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AESCHLIMANN, S. How could family group conferences be used ..

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**HOW COULD FAMILY GROUP CONFERENCES BE  
USED AS DECISION-MAKING FORUM FOR  
CUSTODY AND ACCESS DECISIONS UNDER THE  
GUARDIANSHIP ACT 1968?**

**LLM RESEARCH PAPER  
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## **ABSTRACT**

This paper examines whether and how family group conferences could be used as decisions-making forum for custody and access arrangements for children whose parents part. Under the current legislation agreement over these matters is sought during the conciliation process at the Family Court which goes through the three stages of counselling, conciliation and adjudication. It can, however, be argued that these proceedings are not focused enough on the needs of children and conflict to a certain extent with the common law principle that the interests of the child must be the paramount consideration in all proceedings concerning children. This paper discusses the difficulties connected with the current legislation which include bias in counselling and mediation, delays for mediation conferences and Court hearings, recognition of the rights of children under the UN Convention on the Rights of the Child and recognition of the different cultural values represented in New Zealand's society. The paper proposes a model how family group conferences could be adopted to decide about custody and access arrangements for children. It will be analysed how the proposed system deals with the difficulties in the current legislation and what issues will have to be faced in order for the family group conference model to work successfully.

## **STATEMENT OF WORDS**

The text of this paper (excluding contents page, footnotes, bibliography) comprises approximately 14'800 words.

<sup>1</sup> Ministry of Justice Responsibility for Children Especially when Parents Part Discussion Paper, Wellington 2001, 11.

<sup>2</sup> Ministry of Justice above n 1, 12.

## I. INTRODUCTION

The impetus for this paper came from the current review of the guardianship, custody and access legislation in New Zealand.

New Zealand's law in this area is over 30 years old and has some deficiencies as patterns of family life and our values regarding family relationships have changed significantly since its inception. A discussion paper entitled "The Responsibilities for Children Especially when Parents Part" was released last year by Associate Minister of Justice, Hon Margret Wilson and Social Services and Employment Minister, Hon Steve Maharey. The paper invited public comment on issues in the present law. The discussion related to how the key concepts and language of the current legislation encourage a combatant rather than a conciliatory approach to resolving custody and access issues.<sup>1</sup> The need to give more effect to the rights of children and the concern that not enough emphasis is given to the welfare of the child, though in the legislation it is the paramount consideration, were highlighted in the paper. In respect of custody and access decisions, reforms should aim to shift the focus away from parents' rights over their children to an emphasis of parental responsibilities towards children.<sup>2</sup> Another issue is the recognition of the wider family and of New Zealand's cultural diversity.

The aim of this paper is to propose an alternative to the current decision-making fora for custody and access matters. At the beginning the current procedure and its major difficulties will be discussed. The paper continues with a suggestion how a Family Group Conference (FGC) model could be established as an alternative to counselling, mediation and Court hearing to decide about living arrangements for children. It will be discussed how a FGC model deals with shortcomings of the current legislation and argued that the process would be able to provide some remedies for current deficiencies. Two major benefits of convoking a family meeting are that more effect can be given to the rights of children, as articulated in the United Nations Convention on the Rights of the Child and that the process is able to respect traditional values of the different cultural groups represented in New Zealand's society. FGCs

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<sup>1</sup> Ministry of Justice *Responsibility for Children Especially when Parents Part* (Discussion Paper, Wellington 2000) 11.

<sup>2</sup> Ministry of Justice above n 1, 12.

further contribute to the fulfilment of the aims set out by the Government for its family and child policy.<sup>3</sup>

- Enhancing the well-being of children and young people, maximising their opportunities, recognising their rights and interests;
- Supporting parents and others in carrying out their responsibilities to their children;
- Providing a policy and legal framework which allows for the diversity of family types and cultural beliefs and practices;
- Providing a policy and legal framework which facilitates the range of ways in which parents and others carry out their responsibilities to their children.

With its family policy New Zealand's Government aims to increase opportunities for all children and to strengthen relationships within families. Acts, amendment of Acts and reviews must be based on these principles and contribute to their fulfilment.

## II. DEVELOPMENTS IN CUSTODY AND ACCESS LAW

A short glance at the developments and research in custody and access law explains the rationale behind the current system and decision-making fora. A new model to decide about living arrangements for children with separating parents must be able to give effect to research knowledge in this area.

The rising divorce rates over the last half century, other broad social trends such as changing gender roles in parenting and the workplace and greater recognition of the rights of children has led to major changes in the manner in which divorcing families manage their separation.<sup>4</sup> While nowadays many women work in part-time or full-time positions, men are less likely to assume the traditional role of the sole provider and have begun to take on an increased role in child care. Sole custody by the mother is still the most usual legal arrangement, but sole paternal custody, split custody and joint custody are increasingly common internationally<sup>5</sup> and in New Zealand.<sup>6</sup> A literature review about the welfare of the child suggested that there is no "best" type of custody

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<sup>3</sup> Ministry of Justice above n 1, 5.

<sup>4</sup> G Maxwell *Family Court Counselling Services and the Changing New Zealand Family* (Family Court Counselling Research Report 1, Department of Justice, Wellington 1989) 20.

<sup>5</sup> J B Kelly "The Determination of Child Custody - The Future of Children" (1994) 4 *Children and Divorce* 121.

<sup>6</sup> A Lee *A Survey of Parents Who Have Obtained a Dissolution* (Family Court Custody and Access Research, Report Number 2, Department of Justice Wellington 1990) 67.

arrangement.<sup>7</sup> Increasingly children who live with one parent have a significant relationship with the other parent.<sup>8</sup> The frequency of access, however, tends to reduce over time and a number of children lost touch with their non custodial parent.<sup>9</sup>

These social trends are reflected in changes to family law. Historically a presumption of paternal custody was common in most statutes in western countries. This presumption was replaced around the turn of the last century. Law reforms introduced the consideration of the "welfare of the child" or in some countries the "child's best interests". Although the statutory language favoured neither the father nor the mother, in practice a tender years doctrine prevailed which suggested that young children need the care of their mothers. In the 1970s the maternal custody preference was explicitly removed and replaced with a gender neutral standard in most common law countries.<sup>10</sup> New Zealand made this change in 1980 by an amendment to the Guardianship Act.<sup>11</sup> Under the present legislation the Family Court is required to take the welfare of the child as the first and paramount consideration into account in all proceedings and decisions relating to guardianship, custody and access<sup>12</sup>

in any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

Simultaneously with these changes the no fault divorce was introduced. Fault had earlier been relevant to the determination of custody as the parent found to be at "fault" was often disadvantaged with respect to custody claims.

