Custody decisions – discretion gone too far?

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The "best interests of the child", or the "welfare of the child" principle as we know it, has been central to legal decision-making about the custody of children for the whole of the last century.

At the start of a new century I want to reflect on where we are with the principle, where we have been with it, and where we might go with it.

Example

Moana and Gilbert have been married for 10 years. There are two children of the relationship, Riki aged 10 and Suzie aged 3. The relationship has broken up because Moana had an affair with another man. When Gilbert found out, he became very angry and struck Moana twice. This is the first and only time Gilbert has struck Moana. Moana has left to live with the other man and taken the two children with her. Moana is concerned about leaving the children alone with Gilbert because twice she caught him in the bath with Suzie, and he appeared to have an erection. Moana is also concerned with Gilbert's violence and that it might be taken out on the children. Moana strongly believes that if the children live with her they are more likely to remain in contact with their Maoritanga. Moana wants to move with the children and her new partner from Christchurch to Dunedin. Gilbert believes Moana is alienating the children against him. He is very close to Riki. Both parents want custody of the two children.

The Present

The emphasis is for the parties to make their own decisions aided by the processes of counselling and mediation. Because there are allegations of possible sexual abuse and violence in this case it is most likely to go to a court hearing. The "unacceptable" and "real" risk tests mean that unless the risk can be *dismissed* the Court will have to take it into account. Thomas J in *S* v *S*[1] said that the Court should be "completely satisfied" before dismissing an allegation of sexual abuse. Psychological evidence will be called to assess whether the children show what are called "indicators" of sexual abuse. The philosophy is to err on the side of safety. There will also have to be risk assessment of the father because of his acts of hitting the mother. The law presumes he is unsafe with the children because of these acts, unless the risk assessment and other evidence show otherwise.[2]

Assuming the father is found to be safe, then the Court has to choose between the two parties. There are no rules or presumptions to make this decision. Each case is seen as unique on its own facts. The Court of Appeal[3] have said that *all* aspects of welfare, physical, moral and emotional should be considered. The High Court in *D* v *W*[4] have given a non-exhaustive list of factors to be considered,

1 [1994] NZFLR 657.
2 Guardianship Act, 1968 s.s.16 A-C
3 *G* v *G* [1978] NZLR 444.
4 13 FRNZ 336.

none of which is to be decisive. The Court would require further expert evidence on:

(a) Strength of existing and future bonding
(b) Parenting attitudes and abilities
(c) Availability for, and commitment to, quality time with the child
(d) Support for continued relationship with the other spouse
(e) Security and stability of home environment
(f) Availability and suitability of role models
(g) Positive or negative effects of wider family
(h) Provision for physical care and help
(i) Material welfare
(j) Stimulation and new experiences
(k) Educational opportunity
(l) Wishes of the child

Added to this list on this facts would be the cultural factor of the significance of growing up exposed to Maoritanga.

Finally, in addition to all these factors, is the consideration of the mother moving away from the area. There are two views[5] on this issue — one that the custodial parents should have freedom of movement because this will make them happier and the children will benefit from a happy custodial parent. The other view is that children need close contact with both parents, and the custodial parent should curb their desire to move for the benefit of the children.

After considering all the expert evidence, and weighing all the factors to be considered the Solomonic Family Court Judge will give a decision which is justified as being in the child's best interests. We justify the complexity of this process by saying that if you want the best decision for the particular child, wide-ranging considerations must be made.

The Past

The common law had a much quicker and simpler route. Fathers were the legal head of the household and children were under their control because that gave society stability. The father had the rights to make the decisions, the mother the duties to do what the father asked. The rationale for the father having superior rights was that it avoided the possibility of dispute between husband and wife — one was always right. It was thought to be best for children because it provided harmony and protected children from divided authority which they might take advantage of. Otherwise the child would be the "shuttlecock of its father's and mother's idiosyncrasies."[6]

When the welfare principle became codified an early emphasis which dominated decision-making was the moral welfare of the children. Moana would have been seen as an adulterous wife who broke up the marriage for her own selfish purposes. These children would not be allowed to become the continual

