F W Guest Memorial Lecture 1995

The Family, Family Law, Family Lawyers and the Family Court of the Future

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Francis William Guest, M.A., LL.M., was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

The theme of this evening's address is the work of Family lawyers and the Family Court, the remarkable change of attitude towards Family Law in the last 35 years, and what is needed for the future.

It was only 35 years ago that Family Law was for the first time seen to be worthy of serious academic recognition in its own right and became a full subject as part of the LL.B. degree. Before then it had been touched on as part of the course in Civil Procedure, though 'touched on' is perhaps putting it too high. My own recollection, which may be at fault after all this time, is that it consisted largely of instruction in how to prepare divorce papers and how to present a divorce case in Court without making mistakes and in particular without exceeding the standard hearing time of three minutes. We were warned of the terrible disapproval we would face if through our incompetence we held up the process and that was because of a totally unfounded rumour that the Judges frequently ran sweepstakes on how fast they could get through a divorce list.

So it was 35 years ago that Family Law first became a serious study in its own right, and 35 years ago that the first New Zealand Family Law text book was produced. It is of interest, rather than of significance, that from page 1 to page 662 the whole process lasted exactly the normal period of human gestation. The result hardly matched the standard of scholarship we expect from today's commentators on Family Law, eminent among whom is your own Mark Henaghan.

To read now what was written back in 1960 creates, not nostalgia, but amazed disbelief. In the first place, to modern eyes Family Law as it was in 1960 seems in many areas to have been at best quaint and at worst unreal. Certainly in many of the judgments which formed the law as it stood in 1960 there was a high moral tone: a high value placed on duty and commitment and condemnation of betrayal. But when one digs deeper one realises that the Courts then had none of the support services and background information which the modern Family Court Judge takes for granted. So that in 1960 there was no real opportunity to look at underlying causes, and one suspects that a judgmental

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approach to a particular overt action may often have glossed over the state of human misery which had led to it.

The second cause of amazement is the way Family Law, nearly all of it statutory, has been transformed during the past 35 years. It has been transformed sometimes for the better, sometimes in response to what was seen at a particular moment as a pressing social problem, sometimes in response to the shrill demands of single-issue mind set pressure groups, sometimes without regard to the truism that hard cases make bad law because a new remedy intended to counteract perceived hardship or injustice in a particular class of situation would almost certainly open the door to abuse and so create injustice in quite different situations.

Perhaps the single most important consequence of making Family Law a field of serious study in its own right was that once the law had been laid out for systematic inspection it came to be realised that much of the substantive law was outdated and that the procedure was fragmented and disorganised, and that new ways had to be found to address the human and social problems in which the old statutory law had failed. That led to the great reforms of 1980, the establishment of the Family Court in New Zealand as a specialist Court, and the devolution to the Family Court of much of the Family Law work done up to then by other parts of the traditional Court system.

In reorganising the Court system in that way four factors stood out. First, it was seen as essential that the Family Court should be organised in such a way as to encourage non-confrontational methods of dispute resolution as a first resort and the formal Court hearing process as a last resort. Secondly, it was recognised that this required specialist support services, not only in the important area of counselling, but also the ready availability to the Court of expert and neutral assessments particularly of the needs of children. Thirdly, it was recognised that the adjudication of Family Law disputes required special procedures and also special qualities in the adjudicator, so that the Judges of the Family Court should be appointed only if by reason of training, experience and personality, they were suitable people to deal with matters of Family Law (Family Courts Act 1980, s 5(2)(b)). Fourthly, some attempt was made in drafting the legislation to avoid the danger of seeing Family Law situations in terms of stereotypes.

The 1980 legislation transformed the way most Family Law cases were handled. Since then the value of the Family Court as a specialist tribunal with specialised procedures has become recognised and more and more work has been transferred to it: protection of people whose disabilities deprive them of the ability to manage their own affairs, the care of the mentally ill, family protection cases and testamentary promises cases are areas into which the Family Court's work has been expanded.

As we get near the turn of the century it becomes necessary in the light of experience since 1980 to consider seriously two things: first, the structure of the Family Court itself, and secondly the adequacy of the current Family Law legislation at the present day. But before developing those two themes I want to say a word about the role of the lawyer in Family Law.