New research knowledge gave further impact to developments in custody and access law.<sup>13</sup> The conclusions of the research projects can be summarised as follows<sup>14</sup>

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<sup>7</sup> G Hall *The Welfare of the Child: A Literature Review* (Family Court Custody and Access Research, Report Number 1, Department of Justice, Wellington 1989) 61.

<sup>8</sup> J B Kelly "The Determination of Child Custody - The Future of Children" (1994) 4 *Children and Divorce* 121.

<sup>9</sup> G Hall, A Lee *Discussion Paper* (Family Court Custody and Access Research Report 8, Department of Justice, Wellington 1994) 80.

<sup>10</sup> *Re S (A Minor)* [1991] 2 FLR 388.

<sup>11</sup> Guardianship Amendment Act 1980; M Henaghan "Legally Rearranging Families" in M Henaghan, B Atkin *Family Law Policy in New Zealand* (Oxford University Press Auckland 1992) 83.

<sup>12</sup> Section 23(1) Guardianship Act 1968.

<sup>13</sup> J Pryor, F Seymour, "The Impact on Children of Parents' Separation" in M.-E Pipe, F Seymour *Family Law and Psychology* (University of Otago Press, Dunedin 1998) 31.

<sup>14</sup> J Pryor, F Seymour above n 13, 31.



- The majority of children desire an ongoing relationship with both parents following divorce;
- Children benefit from ongoing involvement with both parents, especially when the pre-divorce relationships with parents are positive, the parents have a cooperative parenting relationship, and there is parental respect for the child's relationship with the other parent;
- Children's psychological adjustment is adversely affected by parental conflict particularly when they witness high levels of conflict and feel caught up in it.

The developments described above contributed in New Zealand to the establishment of specialist Family Courts which promote conciliation between the parties and the consideration of the children's best interests. The procedure for custody and access decisions at the Family Court which includes counselling, mediation and Court hearing, is designed to encourage an ongoing relationship with both parents in children's lives. A number of issues, however, emerged from the present system and encouraged the search for alternatives.

The gender neutral standard of the "child's best interest" and the trend that both parents should be involved in post-divorce parenting, led to increased contesting of custody and access matters.<sup>15</sup> As a consequence some authors suggested the introduction of the "primary caretaker principle."<sup>16</sup> They emphasised that the principle gave a clear guide as to how the primary custodian should be identified.<sup>17</sup> In contrast to the best interests principle the primary care taker principle does not take into account factors such as the child's age, gender and emotional ties of the child to each parent.

This paper argues that although the best interest principle may be more difficult to define it will lead to better agreements for children. Instead of replacing the "best interest" principle the proposed model suggests to give the responsibility to identify the "best interests" of an individual child to a meeting of the family group. As there is no "best" living arrangement the responsibility to agree upon the most appropriate in an individual case is given to the wider family, rather than the parents only or a judge. Presumably this forum has enough background knowledge about an individual case and is therefore in the position to decide in accordance with the children's needs. The presence of the family group and of a Care Coordinator contribute to ensure that no

<sup>15</sup> R E Emery, M M Wyer "Divorce Mediation" (1987) 42 American Psychologist 472.

<sup>16</sup> I Hassall, G Maxwell "A Children's Right Approach - Time for a Radical Rethink - Part II" (1992) 3 BFLJ 75: The primary caretaker principle states that the parent who has been the primary caretaker (defined in terms of meal preparation, nappy changing and other basic childcare) during the marriage should be awarded custody after separation, in case of a custody dispute, as long as she/he is a "fit parent".

<sup>17</sup> I Hassall, G Maxwell above n 16, 75.

solution is overlooked and arrangements are in fact in accordance with the needs of the children. Wider family members may play an important role in the implementation, monitoring and fulfilment of custody and access arrangements. The flexibility of the FGC process allows to include and give effect to research knowledge in this area.

### **III. CUSTODY AND ACCESS DECISIONS IN THE FAMILY COURT**

This paragraph discusses the current procedure to decide about living arrangements for children. The rules relating to the procedure are contained in the Family Proceedings Act 1980 and the Guardianship Act 1968.

The current Guardianship Act leaves the majority of the power to make decisions for children to the parents. After separation they are free to share custody rights or to transfer the totality of their rights to either one. Their disposition is limited if there is a concern about the need for care and protection of the child<sup>18</sup> or if criminal issues arise. The state intervenes if divorcing parents cannot agree with whom the children should live or how contact arrangements will be handled.

Separating parents who cannot agree upon custody matters can either refer to a lawyer as their first port of call or alternatively refer to the Family Court directly. Legal advisors have a statutory duty to advise clients of available counselling services.<sup>19</sup> Subject to the discretion of the judge, parties who approach the Family Court are normally referred to counselling/conciliation.<sup>20</sup> The judge will dispense with this first stage of the procedure only if violence or threats of violence occurred between the parties.<sup>21</sup> Counselling takes place using community based counselling services or private counsellors. There is a maximum number of sessions per referral.<sup>22</sup> Counselling is expected to be a short-term process, focused on decision-making. The counsellor has a statutory duty to promote reconciliation between the parties and if this is not possible conciliation.<sup>23</sup> It is the counsellor's role to help the parties explore whether their relationship is at an end and if it is to help them see the available options.<sup>24</sup> Counsellors

<sup>18</sup> under the Children, Young Persons and their Families Act 1989.

<sup>19</sup> Section 8 (1) (a) Family Proceedings Act 1980.

<sup>20</sup> Section 10 Family Proceedings Act 1980.

<sup>21</sup> Section 10 (2) Family Proceedings Act 1980.

<sup>22</sup> Section 12A Family Proceedings Act 1980.

<sup>23</sup> Section 12 Family Proceedings Act 1980.

<sup>24</sup> Section 11 (2), 12 Family Proceedings Act 1980.

prepare a report for the Court on whether the parties wish to reconcile and whether any understandings have been reached between them. Parties who reach an agreement can seek consent orders in order to make their arrangements legally binding.