5 The Court of Appeal in *Stadniczendo* [1995] NZFLR 493 endorsed both these views.
6 Major Sir B Falle, House of Commons, Vol 141, 1921, C1407.

witnesses of the "triumph of evil". The 1924 case of *Van de Veen*[7] is the high point of the emphasis on moral well-being:

> When the petitioner joined the Australian forces and sailed for Europe for service in France he left the respondent in charge of his home and children. On his return he found that the respondent... [was living] with the co-respondent. She refused to leave the co-respondent and run to the petitioner. She is now the wife of the co-respondent. If the custody of the children were given to her she would no doubt be their guardian in name, but in fact they would be in the custody of the co-respondent, who, when the petitioner was risking his life in the service of his country, crept into his house, seduced his wife from her allegiance, and brought shame and domestic ruin upon him. To suffer such a consummation would be to put a premium on treachery and immorality, bring additional and intolerable shame upon the innocent victim, and to condemn the children to be the continual witnesses of the triumph of evil.

As the century progressed two other rules of thumbs emerged. The mother principle applied to all young children and girls of any age, which would mean placing Suzie with her mother. The father principle was for boys 5 or older, which would mean placing Riki with his father. These principles were not based on any scientific evidence but on the belief that all children need the nurturing of a mother when young, and girls need her guidance as they grow older, and that a boy needs the guidance of a father when he gets older. In the past, decisions were easier and more predictable to reach because the rules of thumb kept the focus on fewer relevant facts. Individual parenting qualities were not significant. The "best interests" reflected what society thought was generally best for children. Fewer cases were contested because the rules of thumb made it clear what the likely outcome would be. It was in 1981 that the rules of thumb were removed by s.23(1)(A) of the Guardianship Act 1968 which says that there is to be no presumption in law that one parent is better able to care for children because of their sex. The year 1981 was the same year the 21 grounds of divorce which provided much litigation, were replaced by a simple rule of two years living apart.[8] The removal of the simple rules of thumb in custody cases opened the door to the wide ranging considerations we now have, with the consequent growth of litigation in this area since 1981.[9]

The Future — Where should we head?

There is general agreement that ongoing conflict about the placement of children after relationship breakdown, is harmful for all involved, particularly the children. A number of different strategies have been suggested to reduce conflict.

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7 [1923] NZLR 794.

8 Family Proceedings Act 1980, s 39.

9 There has not been a systematic record keeping of numbers of all decisions, the majority of which are unreported. However, there were 4 reported custody cases in 1980, and 20 reported cases in 1999.

(a) Divorce Gospel Style

The United Kingdom has put faith in parent education which tell parents how to relate to one another and their children. They will all see the light, and not fight over their children. The divorce process begins with an information meeting. Originally it was to be an information session which would have resembled something like "alcoholics anonymous" and the public discussion of private concerns. This would have deterred many from starting the process of divorce, and may, depending on your views on divorce, have been a good or a bad thing. The purpose of the information meeting is to explain the support services available, to emphasis the importance of the children's welfare, to explain the financial issues that need attention, and to explain the divorce process. The underlying political agenda is "support marriage, slow the pace of divorce and cut costs, not least to the tax payer."[10] The weaknesses in this solution are three fold. One, it only applies to married couples whereas de facto relationships are on the increase. Second, it may make little difference to that small percentage who fight over the children. Third, the time and money spent on administering it will decrease the money available to those who need legal representation to defend their basic rights. At present the excellent information pamphlets prepared by the New Zealand Law Society, and the Department for Courts are more than adequate.

(b) Conciliation Services

Professional mediators along with specialist advisers will help find a solution, and conciliate them out of conflict. This was a solution put forward by the Boshier Report.[11] Again there are two major problems. One is the cost of setting up separate mediation services with specialist support staff to advise on the needs of the children. The other is the shift away from law and basic rights and responsibilities. Mediators cannot be totally neutral, and neither can the expert advisers on children's needs. Outcomes will depend on the particular mediator and particular adviser. There will be less emphasis on the external measures which the legal framework provides.

