Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* p3

⁸⁷ *Ibid* p 62

Family Court Counselling and Consultancy Service and DCP in respect of information sharing for the purposes of triage, risk assessment and collaborative case management of their mutual client base.

In the future, the New Zealand approach could be used as a model in circumstances where the evidence in a private family law children's matter causes the Court to be concerned that a protection (care) order might be necessary. In New Zealand the child protection authority is required to convene a family group conference, have input and report on the outcome to the Family Court before a protection (care) order can be made. The Signs of Safety Pilot process described in this paper could be the basis for a similar approach in Western Australia.

Legal Aid

Legal Aid WA (LAWA) is funded by the Commonwealth and State Governments and provides legal information, advice and representation (including duty lawyer services for unrepresented litigants) and lawyer assisted mediation processes for financially disadvantaged people in private family law and child protection. LAWA has strong working relationships with the Courts, DCP and other members of the Family Law Pathways Network. The agency has been an active participant in the development and implementation of new initiatives which have improved information sharing and case management in relation to the families in the family law and child protection jurisdictions, and those that move between them, including the Memorandums of Understanding and the Signs of Safety pilot referred to in this paper.

Developments that are bridging the gaps

There have been a number of developments which have demonstrated the benefits of bridging the gap between the management of child welfare issues in family law and child protection and the benefit to children and their families of this approach.

In the Australian Law Reform and New South Wales Commissions Report *Family Violence-A National Legal Response* published on 11 November 2010 the Commissions' view was that, wherever possible, matters involving children should be dealt with in one court-or as seamlessly as the legal and support frameworks can achieve in any given case. Specifically, they suggested "that the work proposed in Western Australia, involving integration of family law and child protection issues, be used as an instructive pilot, to identify the benefits and challenges of this change in more detail and to inform future developments in other states and territories."⁸⁸

Memorandums of Understanding

Important local developments include the Memorandum of Understanding (MOU) that is in place in relation to information sharing between the Family Court of WA, the Department for Child Protection ("DCP") and Legal Aid WA in relation to families that have had contact with DCP. The location of a senior Department for Child Protection ("DCP") Worker at the Family Court of WA facilitates the operation of the MOU. This arrangement is unique in Australia and has inspired other jurisdictions to consider the implementation of similar arrangements. The worker represents the values, practices and concerns of DCP in relation to problem solving and client management processes.

In addition a Memorandum of Understanding has been in place since 2009 in relation to information sharing in respect of matters involving family violence between the Family Court

⁸⁸ Paragraphs 19.137 and 19.145 page 928.

of WA, the Magistrates Court, Department of the Attorney General, Department of Corrective Services and Legal Aid WA.

The development, implementation and ongoing commitment of the stakeholders to the monitoring of the progress of the MOUs increases the knowledge and understanding of the Courts, DCP and LAWA of each other, their respective roles and their shared responsibility for the welfare of children and to ensuring the safety of family members from family violence.

The Signs of Safety Pilot

Another relevant innovation in Western Australia has been the Signs of Safety Lawyer assisted child protection mediation pilot and other States, Victoria and New South Wales have now followed that lead. The mediation model which has been developed combines aspects of the Legal Aid WA Family Dispute Resolution process for family law matters and the *Signs of Safety* child protection risk assessment framework⁸⁹ implemented by DCP in July 2008. The pilot of 100 child welfare matters, being a combination of lawyer assisted Signs of Safety Meetings with Facilitators involving pregnant mothers and their families at KEMH (prior to Court proceedings) and Signs of Safety Pre-Hearing Conferences with Convenors in relation to child protection proceedings at Perth Children's Court, commenced on 9 November 2009. The facilitator/convenors are a combined group of DCP Signs of Safety Practice leaders and LAWA Family Dispute Resolution Practitioners, who have trained and worked together in the pilot.

The experience of the Legal Aid WA lawyer assisted family dispute resolution program in the family law context was a major catalyst for the Pilot. The collaborative work that has been done by the pilot partners, facilitator/convenors and meeting/conference participants to date in the development, implementation and monitoring of the pilot program is already having beneficial effects beyond the child protection mediation pilot program for the working relationships of those involved in supporting families where there are child welfare concerns in both public (child protection) and private family law matters.