We all know that the legal profession is slow to change its ideas. There are still some lawyers both off and on the Bench who have not got out of the habit of seeing Family Law as an unappetising and somehow inferior branch of legal practice, not to be mentioned in the same breath as areas of the law which undoubtedly bring in more money and so are seen as more important. And regrettably, to some young lawyers just starting practice, Family Law is not seen to offer the same opportunities for the creation of a public or professional image. That is wrong, for my belief is that if a lawyer is shown to be capable of handling one of the more difficult child custody cases he or she is capable of handling anything in any branch of the law. By the time I have finished I hope I will have convinced you that a sound system of Family law is an imperative in any modern society, a vital force in shaping the standards and expectations of a mature community, and a vital force in the community's long-term future.

The development of Family Law has brought it a marked distinction, to its advantage, from other areas of the law. In the more traditional areas of the law the concentration of most lawyers and Judges in their working lives is on single and limited issues. Is this particular accused person guilty or not guilty? Will this particular commercial transaction stand up? Has there or has there not been a breach of this particular contract? Has the defendant been in breach of his duty of care? By contrast, in almost every area of Family Law the net is cast much wider, because it is realised that the advice that is given or the decision that is made is going to have an impact on the particular family relationships well out into the future. You are not simply settling an ordinary commercial dispute between strangers who will go their separate ways once the decision has been given. You are, whether you like it or not, influencing the course of people's lives within a family relationship. Where there are children that relationship by nature has to continue whether the parties like it or not. So the approach of the family lawyer and the Family Court has to be a holistic approach, responding to particular and individual human needs as well as the particular legal issue, ensuring that the general is not allowed to dominate the particular, protecting the parties against glib mind set solutions, yet at the same time setting and maintaining appropriate standards, boundaries and expectations in family and social behaviour.

One of the most difficult aspects of the work of a family lawyer is coping with the raw emotion that can very often be unleashed when a client is faced with disintegration of the family unit. They are often unable to see their situation either objectively or realistically. They are difficult clients to represent, for in a real sense they are disoriented. Dealing with a client in that situation draws to an unusual degree on the lawyer's patience, objectivity and understanding. It is that side of it which may frighten many lawyers away from practising in Family Law. And Family Law is not for the squeamish. But those lawyers who have chosen to make Family Law an important part of their practice are now a significant and influential specialist branch of the legal profession. In addition to a high degree of legal skill there have to be personal qualities of dedication, compassion, objectivity and the ability to identify and cope with the human problems which underlie so many of the cases which come into their professional care. The Judges of the Family Court, working daily in an arena served by a largely specialist Bar, have reason to be thankful for the high standards of the

men and women lawyers who have been courageous and dedicated enough to accept the real and unique challenges of practice in this area. So it is timely to pay a tribute to a specialist branch of the legal profession which without enough recognition engages in work of supreme social importance.

But of course all this work is done away from the public eye, in closed Court, for by statute the Family Court must sit in private. It was believed at the outset that if the parties were protected by confidentiality they would be much more forthcoming about the matters that had brought them into Court with the assurance that the intimate side of their lives would not be laid out by the news media for the entertainment of those who are interested in gaining satisfaction from others' misfortunes. The result of course is that the only people with any real knowledge of what the Family Court actually does are the lawyers, their clients, and those who read the Family Law Reports. Inevitably the impressions their clients have about the working of the Family Court are often influenced by whether they have ended up with what they wanted.

In other areas of the law it is taken as elementary that justice must be done in public, that members of the public must have access to the Courts so that they can see for themselves what is going on in them. With that necessary openness, the public as a whole has no excuse for not knowing how a Court operates in practice. In the Family Court's work it may be of particular help to those involved in a Family Law case, whether as parties or witnesses, to be able to drop in to the back of the Court so that they can get some idea of what to expect. Across the Tasman the Family Court of Australia, originally a closed Court, has now opened its sittings to the public, though with strict controls about what can be published in the news media, so combining openness of justice with respect for privacy. From personal experience I am able to say that very few people actually take advantage of the Family Court of Australia's open Court policy, but the point is that access is available to those who want it. Where the whole of the Family Court's work, as in New Zealand, is conducted behind closed doors, misunderstandings about the operation of the Court can easily gain currency and for obvious reasons cannot always be effectively answered. Perhaps, to avoid that difficulty, we should open our doors.

So, now that we have a specialist Family Court working with specialist support services and specialist lawyers, it is time to take critical stock of the system as a whole: the Court itself and the legislation which lays down the basis for Family Law.