Separating parents who cannot agree on custody and access arrangements through counselling are subsequently referred to mediation in the Family Court.<sup>25</sup> Mediation sessions are usually convened and chaired by a Family Court judge.<sup>26</sup> During the process the judge assists family members to reach mutual agreement on issues in dispute. The judge has no power to impose a decision during the conference but if agreement is reached the judge can make an order with the same effect as a consent order made in Court.<sup>27</sup> The parents, their lawyers and if appointed, the counsel for the child are entitled to attend the conference.<sup>28</sup> Children represent a third party in mediation and have no general right to be present although they are typically the major focus of decision-making.<sup>29</sup> In assuming the mediator's role the judge should consider closely the children's best interest in the advice and guidance judges give parents in the decision-making process. The Court can make requests for additional help. Specialist reports by social workers and medical, psychiatric or psychological reports on the child or young person can be ordered. If the mediation conference is not successful the matter will be referred to the Family Court for an authoritative decision.

Family Court proceedings are attended only by the persons involved.<sup>30</sup> Reports on proceedings can only be published for professional purposes. Other purposes require leave of the Court.<sup>31</sup> The rationale behind this provision is that custody and access are private matters without further public interest.

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<sup>25</sup> Section 13 Family Proceedings Act 1980.

<sup>26</sup> Section 14 (1) Family Proceedings Act 1980.

<sup>27</sup> Section 14 Family Proceedings Act 1980.

<sup>28</sup> Section 14 (3) (4) Family Proceedings Act 1980.

<sup>29</sup> Section 14(5) Family Proceedings Act 1980.

<sup>30</sup> Section 159 (2) Family Proceedings Act 1980; section 27 Guardianship Act 1968.

<sup>31</sup> Section 169 Family Proceedings Act 1980; section 27 A Guardianship Act 1968.

#### IV. ISSUES IN THE CURRENT LAW

##### A. The Private Ordering System

The law reflects what is sometimes referred to as private ordering system. Custody and access are primarily seen as private matters unless parents decide to make them public by applying to the Court. Private decisions made by the parents are encouraged and state interventions are kept at a minimum. The current legislation assumes that marital disputes referred to the Family Court should be resolved through negotiated solutions. Alternative dispute resolution methods are preferable to the adversarial process. The Family Court procedure acknowledges that parents are in a better position than judges to decide about living arrangements for their children. In fact, the majority of families seem to be able to resolve their custody matters on a consensual basis without state intervention. Many custody and access arrangements are achieved at the Family Court's Conciliation Services and at the mediation conferences chaired by a Family Court judge. Less than 5% of all divorce cases require the resolution of the custody and access issues by judicial determination. These cases, however, involve extensive and time consuming legal processes and consume a disproportionate share of available Court resources.<sup>32</sup>

American writers in law and social science promoted the private ordering approach for two major reasons.<sup>33</sup> They assume parents to have a right to raise their children as they think fits without state intrusion unless there is abuse, neglect or abandonment. As a consequence of the parent's right, their children have a continuity of decision-makers in their life. This is seen as psychologically important for children in order to have a powerful role model. The second argument towards an approach of private ordering is that the law is often incapable of managing the complexity of human relationships. Private ordering applied as an operating principle suggests that negotiated decisions about custody and access are preferable from a child's perspective.<sup>34</sup>

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<sup>32</sup> Family Court Judges of New Zealand "Submission to the Discussion Paper for the Review of the Laws about Guardianship, Custody and Access" 4.1.2; Family Law Committee Auckland District Law Society "Considering a Radical Re-think" (1993) 3 BFLJ 133.

<sup>33</sup> J Goldstein, A Freud, A Solnit *Beyond the Best Interests of the Child* (The Free Press, New York 1973) 38.

<sup>34</sup> R Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law and Contemporary Problems 225.

"...since a child's social and psychological relationships with both parents ordinarily continue after divorce, a process that leads to agreement between the parents is preferable to one that necessarily has a winner and a loser...the parents will know more about the child than the judge since they have better access to information about the child's circumstances and desires...given the basic indeterminacy of anyone knowing what is best of the child, having a privately regulated resolution by those who will be responsible for care after divorce seems much more likely to match the parents' capacities and desires with the child's need."

It is unlikely and does not appear to be preferable that New Zealand's legal policy will move away from the basic approach of private ordering of custody issues. Concerns have been expressed, however, about parents having unregulated control over arrangements for their children.<sup>35</sup> Under the current legislation the control mechanisms to ensure that living arrangements correspond with the best interest of the children are weak. During the conciliation process no legal provision ensures that children are consulted and that their needs and views are considered and weighed. The current private ordering system has therefore been referred to as totally parent focused.<sup>36</sup> The law fails, for instance, to prevent a parent giving up custody for financial gain, even though such a transaction is not likely to be in the child's interest. Only if such a case proceeds to Court the Family Court would be required to treat the welfare of the child as the paramount consideration.<sup>37</sup>

### *1. Control mechanisms of privately made arrangements outside the legal system*

Outside the legal system the control of privately made arrangements regularly requires the involvement of a third party. Under section 11 of the Guardianship Act any agreement reached over custody and access can be challenged by the parties. Other persons need the leave of the Family Court. The Court will subsequently be required to investigate whether the arrangement corresponds with the child's best interest. If a child is found to be at risk of emotional, physical or sexual harm or abuse, care and protection proceedings under the Children, Young Persons and their Families (CYPF) Act will be initiated.<sup>38</sup> A specific provision which allows children to challenge custody arrangements is missing in the current law.

<sup>35</sup> M Freeman *The Rights and Wrongs of Children* (Frances Printer London, 1983) 244.

<sup>36</sup> M Henaghan, above n 11, 104.

<sup>37</sup> Section 23 Guardianship Act 1968.

<sup>38</sup> Sections 14-16 CYPF Act 1989.

## 2. *Control mechanisms over privately made arrangements within the legal system*

Under section 23 of the Guardianship Act the Family Court has an obligation to regard the best interests of the child as the paramount consideration, in all matters relating to custody and access. During the process of counselling and mediation it can, however, only be expected that counsellors and mediators use their authority to remind parties about the welfare of their children. But there is no such legal obligation. A counsellor's and mediator's view of what is best for the children may coincide with the parents' or the children's wishes.

Under section 45 of the Family Proceedings Act 1980 judges have an obligation not to make an order for dissolution of marriage unless the Court is satisfied that arrangements for custody maintenance and other aspects of the welfare of a child have been made. The provision, however, only provides a weak control mechanism. The requirements of section 45 are satisfied if the particular issue (for instance child support or caring arrangements) have been discussed "to the level where there is a reasonably clear expectation for the path of resolution."<sup>39</sup> Section 45 replaces the paramountcy of the welfare of the child by a lesser requirement that "arrangements are satisfactory or are the best that can be devised in the circumstances."