Those involved are confident that we are working towards the development of best practice approaches to the management of child welfare issues based on a shared language for communication in respect of those issues and collaborative working arrangements which are empowering and engaging for families and all of the professionals involved. Such an approach is likely to achieve safe and durable arrangements for children which may break the cycle of disengagement and/or continuing involvement with DCP that has been the experience of many of their parents.⁹⁰

The final evaluation report, about to be published, is expected to report that the pilot has reduced demand on Court resources, the length and cost of child protection proceedings and that the involvement of lawyers has been beneficial to the process. In addition, the collaboration of the professionals in the pilot program is having a beneficial "flow on" effect for the working relationships of those involved in supporting families where there are child welfare concerns in both child protection and private family law matters.

⁸⁹ Turnell A and Edwards S, *Signs of Safety: A Solution and Safety Oriented Approach to Child Protection* (New York) 1999

⁹⁰ Howieson, Jill assisted by Coburn,Clare *Interim Evaluation Report Signs of Safety Pilot* September 2010 and Howieson, Jill assisted by Coburn,Clare *Interim Report Feedback Workshop: Preparation Report* 13 December 2010

Permanency Planning Amendments to the Children and Community Services Act 2004

Recent amendments to the *Children and Community Services Act 2004* (“the Act”) which came into effect on 31 January 2011 provide a further stimulus for consideration of the potential to integrate the management of all cases involving the welfare of children.

Section 9 of the Act has been amended to include the principle that “if a child is removed from the child’s family then, so far as is consistent with the child’s best interests, planning for the child’s care should occur as soon as possible in order to ensure long-term stability for the child;” In respect of this principle, DCP has implemented permanency planning policy which requires that long term plans be in place for a child taken into care under two (2) years of age within 12 months and over two (2) years of age, within two (2) years.

In addition, Special Guardianship Orders replace Enduring Parental Responsibility orders in the amendments. If a child has been in the care of DCP for a period of two years either the Department or the foster carer can apply to the Court for this order which will give the foster carer parental responsibility for the child or children. Special Guardianship orders can include conditions in relation to the contact (spend time with) arrangements for the children, their parents and extended family.

This could potentially expand the jurisdiction of the protection and care jurisdiction of the Children’s Court to include applications to vary or discharge contact, relocation and passport applications, areas in which the Family Court already has considerable precedent, expertise and infra structure (including family consultants). It is noted that the Family Court of WA is already dealing with disputes in relation to spend time with arrangements when supervision orders are in place because parents retain parental responsibility in these circumstances.

It is suggested that consideration should be given to further amendment to the Act to provide for the Court to be able to make a family law “exit” order at the conclusion of care proceedings and to have ongoing responsibility to monitor the progress of permanency planning arrangements as is the situation in New Zealand and the United States. This would be particularly beneficial for the management of children in care who are also juvenile offenders and their families.

Although both the Family Court and the Children’s Court have serious resource issues, the integration of Court services into a unified family court could maximise the potential for timely and streamlined “collaborative use of scant resources” whilst also minimising the duplication of court resources.

Family Law Pathways Network

The Family Law Pathways Network (FLPN) which is funded by the Federal Government has grown out of the family law reforms of 2006 as a vehicle for the Family Courts and other organisations providing family law, mediation and support services law related services to share information about services and build working relationships. The role of the Family Court in the FLPN and its ongoing strength and expansion in regional areas of Western Australia, was reflected in the number of DCP staff and Police who participated in last year’s annual conference which was focused on family violence.

This means that a Unified Family Court in Western Australia is well placed, taking into account the infra structure that is already available through the family consultants in the Family Court Counselling and Consultancy Service to offer the “array of court-supplied or court connected social services to meet litigants’ nonlegal needs that contribute to the exacerbation of family law problems” identified by this research as an aspect of other

jurisdictions that is working well and, by Professor Babb as integral to a unified family court structure.

