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PRACTICE AND PROCEDURE IN THE FAMILY COURT

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by

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I start this paper with a raft of disclaimers. First, I do not undertake to present the views of any other Judge of the Family Court. As we proceed it will no doubt be realised that the opinions in this paper are entirely my own. Secondly, a good deal of what follows is intended to stimulate discussion, for the picture gained from the Bar, or for that matter from the witness-box, is very different from the panorama seen from the Bench.

Thirdly, I have become aware that there are different views in different parts of the country about the various support services on which the Family Courts rely. Indeed there are wide differences throughout the country in the support services available. And the response to the Family Court seems to depend to some extent on the outlook of the practitioners in particular areas: there is a great difference between the Family Court in Napier and that in Hastings, yet the centres are less than 30 km. apart, are served by the same Judges, the same Counselling Co-ordinator and virtually the same support services. But there is a distinct difference both in atmosphere and in attitude. A different atmosphere and attitude again in Palmerston North; different again in Wellington. Those differences lead me to say that when talking generally about practice and procedure one has to remain sensitive

to the possibility that what may suit one centre may not suit another. One thing is certain: no one Family Court centre can ever be foolish enough to believe that it has the complete answer or the perfect system. What differences there are tend, I suspect, to arise from the varying standards and expectations in each community, and the capacity of the local legal profession to respond to those community standards and, where necessary, to provide leadership.

The fourth disclaimer stems from the fact that each Judge of the Family Court has a different way of doing things. While we all usually agree on matters of basic principle, there are some points on which we tend to think differently. Take as an example the point at which it can be said that mediation and conciliation have done all that can reasonably be expected of them; that there is a limit to the services that can properly be provided out of public money to help solve the problems of the eccentric, the unbalanced, or the plain bloody-minded; that the time has come for the referee to make the parties' decision for them. On this kind of issue, different Family Court Judges naturally have different flash-points.

The final disclaimer (though I cannot have exhausted all of them) is that in our area of the law many generalities are quite meaningless. Experience shows us that so much depends on the individual circumstances of the individual case. <u>This</u> man, <u>this</u> woman, <u>these</u> particular children. I need not labour the obvious. A Judge of the Family Court very soon realises that to a considerable extent the approach and the remedy have to be moulded to the individual family situation, though there are of course limits to the degree that one can stretch legal principles and procedures to cope with the bizarre. So if at times I speak in terms of generalities, as I must, I hope it will be understood that in many situations in the Family Court generalities can never be any more than a starting-point for the approach to an individual family's problems.

The Domestic Protection Act

If volume of business is any criterion, the ex parte procedure under the Domestic Protection Act 1982 is the latest legal growth industry. There is no doubt that the provisions of the Act fulfil a valuable purpose. Nor is there any doubt that its provisions are frequently used inappropriately.

Let me outline a type of situation which is frequently encountered. The applicant has been beaten up by the respondent. She has left the home, with the children, and has sought sanctuary with friends, relatives, or in a Women's Refuge Centre. Within days she is in the Family Court seeking ex parte orders for non-violence, non-molestation, occupation of the home and sole possession of the furniture, and interim custody of the children. It is a crisis, and she needs emergency relief. She has come to the Court ex parte because of her fear of what will happen to her and the children if the respondent learns what she is doing. In the meantime the respondent is sitting tight in the home and will not move out. The affidavit filed in support of the application will be designed, understandably, to create an atmosphere of maximum sympathy and urgency. The applicant will often be waiting in the wings so that the Judge can see for himself the visible marks of violence.

Now in such a situation no-one has the slightest difficulty in understanding the applicant's position and her need for protection at least until the situation can be properly looked at and defused. But it is necessary also to look at the matter from the respondent's viewpoint as well, for the relief that can be granted under the Domestic Protection Act provides powerful weapons in the matrimonial or quasi-matrimonial armoury. By an occupation order a respondent can be put out of his or her own home: summarily put out into the street. By a non-molestation order an applicant

with a fortress mentality can consolidate his or her position and can evade any attempts at reconciliation or conciliation. Weapons which are not only powerful in themselves, but weapons which have great tactical potential in matrimonial or quasi-matrimonial warfare. And it would be naive not to recognise that there are some who will deliberately manipulate the respondent into an incident in which violence either occurs or is threatened in order to terminate a relationship which in the applicant's eyes has become burdensome or superfluous. There are some, too, who will behave so tactlessly and with such lack of consideration as almost to have invited the violence of which they complain.