### *B. Issues about the Decision Making Fora for Custody and Access*

#### *1. The Family Court as decision-maker*

The Court as decision maker for custody and access issues has been criticised as inappropriate forum. The potential lack of detailed knowledge about a case led to the statement that judges and the Court are not in the position to determine what care arrangements are best for the welfare of the child.<sup>40</sup> In interviews about clients satisfaction in the Family Court a number of parents said that they were waiting at the Court without being given the opportunity to enter the courtroom. Instead their lawyers dealt with the case in absence of the parents. Other parents said that although they were present in the courtroom they did not have the opportunity to speak for themselves.<sup>41</sup>

<sup>39</sup> *Ellmers v Seymour* [2000] NZFLR 67.

<sup>40</sup> I Hassall & G Maxwell "A Children's Rights Approach to Custody and Access – Time for a radical Rethink – Part I" (1992) 3 BFLJ 64.

<sup>41</sup> G Hall, A Lee, above n 9, 5.

Apart from this defended hearings about care arrangements for children are a destructive process. The delay, conflict and costs associated with such procedures are against the best interests of the child.<sup>42</sup> Children who have been the focus of such disputes between their parents often carry the scars with them into their adult life.<sup>43</sup>

## 2. *Counselling and judge-led mediation*

Neither, mediation nor counselling sessions provided under the Family Proceedings Act 1980 are primarily focused on making decisions about children. Research showed that consideration needs to be given to finding ways to make counselling and mediation conferences more effective in resolving custody disputes.<sup>44</sup> Counselling aims to promote reconciliation between the parties and if this is not possible conciliation.<sup>45</sup> In some cases arrangements for children may be made at the counselling session but they have no legal force. Mediation conferences enable parties to identify disputed issues and resolve them through agreement.<sup>46</sup> Parents often become more reasonable through mediation. Although these settlement negotiations should always focus on the best interests of children they should at same time they validate other concerns of the participants. It is therefore likely that on occasion the desire to reach an agreement prevails over the premise that living arrangements made in these fora comply with the best interests of the children.<sup>47</sup>

Particular criticism concerns the mediation sessions chaired by a Family Court judge. The more closely mediation is linked to the Court and to special legal personnel the less control the parties have over the decision-making process. Mediation then becomes confused with the traditional adversarial system.<sup>48</sup> Although judge-led mediation is able to facilitate the speedy processing of disputes and reach settlements, much criticism has been aimed at the fact that judges take a directional approach rather than acting as neutral mediators. Their authority gives them the ability to impose views and solutions upon the parties. In a study about mediation in the Family Court clients

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<sup>42</sup> I Hassall, G Maxwell above n 40, 64; Family Law Committee of the Wellington District Law Society "Response to the Hassall-Maxwell Paper" (1992) 3 BFLJ 116.

<sup>43</sup> Family Law Committee Auckland District Law Society, above n 32, 133.

<sup>44</sup> G Hall, A Lee above n 9, 57, 62.

<sup>45</sup> Section 12 Family Proceedings Act 1980.

<sup>46</sup> Section 14 Family Proceedings Act 1980.

<sup>47</sup> Family Law Committee of the Wellington District Law Society, above n 42, 116.

<sup>48</sup> R Chapman "Court-Linked Mediation" (1997) 5 Journal of Dispute Resolution 67.

<sup>49</sup> N Barry and M Henaghan "Mediation in the Family Court" (1985-88) 1 BFLJ 84.

stated that they often accepted what the judge said. "When the judge offers his view on the matters then parties will often adopt that just because it is said."<sup>49</sup> This appears to confirm the concern that mediation conferences have become pre-trial hearings in which judges rather than parties make the decision.

### 3. Delays

Of particular concern is the problem of delays in the Family Court. It appears that people are waiting too long for mediations sessions and Court hearings. Such delays lead to long custody battles. The 42-day time limit for domestic protection is often not adhered to.<sup>50</sup> Delays appear especially in cases which have long fixtures and are expected to take longer than a day in the Family Court before a judgment can be made. Quick access to mediation seems to be more problematic than quick access to counselling.<sup>51</sup> While particularly children suffer from such delays, for parents the lapse of time may allow the heat of the initial dispute to dissipate. Hostilities may have reduced and they may be in a better position to focus on the needs of the children.

Hold-ups in obtaining psychological and other specialist reports<sup>52</sup> as well as the ability of parents to make repeat applications for custody to the Court further extend the process of marriage dissolution and have a detrimental effect on children.<sup>53</sup> A restriction to make repeat applications will be necessary.<sup>54</sup>

The difficulty of delays led to the 1993 Boshier report which proposed the establishment of a separate and distinct Family Conciliation Service.<sup>55</sup> This Service would receive and resolve most of the applications under the Guardianship Act 1968 which are presently filed and dealt with by the Court through mediation and counselling. Specialist reports on children's needs and wishes and impartial legal information would only be available on request.

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<sup>50</sup> C Mac Lennan "Family Court Delays Need Action" (8 February 2001) *New Zealand Lawyer* 13.

<sup>51</sup> C Mac Lennan above n 50, 13; Parties waited up to three months for mediation.

<sup>52</sup> C Mac Lennan above n 50, 13.

<sup>53</sup> Family Court Judges of New Zealand above n 32, 5.20.2.

<sup>54</sup> Family Court Judges of New Zealand above n 32, 5.20.2; C Mac Lennan above n 50, 13.

<sup>55</sup> P Boshier *A Review of the Family Court - A Review for the Principal Family Court Judge* (Auckland 1993).



#### 4. *The problem of bias*

Concerns about bias further surround the current system, particularly in mediation and in the hearings before the Family Court.

Although the concept of mediation has been described as bringing female identified values into the legal system and being a female alternative to adversarial procedures, feminists criticise mediation as unsuitable for women.<sup>56</sup> They argue that different values of men and women, different thinking modes as well as traditional inequalities based on the patriarchal structure of our society are the cause of power related inequalities which mediation fails to effectively address.<sup>57</sup> As a consequence feminists assume that women will often find themselves in a weaker or disadvantageous position to men in mediation. In a situation of impasse, in which the goal is to reach an agreement, the stronger party is in the position to resist making an agreement. The weaker party is under pressure to be reasonable and give in. Research projects have shown that women generally make these compromises.<sup>58</sup> Women seem to be particularly vulnerable to pressure when the bargaining inequality they perceive is the fear of losing their children.<sup>59</sup>

Court hearings on the other hand have been criticised especially by men for being anti-dad.<sup>60</sup> Despite the rejection of a maternal preference, custody continues to be awarded to the mother in the majority of Court hearings.<sup>61</sup> Judges use the best interest principle to rectify such decisions. Men therefore claim that Family Court proceedings should become open to public and that the "failures" of the Court should be able to be revealed through media. Last year the Family Courts Amendment Bill (Openness of Proceedings) promoted a general requirement that Family Court hearings are open to public and that reports of proceedings are able to be published, with some limitations in the case of counselling or mediation and in the interest of justice. The views about confidentiality in the Family Court are, however, mixed. It seems to be accepted that

<sup>56</sup> J Rifkin "Mediation from a Feminine Perspective: Promises and Problems"(1984) 2 *Law & Inequality* 21, 22.