Family Dispute Resolution and Mediation in Child Protection Matters

In Australia, since the family law reforms of 2006 and the introduction of Family Relationship Centres, there is a requirement for compulsory family dispute resolution in children's matters before Family Court proceedings with limited exceptions. The potential to refer matters to off-site mediation services is also considered as an option during the course of family law proceedings. Recent research in relation to family dispute resolution has identified the importance to participants, from a procedural fairness perspective, of the role of lawyers in the process, to constructively protect their legal rights.⁹¹

Western Australia has introduced the use of lawyer assisted mediation in child protection matters in the metropolitan area both prior to and following the commencement of care proceedings in the Signs of Safety Pilot. Following the commencement of child protection proceedings these matters are referred to off-site Signs of Safety Pre-hearing Conferences. This process could continue in a Unified Family Court.

There are some family law dispute resolution services already available in regional areas. The Signs of Safety Pilot process is not yet available in regional areas (other than the local wheat belt), but there are proposals for expansion into regional areas, in the near future. These private family law and child protection mediation processes could be developed and enhanced in a unified family court.

Child Focussed and Child Inclusive Practice

An exciting aspect of the unification of the management of child welfare issues in family law and child protection is the potential to explore, develop and enhance the current use of both child focused and child inclusive practice in these areas.

In the jurisdictions the subject of this research, all children were represented in care proceedings, but, with the exception of New Zealand, they were much less regularly represented in family law proceedings. Lawyers for children have an important and integral role in both family law and protection and care proceedings, working in partnership with the social science professionals providing assessment and support services. Their legal skills and understanding of court rules and processes is essential for effective case management, maximising the Courts ability to have timely access to relevant evidence to make decisions in the best interests of children.

In family law, child inclusive processes are being used in some family dispute resolution processes that are not court based. In Court, independent children's lawyers act "in the best interests" of children. Exploration of the potential to use child inclusive processes in the context of family court proceedings in Australia has commenced but is still at a relatively preliminary stage. There are many understandable adult anxieties about the potential for children to be traumatised or overborne in such processes, to be made to feel responsible for decision making or ignored in the event that outcomes are not consistent with their views.

In child protection Child Representatives attend Signs of Safety Pre-hearing Conferences on behalf of children acting either "on best interests" or instructions, depending on the circumstances of the particular case, the age and maturity of the children involved and their understanding of the proceedings. Children can attend conferences where they make the

⁹¹ Dr Jill Howieson Family Law Dispute Resolution: procedural justice and the lawyer-client interaction November 2009

decision to do that in consultation with their child representative. Children do not usually attend proceedings at Court.

It is understood that there is a need to ensure that the participation of children in conferences is managed in a way that enables them to express their views and meets their needs, but does not traumatise them. To date we have only had one child attend a conference, by telephone and are hoping that participation will increase in the future. "Decisions about when, if, and how a child participates require careful and thoughtful considerations. Factors to be weighed include the child's age and developmental level, emotional status, an ability to understand the nature of the mediation process and to articulate wants and provide relevant input, the relevance to the child of the issues being mediated, the desire to participate, case dynamics, and the ability to provide the child adequate support during and after mediation (Henry, 2005)." ⁹²

The accounts of some primary school and early teen aged children speaking about their experience of the family group conference process in the care system in England⁹³ would suggest that such participation can be an empowering and beneficial experience for children if they have had the benefit of careful preparation and are supported during and after the process by appropriately qualified and supervised professionals.

Judicial and Interdisciplinary Education

In San Francisco, Baltimore and Washington DC there were centres or court departments associated with the Courts responsible for the education of judicial officers, court staff, lawyers, social workers, psychologists and other experts working in the Unified Family Court. They also had a role in the development, implementation and evaluation of new court programs.

There may be a benefit in the establishment of a similar service to identify, coordinate and provide judicial education and to develop and evaluate new programs introduced into a Unified Family Court.

Juvenile Justice

In the jurisdictions the subject of this research, other than the United Kingdom, the age of criminal responsibility for juvenile offenders was 12 years of age or older, in contrast to the age of 10 years provided for in the *Young Offenders Act 1994* in Western Australia. In addition, in most locations the majority of their offending behaviour (with the exception of serious offences), being addressed as a child protection issue, with their family circumstances and welfare issues as the main focus, rather than their accountability for their offending behaviour, although this behaviour was also addressed.