So in this area ex parte proceedings can be a very tricky business, first, because only one side of the story is presented, and secondly because of the drastic effects of the orders which can be made.

These risks are diminished to a considerable extent by the respondent's right to come into the Family Court on short notice on an application for the discharge of any such orders made ex parte. But that is in theory: it seldom seems to happen in practice. And I wonder why. It may be because in some cases the respondent knows quite well what his or her behaviour has been and knows the difficulty there may be in having the orders set aside. But should we be thinking in these terms in a Court which is supposed to encourage therapy as well as provide surgery? which is supposed to recognise that there are very few matrimonial or quasi-matrimonial breakdowns that can be seen in terms of stark black or white? Experience suggests that many ex parte applications under the Act are made simply because the applicant wants a breathing-space, or to bring a measure of control into a situation that seems to be getting out of hand. The casualty rate in ex parte orders that lapse at the stage of hearing seems to indicate this. But there is nonetheless a significant number of ex parte

applications which are never resisted but which turn out, on examination in a different context, to have been without merit: the orders have been sought to impose on the respondent the solution to their conflict which suits the applicant. There are enough cases of this last kind to cause concern.

This abuse of the system - for that is what it is - could be materially cut down by observing some simple and basic principles.

The first is elementary. An ex parte application must fully and fairly disclose to the Court the real state of affairs. Not merely the version of the state of affairs that suits the applicant. The responsibility rests not only on the applicant but on the applicant's solicitor.

This point needs emphasis. It is clear, as a matter of principle, that on an ex parte application the 'applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application': WEA Ltd v. Visions Channel 4 Ltd [1983] 1 W.L.R. 721, 727 (Sir John Donaldson M.R.). I sometimes wonder how many solicitors who rush into the Family Court with an emergency ex parte application seeking omnibus ex parte orders under the Act are conscious of that first and basic principle. How many have made any inquiry into the real facts? How many have simply swallowed the applicant's story hook, line and sinker and have responded with a rush of sympathy to the head? How many have asked why the violence occurred?

Some of these problems might be avoided by bearing in mind that a solicitor's duty is to act professionally, not to allow himself or herself to be used. And it is worth stressing these matters because it will only be a matter of time before some aggrieved respondent, tipped out of the matrimonial home on an ex parte occupation order, or

who is effectively isolated from his or her children by an ex parte non-molestation order and an ex parte custody order, will get the idea that he or she ought to sue somebody for allowing these consequences to happen. Who is more naturally in the firing-line than the solicitor who advised that the ex parte applications be made? The present adventurous widening of the boundaries of negligence and the duty of care suggests a practical reason for caution.

But the main point is that the applicant for an ex parte order has a duty to make full disclosure. That has always been so. Cases under the Domestic Protection Act are not exempted from the general rule.

The second point is that every ex parte application under the Act should be supported by a detailed affidavit, specifying precisely the facts on which an ex parte order is claimed and justifying the need to apply ex parte. Only in quite exceptional and urgent circumstances should an affidavit be dispensed with. The reason is basic: the respondent must be told the precise nature of the evidence on which the ex parte order was based. Otherwise the respondent's right to come to the Court for discharge of the order loses all meaning: how can that right be effective if the respondent has no idea what has been said against him?

In my early days on the Family Court I had been innocent enough to assume that the moment an ex parte order was made, a copy of the application and supporting affidavit would be served on the respondent as a matter of course. It was not until I had heard a number of these cases that I started to wonder why so many respondents who appeared seemed to have no idea what had been alleged against them. Now I know better, and if I make an order I will invariably direct that the papers be served forthwith on the respondent with the order.

Perhaps the main point in all this is to emphasise that on any ex parte application under the Domestic Protection Act - or for that matter any ex parte application - the party applying must put all the cards on the table: not only the applicant's cards, but what is known of the respondent's hand as well.

A word about speed in the processing of Domestic Protection Act applications and orders. Where an interim order is granted the applicant's solicitor can materially speed up the next step of the process by feeing the relevant information into his word processor and producing a draft formal order. The process can be speeded up even faster if a draft order is filed with the original papers. This is not to save work for the registries; but if an order is required for service urgently, this is one way of making sure that happens.