<sup>57</sup> T Grillo "The Mediation Alternative" (1991) 100 *Yale LJ* 1555.

<sup>58</sup> G Davis *Partisans and Mediators - The Resolution of Divorce Disputes* (Clarendon Press, Oxford 1988) 64.

<sup>59</sup> G Davis above n 58, 64.

<sup>60</sup> "Fathers and Lawyers Want More Open Family Court" *The Dominion*, Wellington, New Zealand, 25 January 2001, 4.

<sup>61</sup> G Hall, above n 7, 16.

some relaxation of the stringent restrictions on publication may be needed, particularly in cases where the public interest outweighed the need for privacy.<sup>62</sup> Psychological reports, however, should continue to be kept confidential.

### *C. Children's Rights under the UN Convention*

Under the United Nations Convention on the Rights of the Child New Zealand has a duty to recognise the principles set out therein. Since New Zealand ratified the UN Convention in 1993 the demand to give more emphasis to the rights of children has repeatedly been expressed and is an issue in the debate surrounding the review of the Guardianship Act.<sup>63</sup>

The following articles of the Convention are relevant to the care of children during the process of their parent's separation.

3.1 In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

9.1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as involving abuse or neglect of the child by the parents, or one where the parents living separately and a decision must be made as to the child's place of residence.

9.2 In any proceeding pursuant to paragraph 9.1, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

9.3 State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest.

12.1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely and in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

12.2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

18.1 States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents

<sup>62</sup> "Fathers and Lawyers Want More Open Family Court" above n 60, 4.

<sup>63</sup> For example I Hassall, G Maxwell, above n 40, 63; Ministry of Justice, above n 1, 12.

or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

It can be argued, however, that the current procedure does not give full effect to the rights of the child contained in the UN Convention.

### *1. Best interest of the child*

Under section 23 of the Guardianship Act 1968 Courts are obliged to consider the best interest of the child as the first and paramount consideration in custody and access matters. But as seen above control mechanisms, which ensure that living arrangements comply with this premise are weak outside as well as within the legal process. Lengthy divorce proceedings and contested Court hearings are against the interest of the children. During mediation and counselling the welfare of the child may be overlooked by the desire to reach an agreement.

### *2. Participation of all parties*

Currently most custody and access questions are resolved through counselling or mediation. The danger of power imbalances and bias in these fora may lead to disadvantaged positions either for mothers or fathers. The current Family Court procedure is rather parent focused and does not provide for participatory rights of children and other parties who may also have an interest in the decision, for example grandparents, uncles and aunts of the children.

### *3. Ongoing relationship with both parents*

The Guardianship Act contains "the welfare of the child" as the only principle according to which custody and access decisions should be made. No other principles are set out as to how custody and access arrangements should be handled. The Act does not contain an explicit acknowledgement of a right of the child to maintain an ongoing relationship with both parents and other relatives.

#### 4. *Participation of the child*

Article 23 of the Guardianship Act requires the Family Court to ascertain and take wishes of the child into account. During the conciliation process no legal provision ensures for the children's wishes and needs to be ascertained and weight. Neither in counselling nor in mediation conferences or Court hearings children have direct participatory rights. They are regularly excluded from the separation process on the putative grounds of prevention of trauma to the child. The negative impact on children if parents battle over them can, however, not be avoided by closed doors.<sup>64</sup> The anxiety of children and adults tends to increase when they are denied a voice and control over decisions which affect their destinies. Surveys and literature indicate that children often want to have their views taken into account. Frequently that does not happen.<sup>65</sup> In a sample of separated families three quarters of the children said they were not consulted by their parents about when and how long they wanted visits, 81% said they were not consulted about any changes to arrangements and over 90% of parents did not talk to their children about matters being disputed in the Family Court.

#### 5. *Representation of the children*

Under section 30 of the Guardianship Act 1968 and section 162 Family Proceedings Act 1980 the Court has a discretion to appoint a counsel for the child. A counsel for the child must be appointed if proceedings relating to custody and access appear likely to proceed to Court<sup>66</sup> and in proceedings before the Court.<sup>67</sup> Under the current legislation children have no particular legal right to challenge custody and access arrangements reached by the parents.

#### 6. *Parental responsibility*

The current law focuses on parent's rights rather than on their responsibilities towards their children. The Guardianship Act 1968 defines custody as the right of the parents to "possession and care for the child" and guardianship as the right to "control

<sup>64</sup> I Hassall & G Maxwell, above n 40, 66.

<sup>65</sup> Family Court of Australia *Children's Perception of Access and their Adjustment in the Post Separation Period* (Report Nr 9, Australian Government Publication Service Canberra 1990).

<sup>66</sup> Section 30 (2) Guardianship Act 1968.

<sup>67</sup> Sections 159 and 323 Children Young Persons and their Families Act 1989.

over the upbringing of the child”<sup>68</sup> Access is seen as “the right of the non-custodial parent to spend time with the child.”<sup>69</sup>

This approach is based on a mixture of the “child’s best interests” and the parental right to exercise authority over the child.<sup>70</sup> The rights of children often conflict with their parent’s rights. This creates the potential for inconsistency in judgments in either taking a “children’s interests” position or a “parental status” position.<sup>71</sup>

#### *D. Recognition of the Different Cultural Values in New Zealand’s Multicultural Society*

The philosophy behind the Guardianship Act is incompatible with cultural values of Maori and Pacific people and their understanding of ‘family’.<sup>72</sup> The word “family” can have a range of meanings.<sup>73</sup> The Guardianship Act 1968, however, is designed to protect the nuclear family consisting of a man and a woman married to each other and their immature children under their care and control.<sup>74</sup> Parents are connected through their marriage which is seen as a contract between the two individuals that gives them rights and responsibilities towards each other. These rights and responsibilities are presumed to take precedence over all pre-existing ties, including those with parents and siblings.<sup>75</sup> The Act assumes that guardianship belongs to a child’s parents by natural right and to the exclusion of others, except when they are disqualified from exercising guardianship rights.<sup>76</sup> Other people and relatives have no legal rights in a child unless conferred by legal process. If parents separate there are only limited provisions to give access rights to members of the wider family.<sup>77</sup> During

<sup>68</sup> Section 3 Guardianship Act 1968.