(c) Change the Legal Language

The assumption here is that language affects people's behaviour. Words like custody and access are seen as promoting a winner and loser. "Responsibility" emphasises a duty towards the child rather than a right to the child. It is the language used in the 1989 UN Convention on the Rights of the Child — "Both parents have common responsibilities for children".[12] The most developed model of this approach is in Scotland where parental responsibilities are defined alongside the necessary rights to exercise those responsibilities.

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10 M Freeman, "Divorce Gospel Style," (1997) 27 Family Law 413.

11 1993. The report is an excellent detailed summary of all the issues that face the Family Court.

12 Article 8.

Children Scotland Act 1995

A parent has in relation to his children the responsibility—
(a) to safeguard and promote the child's health, development and welfare;
(b) to provide, in a manner appropriate to the stage of development of the child—
  (i) direction;
  (ii) guidance, to the child;
(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to Act as the child's legal representative, but only in so far as compliance with this section is practicable and in the interest of the child.

Rights

(a) to have the child living with him otherwise to regulate the child's residence;
(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
(c) if the child is not living with him, to maintaining personal relationships and contact with the child on a regular basis;
(d) to act as the child's legal representative

Family Court Judges in New Zealand have emphasised joint responsibility in a number of ways, both in judgments and in articles.[13] As the law stands, in most cases there will be joint responsibility for decision-making, because both parents will normally be guardians. Changing the language to "responsibilities" will make this explicit. But it will not necessarily resolve cases where there is clear conflict over how or whether joint responsibility should be exercised in relation to children.

(d) Rules

The case by case, factor by factor approach, depends totally on which factor or factors the particular Judge wants to emphasise. For example, in *Powell* v *Duncan*[14] the Family Court emphasised cultural well being over stability of environment. The outcome was that a seven year old Chinese boy who, since he was 18 months old, had been living with foster parents, who were not Chinese, was to be placed with his Chinese aunty and her husband. The boy had been placed with the foster parents by his own parents because of difficulties in their marriage. When the boy was 5 his father murdered his mother then committed suicide. The Family Court relied on evidence that said that the boy could not be truly Chinese unless he was exposed to the Chinese language. The High Court on the same facts emphasised the stability of environment over cultural well being. The house of the foster parents was his home, where he was loved and felt loved. The outcome was that the boy was to remain with the foster parents. In the High Court case of *J* v *A*[15] expert evidence of "parental alienation" by the mother and the need for the boy to see his father were emphasised over the

[13] Eg *Makiri* v *Roxburgh* (1988) 4 NZFLR 676. *Windfuhr* v *Lewis* [1990] NZFLR 264 Judge von Dadleszen [1995] New Zealand Family Law Journal 263.
[14] [1996] NZFLR 722.
[15] [1994] NZFLR 205.

continuity of environment with the mother. The outcome was that the seven year old boy who had been living with his mother in Invercargill since he was 11 months old was ordered to be removed to live in Wellington with his father whom he barely knew. The Court of Appeal emphasised continuity of environment over parental alienation and father/son relationship. The Court accepted it would be a traumatic experience to change environment after all these years. The boy was left in Invercargill with his mother. As more factors emerge the possibility of different results on the same facts becomes even greater.

The factors themselves have become more dependent on findings which are not strictly findings of fact, but findings based on social science theory such as "bonding", "attachment", "psychological parent", "parental attitude". An example of the powerful effect psychological theory can have is the famous case of *Painter* v *Bannister*.[16] The case was between a father and the child's grandparents. The child had been living with his grandparents. A psychologist gave evidence that the grandparents were the psychological parents and that "the chances are very high [the child] will go wrong if he is returned to his father." How can anyone make such a prediction?

For example "capacity" of parents and "attitude" of parents are matters of opinion rather than fact. A factor such as the "effect" of change on a child can only ever be a matter of speculative opinion. The test for expert evidence put forward in the American *Daubert*[17] case requires that the techniques used to gather expert evidence must be tested or be at least testable, and that actual or potential error rates need to have been considered. At present the "techniques" for measuring parent capacity or psychological parenthood have not been tested or considered for error rates. Nor is it likely that they could be so tested because concepts like capacity do not have a readily agreed content. Also, amongst the social scientists there is, as there is in any healthy field of inquiry, ongoing disagreement of what is best for children.