Let me deal first with the legislation. Our present Family Law legislation is badly in need of a complete overhaul. The present statutes run in total to something like 1400 pages of small print and one only has to look at it with dispassionate and scholarly eyes to see at once that it has been developed haphazardly and on the whole lacks any overall theme or pattern. Some is outdated, simply adapted from the pre-1980 legislation. Some has been enacted to meet the fashion of the moment without regard to overall structure and purpose. Some of the legislation has clearly been enacted with certain stereotypes in mind and is inadequate to deal with cases which fall outside that stereotype.

My choice of examples should not mislead anyone into believing that only limited overhaul is needed. If I were to give a full list I would be establishing a

new record for the length of an F W Guest Memorial Lecture. First, let me take matrimonial property.

The Matrimonial Property Act 1976 was developed to provide a greater measure of certainty in the outcome of matrimonial property disputes. In particular it was developed to meet the stereotype of the one-income family in a relatively long marriage, the husband having the income and accumulating the family capital, the wife bringing up the children and looking after the home. Under the earlier law matrimonial property had usually been divided in shares which corresponded to the contribution each had made to the accumulated property, so that it was difficult for a wife with no income or assets of her own to claim a significant share. That situation was sought to be corrected by the 1976 Act. First the Act emphasises the notion of equality in the sharing of accumulated matrimonial assets in a way that makes it clear that unequal sharing is to be treated as exceptional. Secondly, the Act reinforces that notion by recognising that the value of non-financial contributions to the marriage partnership is not to be treated as inferior to the value of financial contributions. In general, therefore, each marriage partner is presumed to have an entitlement to an equal share of the total matrimonial assets.

I have already referred to the stereotype which Parliament had in mind when it passed the 1976 Act. But what about cases which do not fit into that stereotype? Take the case of the working or professional wife who not only earns more than the husband but who also runs the house and cares for the children. Must the value of the matrimonial home be shared equally in that situation? Examples could be multiplied from the myriad cases in the Family Court's experience in which one has to wonder whether it was wise for the convenient notion of equal sharing to be as pervasive as it is or whether the Court should have been left with a more effective discretion to enable the result to reflect more truly the real merits of the case.

Now the Matrimonial Property Act was designed to provide for a fair division of matrimonial assets, so that it dealt with division of capital. But what about division of income? Take the case of a husband, upwardly mobile, with high prospects, and a wife whose earning capacity has been limited by the need to care for their three children. After 10 years of marriage the husband finds another woman whose energy has not been sapped by her duties as a mother, and there is a separation. They immediately face the reality that the capital assets which were adequate for both of them as a family unit will not be enough for either of them when divided — that is not a worry for the husband, for his rapidly increasing earning power will tide him over any difficulty. Nonetheless matrimonial property is divided equally, and after the mortgages and debts have been repaid the wife is left with the children, $30,000, say, as her share of the matrimonial property, and a very limited earning capacity. Apart from child support, the husband's income and his shining prospects remain intact.

Now here is the anomaly. Four years after it passed the Matrimonial Property Act, Parliament passed the Family Proceedings Act and in doing so made it quite clear that a separated wife was entitled only to limited maintenance and, following dissolution of the marriage, was expected to become self-sufficient. Because of the compartmentalised development of Family Law it does not seem

to have occurred to anyone that when a marriage breaks down it is necessary to consider not only the matrimonial capital but also inequality of earning power and financial dependency. To make the anomaly even worse the Family Proceedings Act makes it clear that spousal maintenance is designed to do no more than to meet the spouse's reasonable needs — note that the standard of living in the former household is *not* the benchmark. This peculiar way of looking at matters has escaped public attention largely, I suspect, because as the law stands solicitors have had to advise their clients that to seek spousal maintenance is not worth their while. Nonetheless there have come to notice one or two cases, the tip of the iceberg, where former husbands are living very comfortably in retirement on assets accumulated since separation while their elderly wives, totally dependent on them during the marriage, are forced to survive in the limited accommodation they were able to purchase from their share of matrimonial property and on national superannuation. There is little or nothing the Court can do for them. They have been made casualties of short-sighted and compartmentalised law reform.

The Matrimonial Property Act deals only with the capital assets of those who are married. You will be relieved to hear that I do not propose to step into the minefield created by the property disputes of those who have chosen to enter into a relationship outside marriage. The Courts have been battling with this issue for some time, and of course the problem is compounded by the infinite variability of relationships outside marriage, for 'living together' can last for a week or a lifetime. But one immediate anomaly that ought to be considered arises from the fact that such cases are at present outside the Family Court's jurisdiction. Would not such cases be more appropriately dealt with in the Family Court?