<sup>69</sup> Section 15 Guardianship Act 1968.

<sup>70</sup> Under section 6 of the Guardianship Act 1968 parents are appointed as natural guardians of their children. Guardianship is defined in section 3 of the Act as the right to possession and care of the child, including the right to control over the upbringing of the child.

<sup>71</sup> G W Austin “The Guardianship Act 1968 – A Status Statute?” (1991) 2 BFLJ 14.

<sup>72</sup> D Metge, D Durie-Hall, Kua Tutu Te Puehu, *Kia Mau: Māori Aspirations and Family Law in Family Law Policy in New Zealand* M Henaghan, B Atkin (Oxford University Press, Auckland 1992) 60.

<sup>73</sup> According to the Concise Oxford Dictionary (8 ed Oxford University Press, Oxford 1990) the word “family” can mean a set of parents and their children, a set of children without parents, a household comprising relatives and non-relatives, the descendants of a common ancestor or, applied in a metaphorical sense, a group of people of common stock or association of persons or nations united by common interests and goals.

<sup>74</sup> In earlier statutes married means *de jure*; in later ones *de facto* unions are also admitted.

<sup>75</sup> D J Metge, D Durie-Hall, above n 72, 60.

<sup>76</sup> Section 6 Guardianship Act 1968.

<sup>77</sup> Section 16 Guardianship Act 1968.

the whole process of marriage dissolution wider family members have no participatory rights.

This clearly conflicts with Maori and Pacific culture, in which the wider family plays a crucial role. Maori and Pacific people recognise two kinds of family, the nuclear family and the whanau. Commonly the whanau is understood as a group of relatives descendent from a common ancestor. A whanau comprises several generations, several nuclear families and several households.<sup>78</sup> The whanau has a degree of on-going corporate life focused in group symbols such as name or land base. Members of a functional whanau are bound to each other by ties of loyalty and affection. They provide financial and moral support to each other and group hospitality to guests. Ideally they also accept responsibility for each other's behaviour. The whanau plays for example a role in checking those who show disapproved of tendencies, in mediating disputes, in sharing public recognition accorded to a member for achievement and in sharing the blame when a member offends against community norms. In Maori thinking children belong not only to their parents but also to the whanau and beyond that to hapu and iwi.<sup>79</sup>

With its narrow concepts for custody, access and the nuclear family the Guardianship Act fails to acknowledge the values of Maori and Pacific culture represented in New Zealand's society. The importance of the wider family in a child's life, and the potential of wider family members to help with child care are currently overlooked.

### *E. Summary*

The current marriage dissolution procedure at the Family Court provides three fora in which arrangements for children are made. These are counselling, mediation conference and formal Court hearing.

The current law is based on a system of private ordering. This means that custody and access are seen as primarily private matters. If separating parents are able to make their own custody and access arrangements, the state will not intervene. Although concerns have been expressed as to whether parents should have unlimited control over the living arrangements for their children it seems undesirable and unlikely

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<sup>78</sup> D J Metge, D Durie-Hall, above n 72, 61.

<sup>79</sup> D J Metge, D Durie-Hall, above n 72, 63.

that this approach will be replaced. A problem with the current law is that it contains only weak control mechanisms which ensure that the privately made arrangements comply with the interests of the children. Within the legal process some provisions encourage a consideration of the child's welfare but clear legal requirements to do so are missing.

The current decision-making fora have been criticised for various other reasons. Family Court judges have been referred to as not being in the position to decide what the best interests of the child are. Counselling and mediation settings have the disadvantage of not being primarily focused on children and rather ineffective in making custody and access decisions. The proceedings aim to promote reconciliation, and if this is not possible, conciliation between the parents. The goal of reaching an agreement may on occasions prevail over the recognition of the children's best interests. Delays leading up to Court hearings and mediation conferences are of particular concern at the Family Court as they are detrimental for children. The obtaining of specialist reports and the ability of parents to make repeated applications for custody to the Court also contribute to the hold-ups in the procedure. In counselling, mediation and Court hearings the danger of bias and power imbalances are further areas of concern.

The current legislation does not give full effect to children's rights as articulated in the UN Convention on the Rights of the Child. Direct participatory rights of the child and other interested persons are missing. The right of the child to maintain an ongoing relationship with both parents is not expressively contained in the Guardianship Act. Further, the Act is based on parents' rights rather than parents' responsibilities towards their children.

Another deficiency of the current legislation is a lack of recognition for different cultural values in New Zealand's society. The important role of the wider family and their potential in child care matters is underestimated. The wider family has no participatory rights in the current procedure of marriage dissolution.

V. *A DIFFERENT APPROACH THROUGH FAMILY GROUP  
CONFERENCE*

A. *Introduction*

Deficiencies in the current decision-making fora for custody and access lead to a search for alternative proceedings to counselling, mediation and Court hearing. A possible alternative is to adopt FGCs for custody and access decisions.

In 1989, with the introduction of the CYPF Act, New Zealand was the first jurisdiction which formulated and gave statutory effect to a family decision-making model. The model represents a synthesised application of the key social, political, cultural and economic trends in New Zealand.<sup>80</sup> Under the Act, FGCs are used to make decisions for youth offenders and children in need of care and protection. The Children Young Persons and their Families Bill was originally based on four 'philosophical strands' - family responsibility, children's rights, cultural acknowledgement and partnership between the state and the community.<sup>81</sup> FGCs allow the development of individual solutions for families and enhance the strengths of the extended family network. The process encourages co-operation, communication and collaboration amongst family members and professionals. It recognises that families have the most information about themselves, have the primary responsibility for their children and should provide their children with a sense of identity. Two main reasons are cited for the success of FGCs in care and protection cases and support the assertion that FGCs would also be appropriate in custody and access cases.<sup>82</sup> First, family plans are expected to be more creative, more stringent and better followed than agency plans. Parties appear to be more willing to comply with their own plans. Transferred to custody and access cases it can be expected that plans established and monitored by the families themselves will be better adhered to than arrangements reached by the parents only or the Family Court. Currently an application to the Family Court is required if either party fails to comply with the custody arrangements. Secondly, children instinctively react more positively to the care of a relative than that of a professional, for they know that

<sup>80</sup> D Swain "Family Group Conferences in Child Care and Protection and in Youth Justice in Aotearoa/New Zealand" (1995) 9 *International Journal of Law and Family* 156.