As I have already indicated, non-molestation and occupation orders are regularly sought ex parte as part of an omnibus formula for emergency relief. It may be helpful to mention some apparent misunderstandings about the nature of these particular orders.

The seems to be some feeling abroad that once a non-molestation order has been made its effect is to provide the applicant with a fortress from which any kind of communication or contact with the respondent can be shut out. That is a complete fallacy. A non-molestation order is not a non-communication order; it is not a non-visiting order. It is not designed to provide protection against reasonable communication, visits, or contact. It is, as its name declares, an order to protect against molestation. If we look at the ingredients of what is prohibited by a non-molestation order we gain a true understanding of its character: s.16 is aimed at unlawful trespass, and against 'molesting' (note the word) in various ways - conduct which amounts to an unreasonable and unacceptable invasion of the

applicant's privacy.

On that view of the matter the circumstances in which a non-molestation order can properly be applied for and granted are quite clear. A non-molestation order cannot be used as a back-door means of procuring a separation. A mere desire on the applicant's part not to be exposed to attempts at conciliation or reconciliation cannot possibly justify a non-molestation order. What is required is proof that the applicant is justified in seeking protection against abuse by the respondent of their relationship.

For myself I will now seldom make a non-molestation order on an ex parte application; I will usually insist that the application be on notice - sometimes quite short notice - so that the respondent is given a realistic opportunity to make his or her attitude known. More often than not the matter that is really troubling the parties then surfaces and can be dealt with by counselling or mediation. But sometimes mutual non-molestation orders can have a therapeutic effect, with leave to apply for discharge once the parties feel they are able to communicate without fighting.

On occupation orders one thing remains to be said under the heading of domestic protection. An occupation order under the Domestic Protection Act is for first aid, not for intensive care: Davis v. Johnson [1979] A.C. 264, 343. Intensive care, if it is needed, comes under the Matrimonial Property Act, and any issue of long-term occupation ought to be considered in its proper context of general division of matrimonial property.

Dissolutions

Although dissolution hearings have become notably less traumatic for the parties, some technical and practical

problems still remain. That is because a dissolution involves the status of both parties and also, to a significant degree, their legal rights.

One issue of importance is service. Personal service is still the norm, though there has been some relaxation as far as substituted service is concerned. But there is still a need for care over service. It is driven home by this horror story.

Mr W. lives in New Zealand, Mrs W. in England. Since about 1968 their marriage became notable for bloodletting on every conceivable matrimonial issue that could be made the subject of warfare. In 1980 Mr W. stopped paying maintenance. This struck Mrs W. as an unwarranted move on his part. In 1983 she set proceedings in motion in England by an ex parte application to the Court there for a maintenance order, the intention being, once she procured a provisional order, to have it confirmed and enforced here.

At the same time Mr W., in New Zealand, realised that the marriage had irretrievably broken down for long enough to justify him in applying for its dissolution. He sought directions for service and, no doubt for some sufficient reason, an order was made directing that Mrs W. be served by registered mail at her address in England. The service copy of the application and the notice to the respondent were duly sent off to her in a registered letter.

Nothing was heard from Mrs W. within the time specified for her to file a defence. Mr W. therefore set his application down for an undefended hearing. Within a short time his counsel accompanied him to the Family Court, followed the correct and desirable procedure of introducing Mr W. to the Judge, and two or three minutes after that Mr W. was a free man. He left the Court carrying his order for dissolution, which had of course

taken effect from the moment it was made, and was unappealable.

Back to England. While Mrs W. was waiting for her ex parte maintenance application to be heard the postman arrived at her home with a large registered envelope addressed to her. She took one look at it, saw in one glance that the name of Mr W's solicitors was embossed on the flap, and because she had resolved not to accept anything that had not been sent to her direct by her own solicitors, told the postman to take it away, which he did. It went back to the dead letter office and finally, some months after the dissolution order had been made, found its way back to Mr W's solicitors in New Zealand.

In the meantime Mrs W's maintenance application came on for hearing. Mr W. knew nothing of it. By an astonishing coincidence the hearing took place in England within, literally, hours of the hearing of Mr W's dissolution application in New Zealand. Mrs W's maintenance application was granted, the amount on current rates of exchange being $24,120 per annum. The resulting order was transmitted to New Zealand for confirmation. During the ensuing battle it emerged that the English Court's jurisdiction to make the maintenance order in Mrs W's favour depended on whether, at the time it was made, there was a valid and subsisting marriage between Mr and Mrs W.