At present the outcome of cases depends on the emphasis of the particular social science s.29A reporter, the position counsel for the child takes, and the particular factor(s) the Judge chooses to emphasis in the particular case. In short, the best interests test is personal and individualised. It attempts to look into the future. It is idealistic and attempts to do the best it can. It is totally dependent on the judgments people in authority make about the particular litigants. The basis of the system is personal judgment in consultation with the personal judgment of others who have experience of working with family break-ups. Complaints about custody decisions are not directed at the law but at the individual behaviour of s.29A reporters or Counsel for the child.[18] Litigants sense that it is these people who make the decisions about the placement of their children.

The legal process has limits on what it can do for families. The Family Court is only in the family's life for a brief period. The most the Court can do is give the

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16 258 Iowa 1390, 140 NW 2d 152. 385 US 949 [1966].

17 (1993) 125 L Ed 2d 469. For a superb critique of the limits of social science evidence in this area, see J. Caldwell, "The limits of s.29A reports in custody hearings." [1995] Butterworths Family Law Journal, 188.

18 This observation is based on listening at forums and seminars attended by consumers of the Family court over a period of twenty years.

parties the opportunity to reach their own solutions in counselling and mediation, and where that is not possible make decisions for them. If parliament is not prepared to give clear rules on how those decisions are to be made, then Family Court Judges as a group with experience can begin to define more specifically by the use of rules what is likely to happen when decisions have to be made. This will give the court authority as a court where decisions are based on rules of law applied consistently rather than open-ended factors where the outcome depends too much on the particular Judge, and the particular expert evidence given in the case. There is always room for interpretation with rules and the need for exceptions, so lawyers and judges will have some room to move. But the strength of rules is that arguments must be made in terms of the rule which places a restraint on decision-makers, and provides an objective measure for the outcome.

The other advantage of rules is that they make clear what the values are. For example, when matrimonial property law moved to a 50/50 sharing of the home and chattels it was clear what marriage as a partnership meant. The Protection of Personal and Property Rights Act 1988, prioritises clearly what the values are when intervention is necessary into a person's life. At present the "best interests" or welfare test does not in itself have any specific values. The factors list some values but do not prioritise them. The only area where values are prioritised is s.16B of the Guardianship Act where the presumption of unsafety prioritises safety over contact. A very important function of law involves its prioritising values and thereby setting standards for society.

Rules are blunter and are by no means the perfect solution but they have some important differences from the current approach. They simplify what has to be considered. They cut through the mass of detail. They give advanced notice of what will happen. They apply to all on the assumption that while everyone is different and unique, which is true of all litigants in any area of the law, there are also common characteristics of separating families.

The primary function of a Court system is to decide who should have responsibilities and rights where there is conflict. It is precisely because there is disagreement, socially, politically, and psychologically as to what is best for children, that the law provides the crucial role of drawing a line. The law by the nature of its authority can save us from endlessly reopening the issue of what is best. Imagine if we left whether abortion was right or wrong to the discretion of individual judges and experts. Every case would be a major battle opening up all the disagreements. Instead, the law has said it is right under certain conditions. The moral debate can go on forever along with the political debate, but in the meanwhile citizens know where they stand when it comes to making their choices on abortion. It is not a matter of a whether the law is right or wrong, it is a matter that without law there would be no authority for continuing to get on with our lives. Authority to be effective must be reasonably clear and specific, and not open-ended and vague.

People may not always like the rule and are still likely to get angry at the rule from time to time. But at least they know the same rule would just as equally be applied to others.

Rule based decision-making does not allow for all the variations of each case. But given the wide array of factors that now have to be considered, and the wide range of opinions on those factors the chances for error are high — "with some frequency, decision-making institutions designed to make the best decisions in each particular case produce an incidence of errors higher than that that would have resulted from decision procedures with more modest ambitions."[19] Rules are devices for limiting the personal preferences or opinions of decision-makers and experts. Their force is not just felt in the particular case, but in every case. When rule based decision-making operates, the most likely error is to fail to make the optimal decision. But, as there is no clear consensus on what the optimal decision is for children this is not a major problem in this area. With particularised decision-making the most likely errors will be because of bias, personal preference, or simply confusion.