<sup>81</sup> (20 April 1989) 497 NZPD 10106.

<sup>82</sup> J M Lowry "Family Group Conferences as a Forum of Court Approved Alternative Dispute Resolution in Child Abuse and Neglect" (1997) 31 *University of Michigan Journal of Law Reform* 59.



the care of a professional will never match the love, care and commitment possible within the family.

At the same time New Zealand adopted FGCs, similar developments occurred in parts of England and Oregon. FGCs are nowadays found in many countries. In New Zealand and South Australia they are incorporated as statutory processes; England is experimenting with FGCs as a way of giving effect to the philosophy underlying the Children Act 1989; attempts to promote and use FGCs are also being made in provinces of Canada, the United States, South Africa, Israel, Singapore and the Philippines. They are being adopted in these jurisdictions as the preferred decision-making forum for youth offenders and young people in need of care and protection. Some jurisdictions are contemplating experiments in other areas – for example, family violence, arrangements for the care of children of parents in prison, offending by young adults and managing the affairs of those unable to manage them themselves. FGCs have also been proposed as appropriate fora for decisions about adoption and custody and access.

The first proposal to adopt FGCs for custody and access decisions in New Zealand was made by Maxwell/Hassall.<sup>83</sup> They claimed that the “best interest principle” should apply to all proceedings. In the interest of children the opportunity for separated parents to use the Family Court to formalise and extend marital disputes should be removed as far as possible.<sup>84</sup> Maxwell/Hassall suggested that a primary caregiver assumption should be adopted to determine the custodial parent. Maxwell/Hassall argued that in order to provide for the child a continuity of residence and relationships, custody decisions should always be made in favour of the primary caregiver. For access arrangements they proposed a mediation procedure and the use of FGCs. In the conference the primary caregiver, the contact parent, the children and the mediator would always be present. Further persons could be invited to attend but in their model participation of other persons and the wider family does not seem to be a compulsory requirement.<sup>85</sup> The conference would encourage the family as a whole to reach access agreements. For families who are unable to make own arrangements Maxwell/Hassall argued that official procedures should be available. They suggested a standard agreement prescribed by law which could be brought into operation quickly and which

<sup>83</sup> I Hassall, G Maxwell, above n 40, 62; I Hassall, G Maxwell, above n 16, 74.

<sup>84</sup> I Hassall, G Maxwell above n 40, 64.

<sup>85</sup> I Hassall, G Maxwell, above n 16, 77.

would be designed to meet the children's needs. Their proposal, however, attracted a lot of criticism.<sup>86</sup>

## **B. A Proposal for the Use of Family Group Conferences for Custody and Access Matters**

### *1. Who would manage the family group conferences?*

New Zealand chose to manage FGCs under the Children, Young Persons and their Families Act through the Government Department of Child Youth and Family Services. There are a number of other options which were adopted in other jurisdictions. These include management by the police, the Court or by independent organisations. All of these options have advantages as well as disadvantages. Management by the Department of Child Youth and Family Services endorses a focus on children's interests but has two main difficulties. Concern surrounds the existence of "cultures of control" within welfare departments in which bureaucratisation occurred and professionals "took over".<sup>87</sup> Further the Department is barely coping with its present tasks and a lot more resources would be required.<sup>88</sup> A possible option is to locate the management of custody and access FGCs with the Department for Courts. Experience gleaned from South Australia showed that location in courts has an apparent neutrality and focuses on the protection of children's rights but has created another type of gate keeping through courts and was associated with deterrent sanctions.<sup>89</sup> This solution, however, would be inconsistent with the management structure for FGCs dealing with youth offenders and care and protection cases. In order to benefit from the experience of the Department in conferencing, this paper suggests that the management of FGCs for custody and access should be placed with the Government Department of Child Youth and Family Services.

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<sup>86</sup> Family Law Committee of the Auckland District Law Society, above n 32, 133; M Henaghan, J Ferguson "Questioning the Hassall-Maxwell Proposals for Custody and Access" (1992) 3 BFLJ 86; M Abrams "A Response to the Children's Rights Approach" (1992) 3 BFLJ 104; Family Law Committee of the Wellington District Law Society above n 42, 114.

<sup>87</sup> J Wundersitz, S Hetzel "Family Conferencing For Youth Offenders: The South Australian Experience" in J Hudson (ed.) *Family Group Conferences - Perspectives on Policy and Practice* (The Federation Press, Australia 1992) 117.

<sup>88</sup> Michael J A Brown *Care and Protection is About Adult Behaviour - The Ministerial Review of the Department of Child, Youth and Family Services* (Report to the Minister of Social Services and Employment Hon Steve Maharey, Wellington 2000) 20.

<sup>89</sup> J Wundersitz, S Hetzel, above n 87, 115, 117.

## 2. *When should a family group conference be convened?*

This paper proposes a structure in which FGCs will be mandatory for all applications for custody and access of children to the Family Court whether or not the parties are the parents of the children, have ever been married or live in a de facto relationship. All these applications to the Court will be referred to a Care Coordinator, who will subsequently have an obligation to convene a FGC within a fixed timeframe.<sup>90</sup> Community institutions, for instance schools, will also have the power to ask for a FGC if they have reason to believe that children suffer as a consequence of their living arrangements.<sup>91</sup> Where parties are not willing to go through the FGC process, the Family Court should have the power to convene a court-ordered conference. This measure can be justified on the ground that the FGC is necessary to ensure that living arrangements meet the best interests of the children. The debate over which cases should be referred to a FGC can be circumvented with the adoption of a mandatory system. An alternative, however, would be to introduce FGCs on an optional basis and only convene them upon the wish of the parents.

In order to ensure an efficient process it is crucial that FGCs are held as early in the marriage dissolution process as possible. FGCs should therefore be convened after an application for a guardianship, custody or access order to the Family Court. This will regularly be before a separation order has been made. The rationale behind this is the fact that lengthy proceedings are detrimental to the welfare of children. The matters relating directly to the children need to be settled first. The aim of the conference will be to establish a plan how the living arrangements of the children will be handled. If the FGC is not able to agree upon a definitive plan, a temporary plan can be established. Temporary plans will contain a date to reconvene the family meeting in order to review the plan.