The remainder of this horror story can be left to the imagination. But it need not have developed into a horror story if: (a) Mrs W. had been served personally with the dissolution papers in the orthodox way; and (b) Mrs W. had not used an ex parte process for her maintenance proceedings. The moral surely is that in any legal proceedings it is a good idea to keep the other side in touch with what is happening.

Joint Dissolutions

Buried at the back of the Family Law Service is an apparently forgotten Practice Note which the Family Court Judges produced in January 1982. Among other useful directions on a variety of topics the Practice Note provides that on the hearing of a joint dissolution application both parties must attend. If one of the parties for some reason cannot attend, then normally an affidavit from that party will be required, covering all the matters that need to be proved and also satisfying the Court that s.45 does not provide any obstacle to the making of the order of dissolution.

This is something of a trap for the do-it-yourself applicant. Every time a do-it-yourself joint application is filed the Registry should firmly warn the applicants that they both have to be in Court for the hearing. There is nothing more embarrassing than to have one joint applicant arriving with that air of expectancy that one grows to recognise, and with the wedding arranged for that weekend, only to be told that nothing can be done unless the other applicant surfaces either personally or by affidavit. Of course there can be exceptional circumstances: the wife who unexpectedly could not join her husband for the dissolution in Napier because she was in hospital in Opotiki having their baby is one example of a situation where some resourcefulness is called for.

The reason for caution in dealing with a joint dissolution where only one party appears is clear enough. By definition there is no service and no proof of service: the only evidence that both parties know what is happening, apart from their joint presence, is the signatures at the foot of the application. If one party is absent, how is the Judge to know how his or her signature was obtained? How is the Judge to know whether the absent party really

wants the dissolution? Is the party who is present giving an accurate account of the up-to-date arrangements in regard to the children? Even when both parties are present there are sometimes difficulties enough. I think of the masterful middle-aged wife and her elderly and apparently senile husband with a home-made dissolution application in her handwriting. When I asked the husband if he knew why he was there - in the tactful and somewhat circuitous way Judges have to use on these occasions - the wife broke in, 'Of course he's here for my divorce: you want it just as much as I do, don't you?' I hesitate to think what might have happened if he had said 'No'. I am afraid I did not have the heart to tell the wife, soon to be the ex-wife, about the Family Protection Act, or about the limitation period in s.24 of the Matrimonial Property Act.

I come back to the need for caution in these matters. We deal with a great many cases which may seem routine but which create disaster if they come unstuck. People are sometimes far too quick to criticise what they mistakenly see as legalistic technicality: but it is caution; it is there for their protection. All we need is a carelessly processed dissolution to blow up in our faces, and the whole system loses its credibility. I do not like to think what might happen if we ever had dissolutions by mail.

Paternity

The same note of caution has to be sounded in regard to paternity applications. Any decision on 'the fundamental human relationship of parent and child' (Campbell v. Pickles (1982) 1 N.Z.F.L.R. 97, 100 (C.A.)) is important - 'of great importance, not only to all directly concerned in it, but also to the public interest at large': Rells v. Keen (Hardie Boys J., Dunedin, 7 November 1983). The

status of the child is involved, of course; and there can be significant financial consequences, not only for the child but for the father: one only has to calculate the liable parent contribution payable for 16 years to see the point.

That leads to another horror story. In the early days of the Family Court there may have been some general understanding that no-one need be too concerned about undefended paternity applications, as long as some kind of lip-service was given to matters such as formal proof and corroboration. When Miss P. started her paternity proceedings against Mr C., she was not absolutely certain of his address, but since he was looking after children of his own and was receiving a domestic purposes benefit, finding out where he lived could not have provided an insuperable problem. Substituted service by the usual advertisement in N.Z. Truth was applied for, and for some reason an order for substituted service was made. The advertisement was published once only (which was all that the order required), and Mr C. did not see it: no-one brought it to his attention. In the meantime Miss P.'s application proceeded as an undefended application: she came into Court and was asked a battery of questions so leading that they amounted almost to a monologue, and her witness's 'corroborative' evidence was handled in the same way. The presiding Judge could have had no realistic opportunity to assess the credibility of either, and it is difficult to see why either the applicant or her witness needed to come into Court at all for all their presence might have added to the occasion. A paternity order was made: the moment Mr C. received it he applied for a rehearing, which was of course immediately granted.