The Child Support Act 1991 is so full of anomalies that it would take the rest of the week to do them justice. This is what can happen when legislation is driven by fiscal need to recover the staggering cost of the domestic purposes benefit and the need to provide an automatic formula setting the amount of child support. The level of domestic purposes benefits granted and the relatively low rate of recovery under the 1991 Act tell us something about the state of our society. The level of domestic violence, which I will comment on later, tells us even more, and one has to wonder what attention is being paid to the urgent need for education in proper levels of commitment, responsibility and behaviour. In these areas the Courts are expected to do their best to clean up the mess at the bottom of the cliff, a task which would have been avoided if proper foresight had gone into putting a stronger fence at the top.

One elementary lesson that comes out of this is that, in an anxiety to follow a particular path or a particular agenda, there has often been a failure to recognise that any attempt to stereotype Family Law situations, and so to provide what is seen as certainty in the administration of the law, overlooks the infinite variety of human situations which in practice come before the Family Court. We are not dealing with finite, single-issue problems. We are dealing with the way people conduct their lives and providing a remedy for sometimes unique personal difficulties. Broad guidelines are of course essential, but any attempt to narrow them is to risk creating rather than reducing injustice.

Dissolution of marriage was an area of the law fundamentally reformed by the 1980 Act. The reform was in many ways welcome because the earlier 20-odd grounds for divorce were replaced wholesale by a single ground for divorce based on two years of living apart without hope of reconciliation, so that no question of fault or blame needed to be considered. With one exception, which I need not trouble you with, once that ground is proved the Court is obliged to dissolve the marriage on the application of the party who wants it dissolved.

Dissolution of a marriage involves a change of status and that change of status carries important legal consequences, but in today's climate that change of status is very frequently anticipated by the abandonment of any marriage commitment long before the marriage can be legally dissolved. Family rearrangements will often follow on separation or, in some cases, precede and so lead to separation. On dissolution day one often finds the applicant turning up for the dissolution hearing with his or her present partner and one or more children of the new relationship. In the normal course of events matters of matrimonial property, custody and so on will have been determined long before the marriage is formally dissolved, so that dissolution will often mark the end rather than the beginning of the process of readjustment.

Attractive as a bland no-fault ground for dissolution may be, and pleasant though it may be to have a complete alibi for escaping from recrimination and bitterness, there are cases in which the no-fault ground can create serious injustice. Not only that, but it can lead to a public perception that serious misbehaviour within a marriage can be swept under the carpet and ignored. Whether it is wise in today's social climate to encourage that perception is for others to judge, but having regard to the important legal consequences of dissolution of marriage there is a clear case for providing for instant divorce without any waiting period in a limited class of situation.

Some may think that in a case where there has been gross domestic violence there can be no reason whatever why the victim should not be entitled to repudiate the marriage and apply for its immediate dissolution. What is the sense in requiring the victim to wait out two years of separation? That is the kind of situation that can bring the law of dissolution into contempt and the status of marriage into disrespect. There are other kinds of gross betrayal within a marriage that can rightly be seen as making continuation of the marriage intolerable and justifying immediate dissolution. If it is said that there are difficulties in apportioning blame or fault within a marriage — that is the argument always advanced to justify a no-fault régime — then I would answer that the Courts have never had any difficulty whatever in recognising gross and inexcusable misconduct when it occurs. And when gross and inexcusable misconduct has occurred, why should the victim not have an instant remedy?

That leads me naturally into the topic of domestic violence, another area of Family Law that has been compartmentalised and which starkly reverses no-fault ideology. There is no need for me to emphasise the extent of the problem. In each ordinary working week I would expect to have to deal with at least 8 or 10 emergency applications for protection against domestic violence or molestation. The majority of these applications are made by women in de facto or casual relationships, many young and many with children.

But the problem of domestic violence is by no means limited to de facto or married partners. We know that some parents need protection against their violent children: the mature son or daughter who will not leave home and terrorises the parents. And it has become obvious, through experience of dealing with these cases, that for some families violence is an accepted way of life and an acceptable means of control, passed down from one generation to the next as a social expectation. It is not necessarily confined to particular sections of the community, nor is it confined to one gender. Alan Duff's perceptive study of domestic violence, *Once were Warriors* — one preserves a vivid memory of the scene of the children cowering together in their bedroom while the fight raged downstairs — touched only part of it; the reality in the Family Court's experience is often much worse and often more horrific.