Mason and Quirk[20] studied the outcomes of 100 cases per year at different time periods. In the 1920s 46% of contested custody cases went to mothers, 35% to fathers. In 1960 50% went to mothers 36.7% to fathers. These results were achieved under a rule based approach of the mother and father principles. In the 1990s much more expert evidence was produced in Court, but there was little change in outcomes in terms of the percentage of mothers and fathers obtaining custody. In both 1990 and 1995 44% of mothers and 45% of fathers obtained custody in contested cases. The main increase was in joint custody orders which increased from 2.8% in 1960 to 9% in 1995. The main decrease was in the decline of awards of custody to third parties. In the 1920s, children were awarded to parties other than the parents in 11% of cases. By 1995 only 1 per cent of cases were awarded to non-parents. There is no measure of whether better decisions are being made because of the introduction of expertise and wider discretion. What is clear is that the pattern of outcomes in terms of mothers and fathers has not changed a great deal.

What Should the Rules be?

The difficult part is to come up with rules. The way I have proceeded is to base the rules on the current outcomes of decided cases. The outcomes show what values tend to be prioritised most of the time. In terms of how the common law has developed, the outcomes reflect what the custom is. The strong tradition of our case law system is not to draw propositions of law from what a Judge says, but from what a Judge does on the particular facts of the case.

A survey of reported custody decisions from 1990-1998 shows that in over 70% of these cases, reported cases being the most difficult and most contested cases, the status quo is maintained. If non-contested cases are also considered the figure may be more like 90%. By building rules around this reality, and the exceptions to it commonly accepted by the Courts, the beginnings of a rule based system is already established. Judicial statements in the Court of Appeal[21] have said there is no presumption of the status quo, but it has also been said in the

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19 Frederick Schauer, *Playing by the Rules*, Clarendon Law Series 1991, 144.

20 [1997] F.L.Q. 215.

21 *Chapman* [1993] NZFLR 408.

Court of Appeal,[22] the High Court,[23] and the Family Court[24] that wherever possible there should be minimum disruption to a child's life when parent's separate. Continuity and stability of environment has been a predominant value.

There are two judgments which set out the open-ended criteria criticised in this paper — namely *G* v *G* (Court of Appeal)[25] and *D* v *W* (High Court).[26] These judgments are commonly quoted in decisions on custody. But what is said about the open-ended factors in these cases is strictly only obiter dictum, because in both cases, the decision on the facts was to leave the children where they were. In both decisions the status quo prevailed. In *BP* v *DGSW*[27] the High Court, after emphasising the importance of the Treaty of Waitangi and placement within the whanau, still left the child where she was. To remove the child into the whanau was held to create a "major disruption for the baby". Fisher J says in *D* v *W* "disruption to the status quo should be avoided." The leading Court of Appeal case on custody, *J* v *A*,[28] upheld the status quo. If this is in fact what we are doing we should make it explicit. The immediate concern with a rule based around the status quo is that it could be seen to encourage child snatching. There are two responses to this. One is that the person who snatches the child for no good reason is changing the status quo and therefore should not be supported in the outcome; they have disrupted the child's life. Second, at the time of break-up parties tend to follow the pattern of child-care before break-up. The person who had been carrying out the predominant care tends to continue, and if it was joint then that will continue. In fact if a rule is based around the status quo that encourages a parent to be actively involved, after break-up. A parent who prevents involvement of the other parent for no good reason can be seen as a situation where there should be a quick access to the Family Court to remedy the situation. The status quo is also generally better for children. Why should things change for them?

It has also been said numerous times[29] in the Family Court, as well as the High Court, and the Court of Appeal that the continuing involvement of both parents in a child's life after a relationship ends is important for the child. Stopping the involvement of a parent in a child's life is the exception rather than the rule.

Article 19 of the 1989 United Nations Convention on the Rights of the Child requires measures to protect children from physical or mental violence, injury or abuse, neglect, mistreatment or exploitation including sexual abuse. Article 19 talks in terms of actual violence or maltreatment to the child, not risks of violence or maltreatment. To stop contact because of "risk" rather than proof of harm is to go further than the United Nations Convention, and to put "risk" as

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22 *G* v *G* [1978] NZLR 444.