Why is that a horror story? Because, I think, it is an example of the very kind of casual approach which was so much a feature of the old 'agony Court' as we used to call it. The same criticism could not be made in a case where it is proved that the respondent actually knew of the

proceedings and let them go by default: in such a case there can be little objection to making a paternity order on the basis of formal proof. But in a situation where the respondent does not necessarily know of the proceedings, and where it cannot be assumed that they have been brought to his notice, I do not for myself think that formal proof can possibly be regarded as enough: it is not a simple matter of the applicant qualifying for a maintenance order; it is a matter of establishing the parentage of the child, and on no view can that be regarded as something equivalent to formal proof of a civil debt.

Put the matter round the other way. Let us suppose that it is the father who wishes to establish his paternity against the opposition of the mother. Such cases can arise under the Guardianship Act. Exactly the same problems of proof can arise, but I do not think that in such a case anyone would suggest that important issues for the child are not involved, especially if, as in a recent case, the child has been absorbed into the mother's new family unit in which the father (if his paternity were established) would necessarily be an unwelcome intruder. Yet we would treat such a case very seriously, while, perhaps only from force of habit, we treat a mother's claim to paternity rather more lightly. Possibly it is time we remembered that in all such cases the central figure is really the child.

That leads me to the question of corroboration in paternity cases. To my mind corroboration is essential. The first reason is that the issue of paternity, no matter who raises it, affects the fundamental human relationship of parent and child. The second reason lies in a combination of factors normally summed up by saying that because the conception of a child normally takes place in the absence of onlookers, in the nature of things an allegation of paternity (whether by the father or by the mother) is easy to make but difficult to disprove. But the matter goes deeper than

that: one does not have to sit in the Family Court for very long to realise that allegations of this kind can be made for a variety of reasons and a variety of motives: that on issues where there is a high degree of emotional engagement people will tend to see what they want to believe as the truth. That can sometimes make them very plausible and convincing witnesses. But they cannot always be completely trusted.

Take a recent case as an example. It was a case where the mother was a convincing witness and where there was plenty of corroboration: a witness who almost (but not quite) saw the very act of intercourse; and photographs of the mother, the baby, and the alleged father, with the alleged father obviously admiring the baby. No Judge could be blamed if he felt the case against the alleged father sufficiently proved. But the later blood and tissue tests proved that the chances against his being the father were something in excess of a million to one.

Guardianship, Custody and Access

As everyone knows, these are extremely delicate areas and can be the cause of serious trouble. It is an area that calls for great flexibility: every case is different; every case must be considered on its own. Apart from the principle that the welfare of the child is the first and paramount consideration there are no real ground-rules and it is the greatest error to believe that there are. Some rules of thumb can provide a useful starting-point, but they can never be decisive: how can they be, when you are dealing with the relationship of this particular mother and this particular father with this particular child. As an example of what I mean, take the general belief that the children in a family should not be separated. That may or may not be a good starting-point, for it all depends on the individual child, and that child's relationship with his or her siblings and with each parent.

It is impossible to go into a custody dispute with pre-conceived ideas.

The notion of 'custody' is particularly troublesome because many people - particularly those who have been granted custody - seem to think that a custody order is a licence to control the child's entire upbringing. That is a surprisingly widespread idea and it is entirely mis-conceived. The idea originates from the English cases and those from other common law jurisdictions, and from New Zealand cases decided prior to the Guardianship Act: sole 'custody' used to be treated as if it were sole guardianship: hence the distinction, in the English cases, between 'custody' (i.e., guardianship in our terms) and 'care and control' (i.e., what is now 'custody' in New Zealand). It is high time that s.3 of our Guardianship Act, which makes the New Zealand terminology perfectly clear, was printed and handed to every party involved in a custody dispute.

It is the former, and now completely erroneous, view of 'custody' which creates so much difficulty over access. For myself I prefer to see access as a normally essential contact with the child of the non-custodial parent to enable that parent, for the child's sake, to share effectively in the general upbringing of the child as the child's joint guardian. Many people do not realise that guardianship - the general charge of a child's upbringing - is a joint affair, whatever is done about custody and access, and that the non-custodial parent must have an input as joint guardian. So access is to be seen, in general, as something rather more than merely an opportunity to see the child from time to time.