Legislation in this area has tended to be unimaginative, over-technical and over-detailed, and it has not allowed the Courts sufficient breadth of discretion to allow the remedy in the individual case to match the situation. Do not blame the Courts for perceived deficiencies in this area, blame the legislation. The legions of those who require protection are entitled to expect legislation that will give the Family Court full discretion to provide the kind of protection that is justified in the individual situation.

The topic of protection leads me naturally to aspects of the Family Court's jurisdiction which are essentially protective: protective, that is, of those who lack the maturity or the capacity to protect themselves. The Guardianship Act 1968 and the Children, Young Persons and Their Families Act 1989 deal with children, the first with the relationship between parent and child, the second with children in need of care and protection. The Protection of Personal and Property Rights Act 1988 deals with adults whose physical or mental disability has robbed them of the capacity to look after themselves or their own affairs. The Mental Health (Compulsory Assessment and Treatment) Act 1992 deals, as its title suggests, with people who suffer from mental illness and who require enforced assessment and treatment for their own protection and for the protection of others.

When we speak of protection we need to ask, protection against what? And the only certain answer is that whatever protective measures are devised should be designed to promote the welfare and interests of the individual who needs protection. Anyone with experience in the Family Court will know at once that this must take into account the whole of the circumstances affecting that person as an individual and that it is a mistake to think that any single protective formula can be treated as having universal validity.

When the Children, Young Persons and Their Families Act was drafted, the ideals of family cohesiveness and family responsibility were given great emphasis. The fact that a child had become in need of care and protection because of neglect, ill-treatment or abuse was to be the concern of family members gathered together in a family group conference which would decide what was to be done. Where possible the child was to be placed with family members, though the ultimate responsibility for the child's future would rest with the Family Court. Much the same principle was to be applied to young people who became involved in criminal offending.

In many cases — very many cases, I should say — family members have responded to the challenge in a constructive way and the procedure has turned out to be valuable and beneficial for the child. But naturally family reunification cannot be treated as if it were an end in itself, for the first and paramount consideration must be for the welfare and interests of the child. In the case of some dysfunctional families, returning the child to the family does no more than lock the child back into the very situation which created the need for intervention in the first place, whatever support may be offered within the limits of available public resources. In such cases there is simply no option but to insist that the child be placed with suitable foster parents if the child is to have a reasonable chance in life. One of the most heartwarming experiences in the Family Court is to see the change in the child brought about by the efforts of some very dedicated social workers who have managed to match the child's needs with excellent foster parents who take the child into their home and their hearts with no expectation of getting anything out of it but the reward of watching the child's often spectacular recovery and progress.

I must now give one last example of the haphazard statutory development of the law. It is the fundamental human issue of paternity. Paternity is an issue of substantial importance in a social climate in which many children are now born ex-nuptially and in which family relationships increasingly readily break up and are reconstituted.

The law of paternity is in a state which verges on the chaotic. Let me explain it simply. There are three ways of establishing paternity. The mother can apply in the Family Court for a paternity order against the alleged father. Secondly, in any proceedings in any Court there can be a decision on paternity when that is put directly in issue. Thirdly, application can be made to the High Court under the Status of Children Act 1969 for a declaration of paternity. But here is the catch. In paternity proceedings under the Family Proceedings Act a paternity order is *res judicata* only for the purpose of maintenance liability. In the other classes of proceedings in the Family Court the finding of paternity will be *res judicata* binding only on the parties to the proceedings, but it is a judgment *in personam*, not a judgment *in rem*. A declaration of paternity in the High Court, however, is a judgment *in rem*, definitively settling the issue of paternity for all purposes.

Confused? The same kind of technical difficulty is mirrored in various other areas of our Family Law. The confusion about a basic issue like paternity is a good example of failure to provide a consistent and logical code for Family Law. Can there be any conceivable reason why the Family Court, in any case of any kind where the issue of paternity has to be decided, should not be able to make a declaration of paternity (or, for that matter, non-paternity) which would settle the issue for all purposes, once and for all?

Now I want to come to the Family Court itself. It was established in New Zealand by the 1980 legislation as a specialised Court for the purpose of ensuring that legal matters affecting the family were dealt with in a way that was seen to be clearly distinguished from the way in which more general litigation was handled. Disputes affecting the family were to be dealt with constructively

wherever possible, recognising the unique qualities of family litigation which I referred to earlier.