It seemed that there was a benefit to juvenile offenders and the community from this approach. The family group conference process was utilised in many places, based on the New Zealand model. The family treatment model used at Red hook, also provides another examples of a program which utilises a whole of family approach, including the capacity to offer parents the services they need. Some Courts were also able to order parents to do certain things.

In addition, in New Zealand and the United States, the Court has an ongoing responsibility to monitor the progress of permanency planning arrangements for children in care, including

⁹² Giovannucci ,M and Largent *A Guide to Effective Child Protection Mediation: Lessons from 25 years of Practice*, Family Court Review, Vol 47 No1, January 2009 38-52.AFCC.page 43.

⁹³ National Conference on Family Group Conferencing London England 11 November 2010

young people who were juvenile offenders. This ongoing responsibility enables the Court to manage the planning to address both their offending behaviour and their welfare issues, ensuring that the relevant authorities work together to achieve a timely and holistic plan for the young person which avoids duplication or gaps in resources. As previously suggested, amendment to the *Children and Community Services Act 2004* to provide for the Court to have ongoing responsibility to monitor the progress of permanency planning arrangements on a regular basis could be particularly beneficial for the management of children in care who are also juvenile offenders and be instrumental in reducing recidivism.

Taking the approach of other jurisdictions into account, the recent experience of the Signs of Safety Pilot suggests that it might be used as a model to inform the development of alternative approaches or options for the management of some juvenile offending behaviour. It might also be used in the management of some applications for violence restraining orders against children, particularly where these involve other family members.

Recommendation-Next Steps

The stakeholders in Western Australia are currently giving consideration to the need to better integrate the management of child welfare issues in family law and child protection in Western Australia and to improve communication between families and professionals in respect of those issues.

The opportunity to integrate and potentially unify court processes should provide the necessary foundation to bridge the current gaps in the family law system to improve outcomes for children, to ensure their safety and should energise those involved for the work ahead. As Martin Luther King has suggested, “Although social change cannot occur overnight we must work for it as though it were a possibility in the morning.”⁹⁴

⁹⁴ Quote from the wall at the entrance of the Unified Family Court Washington DC, October 2010.

The Child's Journey Revisited

If the journey of these two children had taken place in a Unified Family Court, it would have been standard practice for DCP to access the information on the Family Court file and to consult with the Family Court Counselling and Consultancy Service. This may have had an impact on the decision to commence protection order proceedings.

If the proceedings were commenced, the application for a protection order and the subsequent interim placement application, would have been heard by the same Magistrate who had been case managing the family in relation to their family law parenting order proceedings for the previous 18 months. The Independent Children's Lawyer in the family law proceedings would have continued to act "in the best interests" of the children in the protection order proceedings, because of their young ages. It is also likely that the DCP application would have been lodged, and the father's successful application for interim placement listed and heard within a few days, the relevant information would have been available to the Court and the parties, from the parents' family law file. Significantly, the children would not have had to spend 4 weeks in foster care without physical contact with their parents.

The single expert would have proceeded to complete his final report and, the parents, DCP, the ICL could then have been referred to a Signs of Safety Pre-Hearing Conference (or similar) to determine whether they could reach agreement in relation to the care arrangements for the children. In the event that this was not possible, they could define and limit the issues for trial in relation to both the protection and care proceedings and the family law parenting order proceedings.

Based on the history of the matter, it is likely that, at that Conference, DCP would have agreed to withdraw the protection order proceedings and the only matter that would have proceeded to trial would have been the parenting order proceedings. The withdrawal of the DCP protection order application would inform the Court's determination of the mother's allegations of risk and the DCP workers would be witnesses at the trial.