Many non-custodial parents do not like the word 'access': they would prefer to think in terms of shared, or joint, custody. 'Joint custody' is of course a misnomer: the parents, as joint guardians, have joint custody as a matter

of legal entitlement. 'Shared custody' is a better term: it preserves the idea that both parents have responsibility for the care of the child. 'Access', on the other hand, is seen by some non-custodial parents as being no more than the right to borrow the child from time to time: an idea which they find quite unsatisfactory.

I mention these matters because it is so easy to become stuck in a groove of restricted thinking in terms only of custody and access. Everything must, in the end, depend on what is best for the child, and it is always necessary to see these matters from the child's point of view. A formula which the parents may find comfortable from their own points of view may not necessarily be what is best for the child.

The use of affidavits in guardianship and custody proceedings poses a problem largely because there seems to be little uniformity of practice. In some cases there are no affidavits at all; in others there are affidavits, but only of the most sketchy kind; in yet others the affidavits seem to go on for ever.

It is possible to take quite a firm view on this question. It is based on the nature of proceedings under the Guardianship Act. They are not adversarial proceedings: a child is not a possession. The aim of the proceedings is to determine what is in the best interests of the child. So it is in the nature of an inquiry. As Lord Scarman has said recently, delivering the principal speech in In re E. [1984] 1 W.L.R. 156, 158-9, the Court's duty ' ... is not limited to the dispute between the parties: on the contrary, its duty is to act in the way best suited in its judgment to serve the true interest and welfare of [the child]. In exercising [the] ... jurisdiction, the court is a true family court. Its paramount concern is the welfare of [the child]. It will, therefore, sometimes be the duty of the court to

look beyond the submissions of the parties in its endeavour to do what it judges to be necessary.'

That approach, which simply confirms the view many Family Court Judges have been putting into practice, makes it quite undesirable that any Guardianship Act proceedings should be allowed to take the form of trial by ambush or surprise. All the cards should be on the table from the outset, and it seems to me to be essential that the parties adduce all their evidence-in-chief by affidavits, which should be exchanged in advance of the hearing. The saving of time which results is the least compelling consideration: the most compelling consideration is that all concerned are aware in advance of the hearing exactly what the issues are and what is alleged. One considerable gain is that counsel for the child is able to pursue any enquiries that are necessary with some idea of what position each disputing parent has adopted. And if the affidavits are framed so as to bring out clearly the exact proposals on each side for the child's future, a great deal of bloodletting about the rights and wrongs of the parties' marital situation - as distinct from their respective abilities as parents - can be put in proper perspective.

Quite apart from the necessity, in an inquiry directed to the best future interests of a child, to have everyone's cards on the table at the outset and before the hearing, I take the view that to conduct a Guardianship Act hearing entirely on oral evidence is to introduce serious disadvantages. Take a case where a parent, in oral evidence-in-chief, simply cannot be restrained from alleging all manner of misdeeds against the other with a view to showing that he or she simply cannot be trusted with the upbringing of a child. Not long ago I had to hear all about what was described as 'marital rape', then at least two years old. One can understand why a parent might want to get such grievances out of his or her system, but in many cases real or imagined deficiencies in a party's performance as a husband or a wife have very little to do with that party's

likely performance as a parent. The problem with allowing a party to recycle matrimonial grievances in a custody dispute is that the other side has to be given an opportunity to answer them; and the hearing can only too easily turn into an inquiry into matrimonial fault rather than into the welfare of the child.

If, however, the recycling of matrimonial grievances can be kept within reasonable bounds - as it can be if the evidence-in-chief is by affidavit - some discussion of those grievances is not necessarily irrelevant or a waste of time. In that way the Court can sometimes gain a vivid appreciation of the problems likely to be encountered in, for instance, arriving at a workable formula for access. And there may be some relevance in the fact, if it emerges, that one or other of the parties may be the kind of person who is likely to use the child as a means of carrying on the matrimonial fight.

The last topic I wish to discuss under this heading is that of appeals. The appeal procedure in Guardianship Act cases is unique. The form of appeal to the High Court, by way of rehearing de novo, is surely in this day and age an anachronism. Whatever reasons may have led to this statutory procedure in pre-Family Court days surely no longer hold good. On the other hand no-one can reasonably complain about the formula provided for appeals to the Court of Appeal in Guardianship Act cases.