By 1980 there had been a general movement, particularly in the United States and Canada, towards the establishment of specialised Family Courts, but by far the most impressive creation was that of the Family Court of Australia in 1975. The structure and organisation of the Family Court of Australia provide the most valuable criteria for comparison with our own system in New Zealand, though in fact the extent of its jurisdiction is rather more limited than that of our Family Court.

The Family Court of Australia was set up as a federal superior Court of record with an appellate division and a trial division. The appellate division is known as the Full Court of the Family Court of Australia and sits with a minimum of three Family Court Judges. All the Judges of the Family Court of Australia are, like us, required to be suitable for Family Law work by reason of their training, experience and personality. The Family Court of Australia is a stand-alone organisation with its own specialist staff, and its administration is dedicated and extremely efficient. I hope I can speak of the work of the Family Court of Australia with at least a degree of authority, for late last year its Chief Justice kindly gave me the opportunity to sit with the Full Court on a variety of appeals in Melbourne and Brisbane — in case you are alarmed for the future of Family Law in Australia I hasten to add that I was there in a non-participating role.

In setting up their Family Court system the Australians acted boldly and thoroughly. By comparison the New Zealand approach to this necessary reform was, with hindsight, timid, weak and half-hearted. New Zealand created a separate judicial hierarchy, as in Australia, consisting of the Principal Family Court Judge and the Family Court Judges, and specialist Court officers (the Family Court Co-ordinators) whose 'principal responsibility' is 'to facilitate the proper functioning of the Family Courts and of counselling and related services'. Then it stopped short. Instead of the obvious measure of setting up a stand-alone specialist Family Court as the Australians had done, New Zealand's choice was to tack our own Family Court on as an appendage to the District Courts, so that the basic administration was in the hands of the local District Court Registrars and the District Court staff. Inevitably that choice meant that it was difficult to present an image of a Family Court with a specialist status and a distinctive way of doing things.

Despite the fact that the legislation clearly required the Court to be known as 'the Family Court' the various procedural Rules devised by the Justice Department for the Family Court's paperwork created confusion by quite wrongly specifying that its documents were to be headed up 'In the District Court' — an egregious but persistent inaccuracy that has been firmly corrected in some areas of the country.

It is almost as if those in charge of policy matters were determined to downgrade the Family Court's specialist status, to hide its light under a bushel. This curious bureaucratic disinclination to call the Family Court by its proper name, contrary to what the statute says, survives to this day and the reasons for it have never been explained.

The focus of the Family Court's work, as in Australia, is on dispute resolution and conciliation by means of counselling, mediation, and, as a last resort, a hearing in Court. Generally speaking, though with some obvious exceptions, the parties are encouraged to agree on their own solution to their particular problem. The most common exceptions are cases where there has been domestic violence, and some instances where the Court itself has to undertake the responsibility of deciding what is in the best interests of a child. In general, however, cases which have to come to a hearing in Court represent a small proportion of the total work of the Court.

So the emphasis is on alternative dispute resolution, and in this basic aspect of the Court's work there is a significant contrast between the Australian Family Court and our own. In the Family Court of Australia all the counselling, conciliation and mediation services are in-house, run by specialist and qualified Court staff. Having those services under one roof and as part of a single management chain means that the whole system is highly structured with each member of the team having clearly defined and specialised functions.

By comparison our own Family Court system gives the appearance of being unstructured and unsophisticated. The way the legislation is framed does not help the development of a structured pattern. For instance, the counselling function is farmed out to agencies outside the Court's direct control which may very well have their own ideas of what counselling involves. As well, it is a statutory requirement that there must be a mediation conference if one party asks for it, regardless of whether it is appropriate to mediate at that particular time or at all.

In the Family Court of Australia quite a different view is taken of mediation. There mediation is a specialist area with a high success rate, reserved for those cases which are likely to be responsive to it. There is a very efficient screening process. Cases where there has been domestic violence are treated as unsuitable for mediation. Also screened out is the type of case where any agreement reached by the particular parties is likely to last only as long as it takes them to get outside the Court doorway. Under a present pilot scheme mediation is conducted within the Court building by mediators working in teams of two, one invariably a woman and the other a man, and one legally qualified and the other with social work experience. The mediators, many of whom are under part-time contracts to the Court, are certificated under a special programme operated by the Court. It is a very sophisticated service, and the various mediators I spoke to were amazed that in the New Zealand Family Court mediations are conducted by a Judge. They saw the judicial function as quite incompatible with mediation in any orthodox sense.