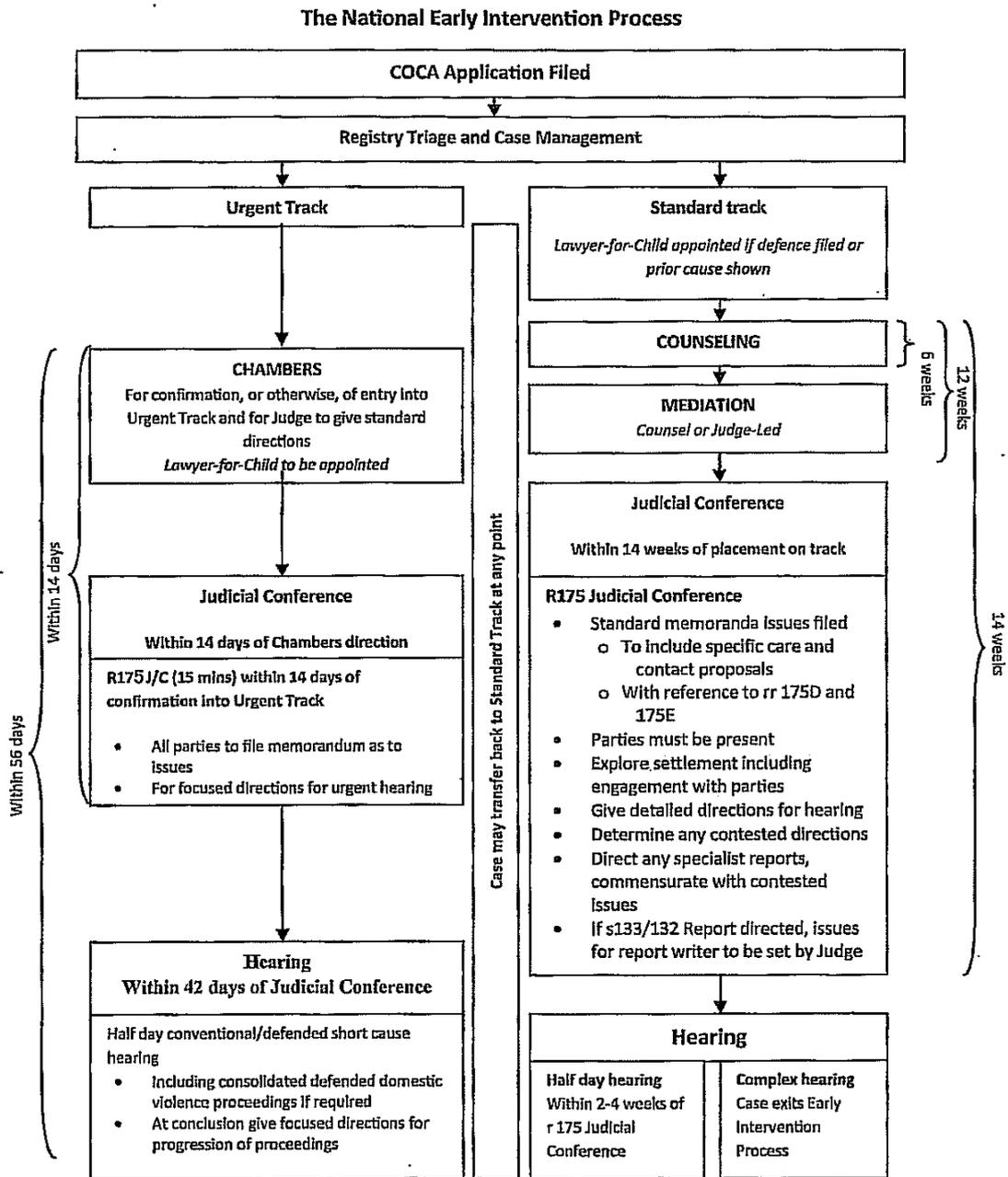
If agreement was reached in relation to all issues, the matter would be referred back to the Court for the protection order application to be dismissed and the making of final parenting orders in respect of the live with and spend time with arrangements.

If agreement was not reached with DCP at the Conference, the protection and care application and the parenting order applications would be listed for trial, on the same date, with the Court to first determine whether the children were in need of protection, then, if they were not, the final parenting orders that were appropriate for their care.

The children's journey, in reality, has taken more than 3 years and it is not yet completed. In a Unified Family Court, delay and duplication of resources would have been minimised and mediation processes utilised. The Unified Family Court would have been well placed to make timely and cost effective dispositions, achieving stability and certainty in the care arrangements for the children, removing the requirement for the attendance of the family and the professionals in multiple courts.