The Family Court is now the Court of originating jurisdiction for Guardianship Act matters, with the exception of wardship proceedings. The consequence of having this anachronistic right of appeal by way of rehearing de novo is that it tempts parties into using the Family Court hearing as a dry run for an appeal hearing in the High Court. It is not the function of the Family Court to provide a forum for a dress rehearsal, nor, I suggest, is it the proper

function of the High Court to provide a forum for the hearing of a case originally test-driven in the Family Court and now put into better shape. The remedy is in Parliament's hands, and in the meantime the High Court can of course do no less than the statute directs it to do. One means by which the Family Court can ensure that Guardianship Act cases are properly and adequately presented would be, in suitable instances, to appoint counsel to assist the Court and to adjourn the hearing until counsel is in a position to place all relevant matters affecting the child before the Court.

'The Family Court'

The Family Courts in New Zealand have more extensive jurisdiction than any Family Court elsewhere in the Commonwealth. It would therefore be wrong to think of Family Courts as tribunals concerned primarily with routine or unimportant matters.

Those considerations lead to two points which require discussion. The first is the role of counsel.

My experience so far leads me to suspect that counsel, for some reason, feel that any detailed opening or closing submissions are not welcomed by the Court. If there is any such feeling it is unfortunate and, I believe, wrong. My own view is that counsel appearing in the Family Court should not in any way be discouraged from making any submissions on either fact or law which they see as helpful.

The second point is the question of hearing time.

I have no experience of the Auckland area, but in the Wellington area we seem to be plagued by under-estimates. I am well aware that if two days is given as the estimate for a four-day case, the case is likely to be given a

rather earlier fixture. But then one runs into the problem of having to adjourn it part-heard, with possibly weeks of delay before the hearing can be resumed. It is really not in anyone's interests for this to happen, particularly in a case where the welfare of a child is involved. Everyone knows that attempting to estimate the duration of a hearing is not easy, but if fair and realistic estimates are given, then the Court's administration runs much more smoothly. And in estimati time it should be assumed that the Court will not wish to hear the case at breakneck speed, but will wish to give it the calm deliberation that litigants are entitled to expect.

A more general aspect of the Court's procedure involves counselling, mediation, and the intractable case. While the counselling and mediation procedures can resolve a great deal, there will always be the kind of case where finality will be reached only if it is heard. In the last few months I seem to have encountered a run of custody and access cases where there has been a great deal of counselling, all of it worthwhile, several mediation conferences, and a variety of ad hoc interim orders to deal with particular periodic crises. But with the advantage of hindsight they have been cases in which the lack of any conclusive progress has done two things: consolidated one side in obstinate and obstructive attitudes, and bitterly frustrated the other.

It would be an advantage if we could have some kind of early warning system which could tell us which disputes are likely to respond to counselling or mediation - in which case the delays involved in those processes would be worthwhile - and which cases simply need to go into Court for a final decision.

The final matter I wish to raise is headings on documents.

As we all know, Parliament has expressly directed, by the Family Courts Act, that this particular facet of the Court system is to be known as the 'Family Court': indeed, that is how some of our buildings were designated even before the Family Courts came into being as such. The Family Proceedings Act, and other Acts as well, repose sole jurisdiction in a variety of matters in the 'Family Court'. Yet by some feat of logic which is not easy to grasp, the Family Proceedings Rules provide that all documents are to be headed 'In the District Court'. There is of course nothing wrong with that name as such: it was possibly adopted for the Rules because the only seal in use is the District Court seal. But it seems to me that litigants, who receive letters headed 'District Court', go there, and are then told to go to the 'Family Court', and, when there, are told to head their documents 'In the District Court', may feel some sense of confusion. The matter becomes more serious, however, when overseas litigants become involved with our system. Take the overseas resident whose marriage has been dissolved in the Family Court. He wishes to remarry, and must therefore satisfy the local authorities that he is free to do so. So he produces his sealed copy of the order for dissolution. The clerk in the marriage registry looks up the Family Proceedings Act and finds that only the Family Court has jurisdiction, yet the order has apparently been made by the District Court. The matter is not improved by heading up orders which are to be used overseas, 'In the Family Court', because the seal (of the District Court) does not match the intitulement. In Wellington the Judges have decided that documents for use overseas should be intituled 'In the District Court (Family Division)', which complies with neither the Rules nor the Act, but you can't have everything.