By comparison, in our own Family Court system there is no one, central, strong directing force, imposing a single clear Family Court administrative policy and a single clear set of Family Court objectives. In some registries it is recognised that specialist skills are required of the staff members who administer the Family Court and who deal with those who come to the Family Court for help. In others the Family Court is seen as simply another aspect of the registry's operations which can be handled by anyone.

The valuable experience of watching the Family Court of Australia in operation suggests that it has achieved the proper structural model required for the adequate servicing of pressing and growing public needs in this quite distinctive area. Of course the New Zealand Family Court in the last 14 years has established a reputation which has largely been due to the efforts which are still being made to overcome its structural inadequacies. But whatever may be said about the obvious need for the New Zealand Family Court to become free-standing with a structured administration dedicated to its specialist needs, something really has to be done about the system in this country of dealing with Family Law appeals.

To overseas observers our appellate system for Family Law is nothing short of bizarre and anachronistic, though some of the Australian Judges who recently offered me their opinions of it were even less polite. Unfortunately for us they speak from a position of advantage, for under the Australian system appeals from the trial Court are heard by a bench of three appellate Family Court Judges who are also involved as trial Judges in the trial work of the Family Court. Appeals from the trial Court will usually be heard within three months. They are heard on the basis of the trial record and the hearing time for each appeal is usually three hours or less. It is accepted as axiomatic that an appeal from a specialist trial Court must be dealt with by a bench of appellate Judges with the same specialist expertise. It is a fast, cost-effective specialist appellate system.

Now look at our own system. The decision to link our Family Court with the District Court system has meant the adoption of the appellate system which applies to District Court matters, so at the outset any element of specialisation is lost. The primary appeal is to the High Court, presided over by a single Judge. That appellate structure goes back to the days when our Court system was first set up in this country and so far has remained impervious to the changes and developments which have taken place since the late 1800s. Such an appellate system was no doubt perfectly adequate for dealing with appeals against the Resident Magistrate in respect of sentence or conviction for such things as shoplifting, exceeding the speed limit or being found drunk in a public place. But whatever might be said about that, local Magistrate's Courts, with their very limited summary jurisdiction, are now a thing of the past and it is no longer possible to see the District Courts as concerned mainly with unimportant petty crime or minor civil issues, nor is it possible to ignore that in the District Courts' jury jurisdiction an appeal lies direct to the Court of Appeal. While there are at the present day compelling arguments for reviewing the appellate structure in regard to other aspects of the District Courts' jurisdiciton, there are certainly unanswerable arguments for creating a specialist appellate structure for the Family Court.

The first is that it is plainly inappropriate that a primary general appeal from the specialist Family Court should be to a single non-specialist Judge, however respected he or she may be. It is unfair to the appellate Judge, who cannot ordinarily be expected to have had day-to-day working experience in the specialised Family Court environment.

Secondly, it is totally inappropriate that general appeals in guardianship and custody cases should lie, as at present, to a single non-specialist Judge who is

required to rehear the whole of the evidence *de novo*, to re-try the case. There is no need to draw attention to the wastefulness and unnecessary cost of an appellate system which allows the abuse of a dry run of a custody case in the specialist Family Court followed by a full retrial in a non-specialist Court. With the recent memory of two notable and lengthy Auckland custody cases involving allegations of sexual abuse which progressed through the Family Court to the High Court and then on to the Court of Appeal, which included apparent disagreement between the respective single High Court Judges on matters of principle ([1994] NZFLR 1, 26), it is difficult if not impossible to mount any rational defence of our present Family Law appellate structure.

For a replacement we should look seriously at the model provided by the Family Court of Australia. It is rare for a custody appeal to run for more than about three hours. It is very rare for the Full Court to receive any further evidence on appeal.

In custody appeals where a change of circumstances is alleged to have occurred since trial, if the Full Court is persuaded that the change of circumstances could have affected the trial result, the preference is to remit the case back to the trial Court rather than to test the issue by receiving evidence on the appeal.

Also of particular interest is the impatience shown by the Full Court towards any submission on appeal which had not been made to the trial Court. Obviously the expectation is that the case would have been fully developed in the trial Court. There is a clear message here for New Zealand, more particularly illustrating the dangers and wastefulness in hearing custody appeals *de novo*.