23 *D* v *W* 13 FRNZ 336.

24 See para 6.115 Butterworths Family Law Service for numerous decisions reinforcing this.

25 [1978] NZLR 444.

26 13 FRNZ 336.

27 [1997] NZFLR 642.

28 [1994] NZFLR 205.

29 See Para 6.117 *Butterworths Family Law Service* for the range of cases stating this propostion and article 9 of the UN Convention on the Rights of the Child.

a priority over continuing involvement. Judges are limited to some degree by the wording of s.16B. However, risk is predicated by the word "real" which shows that there must be clear substance to the risk. Section 16B should not be read inconsistently with s.23 which requires that the conduct *affect* the child.

The final source of the rules proposed here is s.23 of the Guardianship Act. Section 23 has always required that the wishes of the child be ascertained and that they be given weight according to the age and maturity of the child. This is consistent with article 12 of the 1989 United Nations Convention on the Rights of the Child where there is a substitution of the broader word "views" for "wishes". This allows for children to determine for themselves what their interests are. Adults do not like someone else determining their well-being, children deserve the dignity of their views being considered seriously and when they are consistent, given decision-making weight by the courts. The difficult issue here is determining the child's competence.[30] A child is not incompetent simply because the desired outcome is against what others might think is right, otherwise a great many decisions by adults would be rendered incompetent. The influence of others is in itself not sufficient to make a decision incompetent, because most adults are influenced by others when they make decisions.

The exceptions proposed here are based on a survey of reported cases in the 1990s, those which most commonly led to a change from the status quo.

Proposed Rules for allocating the responsibility of children when parents/ caregivers do not agree.

1. Both parents have common responsibilities for the upbringing of their children. These responsibilities include deciding where the child is to live, educating the child, nurturing the child, providing a set of values for the child;
2. Where there is disagreement between parents/caregivers over where a child should live or the exercise of responsibilities, the Court will decide this matter on the basis of the minimum disruption to the child's environment, routine, and relationships.

   The exceptions to this rule are:

   (a) Where the child expresses a consistent view for a change;

   (b) Where change is necessary to protect the child from clear evidence of physical, sexual, or emotional harm to the child;

   (c) Where change is necessary for the safety of a parent or caregiver.

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[30] See J. Eekelaar, "Children's Rights: From Battle Cry to Working Principle" in *Liber Amicorum*, M. Meulders-Klein (ed) 198-215, for an excellent analysis of children's competence, and how to determine it.

Application to Moana and Gilbert

If the rules are applied to Moana and Gilbert the analysis would go as follows:

> At present the children are with Moana, to move them again would be to disrupt their lives further. However for Moana to go to Dunedin would be a major disruption. So Moana would have primary responsibility for the children provided she remained in Christchurch. To take the children to Dunedin Moana would need to establish her safety is at risk. Evidence of a pattern of violence would need to be established. This is not present on the facts.
>
> Other exceptions come into play. If Riki wants to live with his father and he is consistent in this view then primary responsibility can be placed with Gilbert. There is no evidence of harm by Gilbert to Riki. Because there is no clear evidence of sexual harm by Gilbert to Suzie then there is no reason for preventing his continuing involvement with Suzie. That relationship should not be disrupted.

Rules will not make litigation disappear but they will make the focus more specific and they will enable better prediction of outcomes. They also have the major advantage of encouraging behaviour that will benefit children and discouraging behaviour that is not. The rules put forward here are based on an assessment of outcomes of cases — what values are *in fact* at present given priority most of the time. There still will be conflict in some cases because of the way people are, but at least it would be resolved by the application of rules rather than by personal case-by-case judgment.

Conclusion

The purpose of this paper has been to ask for a re-think of where we should go with decisions about the custody of children. If we keep adding factors and become more and more discretionary, respect is likely to be lost for the system as a system of law. I strongly believe that we need to tighten up the decision-making criteria so that values are clearly prioritised rather than left open-ended, vague, and personal. The politics of custody decision-making have been hidden in the processes of counselling and mediation and the exercise of discretion. Substantive rules make the politics explicit, which enables the parties to know the rules when they are in the conciliation processes and when they go to court.