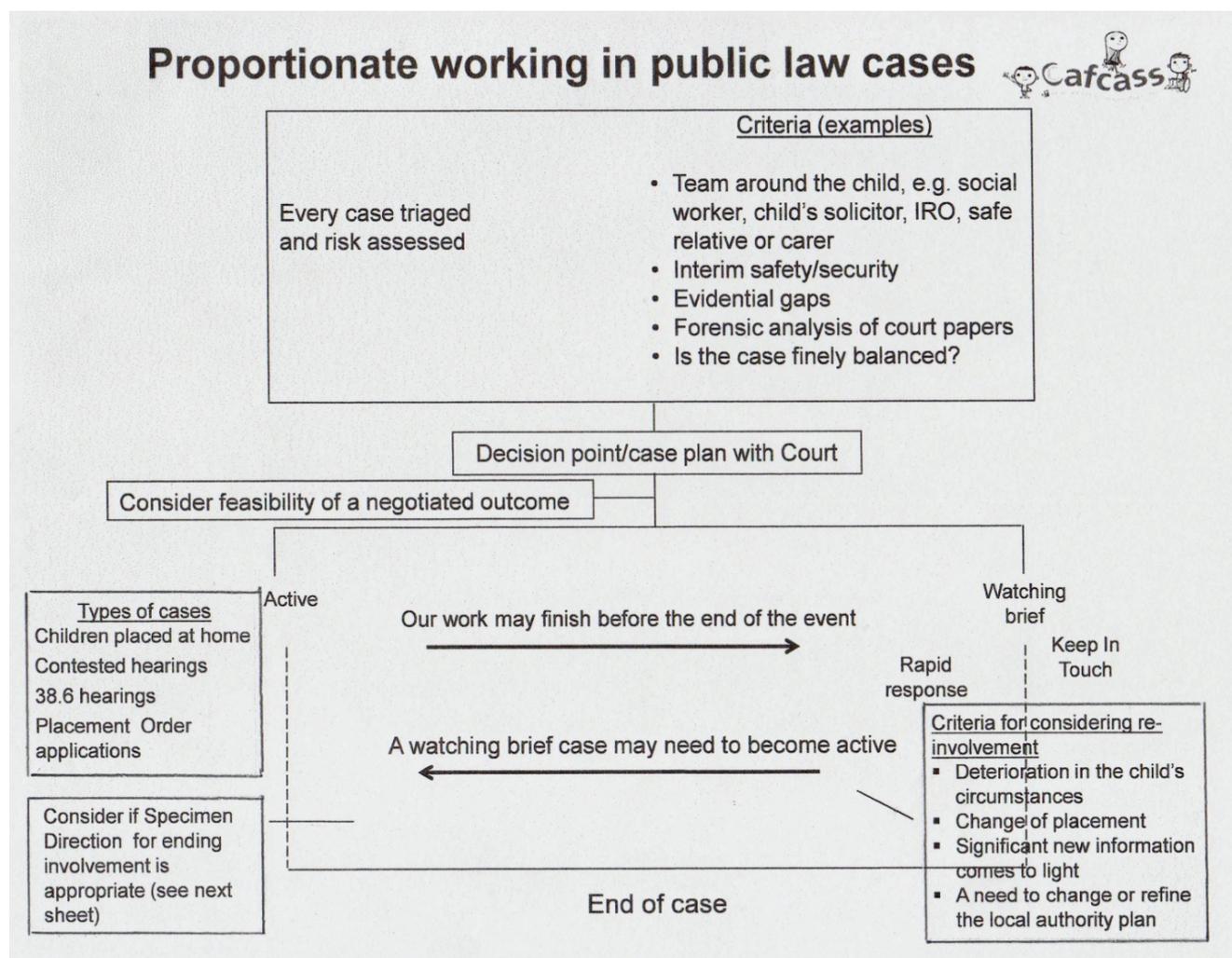
Appendix One

Flow Chart National Early Intervention Scheme (NEIS) Process –New Zealand



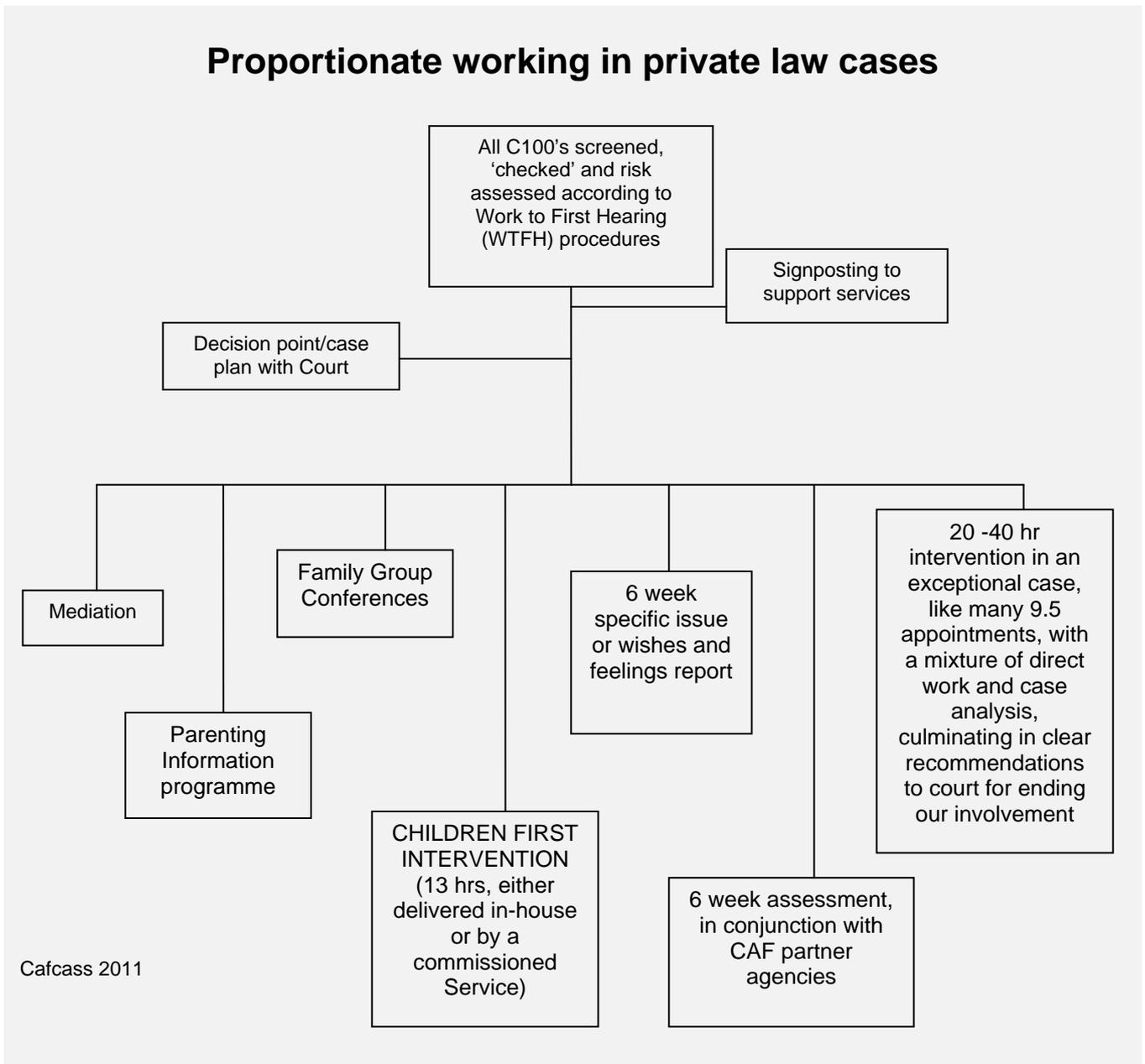
Appendix Two

Cafcass workflow process for the proportionate working in public law cases



Appendix Three

Cafcass workflow process for the proportionate working in private law cases



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