An important function of an intermediate appellate Court is to provide informed leadership and general guidance for trial Judges in policy, practice, and on issues of law. Such appellate leadership can come credibly only from an appellate Court which is fully familiar from practical experience with the working of the Family Court system and with particular features which distinguish Family Law from other branches of judicial work. It is this factor which provides one of the sharpest distinctions between the Australian and the New Zealand Family Court systems. In an appellate system which directs the primary appeal to a single non-specialist Judge, however sympathetic he or she may be to the Family Court's objectives, it is unrealistic to expect the same qualitites of informed leadership.

Many Judges of the High Court in New Zealand have obviously taken great pains to attune themselves to the Family Court's unique character and particular approach and nothing I have said is intended to underrate the value of their contribution. But the fact remains that in both New Zealand and Australia Family Law has become a strongly specialist area in which legal, social and human issues have become uniquely interwoven. In cases where a dispute can be resolved only by the Court, the Court's approach recognises that those issues are interwoven and in particular that in many cases the trial process represents the culmination of a variety of less formal but specialised dispute resolution procedures. The latter point, together with other factors (appointment of counsel to represent children, input from social workers and specialist reporters and so on), sharply distinguish the character of a Family Court trial from any other kind of adversarial proceeding. I have already described the approach as holistic

as distinct from the more familiar 'single issue' adversarial proceeding. On questions of law the Court of Appeal must obviously be the final arbiter as is the High Court of Australia in the Australian system. But of course that depends on the individual parties' desires and ability to appeal further.

Underlying the misgivings about our intermediate appeals on fact and law is the lack of credibility of a system which assigns a general right of intermediate appeal to one non-specialist Judge who is not required in terms of the Family Courts Act, s 5(2), to be a person who is 'by reason of his training, experience, and personality, a suitable person to deal with matters of Family Law'. That requirement is a central statutory requirement for Family Court Judges both in New Zealand and in Australia.

The role of an intermediate appellate Court (which will in most instances in practice be the final appellate Court) in providing leadership and guidance on matters of law and practice in an area as socially sensitive as Family Law must obviously be of substantial importance. It is axiomatic that in order to carry out that role that appellate tribunal must be in a credible position to offer that leadership and guidance. It must be a matter for concern that in New Zealand this important aspect of the role of an intermediate appellate tribunal had apparently been overlooked.

All these factors lead to the view that there is really no answer to a stand-alone Family Court of originating jurisdiction for all matters of Family Law with an effective appellate division. At a time when the existing Family Court deals with major family litigation without turning a hair it is surely necessary to reflect seriously on whether the existing structure is adequate for the purpose, whether it conveys the right public image, and whether the New Zealand public is not entitled to expect a structure totally dedicated to public needs in this socially sensitive area. A stand-alone Family Court need not involve the capital cost of new buildings or expensive new facilities. What is imperatively needed is an administrative structure which recognises that the needs of the Family Court are totally different and distinguished from the requirements of those parts of the Court system dedicated to crime and ordinary civil work.

Also imperatively needed is specialised Court staff to service the Family Court. All this can be done within existing resources. It will be the experience of all the Family Court Judges, as they move around on circuit, that within the present Court staff there are those who demonstrate a remarkable aptitude and sympathy for Family Court work and who would jump at the opportunity to become part of an established and national Family Court team. Under some present policies of staff rotation we can find members of the Court staff who have shown outstanding dedication and skill in Family Court work wasting their talents on things like fines enforcement.

A stand-alone Family Court with its own appellate division gives the structural model required for adequate service of pressing and growing public needs in this quite distinctive area. The New Zealand Family Court has achieved its present international recognition and respect mainly, I suspect, because of the typical New Zealand number 8 fencing wire resourcefulness in treating structural inadequacies, poor planning and inadequate services as challenges to be surmounted.

Perhaps it is time that our justice system cut itself loose from the shackled thinking patterns of the past and prepared itself for the 21st century. Perhaps it is time that we stopped improvising. Ever since the 1800s New Zealand has had a proud record of legislative innovation in Family Law. Why, in 1980, we were ever satisfied with half measures and an inadequate Family Court structure is, with hindsight, hard to comprehend. Since then social changes have accelerated and family relationships, including particularly the welfare of children who are our future, increasingly require the services of a firmly based and soundly structured Family Court system to cater holistically for the needs of the family.

In today's social atmosphere the importance of Family Law cannot be overstressed. At present our Family Law structure consists of a patchwork of statutes riddled with internal inconsistency and anomaly and a Family Court system whose structure and effectiveness can be vastly improved simply by the realignment of existing resources. There are already strong pressures to overhaul the system within the legal profession itself, and the question to be answered is whether we should be content to limp on into the 21st century with a flawed Family Court system.