<sup>90</sup> Section 18 & 19 CYPF Act 1989 provide for care and protection cases to be referred to the Care and Protection Coordinator by social workers, members of the police, by other persons or by the Court for the grounds contained in section 14 of the Act. It is likely that those cases are referred to a FGC in which it is difficult for the social worker to obtain the agreement of the immediate family to a plan and in which serious concerns about the safety of a child exist. In the youth justice context it is the police after consulting the Youth Justice Coordinator who decides if a case will be referred to a FGC.

<sup>91</sup> Section 15 CYPF Act 1989 contains a similar provisions for the initiation of care and protection proceedings.

### 3. Principles of the process

There are a number of basic principles which should guide the process of a FGC in custody and access matters. In order to be successful it is important that the law sets forth its vision, aims, objectives and principles and then stipulates how these will be achieved. Participants should have a clear view of the purpose of the family meeting. The aim of the process is to provide for the care of the children during and after their parents' separation and establish living arrangement which comply with the children's needs and best interests. It is the families' task to design a plan for achieving these aims. The Coordinator will have the responsibility to approve the care plan and to ensure that it complies with the goals and principles of the process, namely

- The overall principle that all procedures, plans, arrangements and recommendations made at the FGC must be in the best interests of the child and that the child's welfare is the first and paramount consideration in all proceedings.<sup>92</sup>
- The principle that an ongoing and loving relationship between children and both parents should be maintained and strengthened.<sup>93</sup>
- The principle that children need a continuity of decision-makers in their lives and that changing living arrangements is against the children's interest and that the loss of familiar environment should be avoided.
- The principle that it is desirable for children to live within their kinship circle, their families or family group.
- The principle that the children's views should be considered and be given such weight as is appropriate in the circumstances having regard to the age, maturity and culture of the child or young person.<sup>94</sup>

The principles enunciated in points 2 and 4 may, on first sight, appear to conflict. A tension between the role of parents and that of the wider family may be felt. It must be kept in mind that the introduction of FGCs means a substantial change in the procedure

<sup>92</sup> See section 6 CYPF Act 1989.

<sup>93</sup> Article 9.3 UN Convention on the Rights of the Child.

<sup>94</sup> Section 5(d) CYPF Act 1989; Article 12.1 UN-Convention on the Rights of the Child.

and concepts of the present Guardianship Act. The main change in practice will be that the responsibility of deciding about living arrangements for children is taken away from parents (with the assistance of professionals, counsellors, mediators or judges) and is given to the wider family group. This system replaces the assumption behind the current legislation that parents have the major responsibility to raise their children.<sup>95</sup> Instead, family group meetings imply that the responsibility for children is widely shared. Children are still assumed to be the responsibility of their parents but also of the wider family. While the exclusive power of parents towards their children is reduced, the role and authority of the child's extended family is strengthened.

#### 4. *Who will be entitled to attend the conference?*

Persons who are entitled to attend the FGC include both parents, or the appointed guardians of a child, the children themselves and if they are not present the child's representative. This requires to appoint representatives for the children earlier than at present.<sup>96</sup> Parents' attorneys will generally not attend the FGC. The rationale is that legal representation of individual family members at the conference may encourage those family members to focus on their individual interests rather than on the interests of the family as a whole and the future well-being of the children. Members of the wider family will have a right to attend the FGC. The family and the children can invite any other person who they consider to be helpful at the meeting. Specialists may attend the conference and assume the role of information-givers. In contrast to FGCs for care and protection cases social workers will not have a legal right to attend and will only be present upon the invitation of the family or if their presence is required in the interest of the child.<sup>97</sup> The rationale behind this difference is that social workers and professionals should not unnecessarily intervene in family matters. Custody and access FGCs will be

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<sup>95</sup> Under section 6 of the Guardianship Act 1968 parents are assumed to be the child's natural and exclusive guardians. Non-parental guardians appointed in cases where parents abdicate responsibility or are disqualified on grounds of illness or wrongdoing, are seen as substitutes for parents. The number of appointed guardians is usually limited to one or two.

<sup>96</sup> At present under section 30(2) Guardianship Act 1968 a counsel for the child must be appointed if proceedings relating to custody and access appear likely to proceed to Court and under sections 159 and 323 CYPF Act 1989 in proceedings before the Court.

<sup>97</sup> Section 22 of the CYPF Act lists persons entitled to attend an FGC in Care and Protection cases. They include the child or young person; parents, guardians and wider family members; the Care and Protection Coordinator; a social worker or member of the police if the FGC has been convened on the basis of a section 18 report; a representative of the body or organisation if the FGC has been convened under section 19; any person or representative who has or is intended to have the care of a child under section 145; the child's representative; any other person whose attendance is in accordance with the wishes of the wider family or young person.

convened mandatory upon every application of parents for a custody or access order to the Court. A right of the referral agency to attend the family meeting, as it exists under the CYPF Act, should not be adopted in the proposed model.

The Care Coordinator will always be present at the conference. The Coordinator assumes the role of a facilitator who looks after the process. Similar to the legislation for care and protection and as a consequence of the principle that the child's interest is paramount the Coordinator should have a discretion to exclude children from the family meeting, if their attendance contradicts their interest.<sup>98</sup> The Coordinator should also have a discretion to exclude member of the wider family and invite any other person whose presence the Coordinator considers to be in accordance with the paramount principle of the children's welfare.

Decisions reached at the meeting will only be valid if at least both parents, or persons who are appointed as guardians of the child, the child or child's representative and the Coordinator were present. Should someone fail to attend, the FGC will normally be rescheduled though a conference will be held if a person fails to attend without good reason and having been given due notice. The FGC will then only be able to make temporary arrangements and the plan will set out a date for a second meeting. In cases in which one parent clearly refuses to cooperate, has disappeared or lives overseas the FGC will be able to make permanent plans.

### 5. *The procedure*

As under the legislation of the CYPF Act, the Care Coordinator will have the responsibility of convening the family meeting and a duty to ensure that all proceedings are carried out correctly and in accordance with the principles for the FGC procedure. The Court has a limited role and no right to interfere in the FGC process.<sup>99</sup>

Before convening a FGC under the care and protection legislation the Coordinator has a duty to consult with a Care and Protection Resource Panel.<sup>100</sup> This ensures that an appropriate range of perspectives reflecting the community and the professional membership of the Advisory Panel is considered. A study found, however, that the consultation process was not always satisfying.<sup>101</sup> This requirement does not

<sup>98</sup> Section 22 (2)(a) (i), (ii) CYPF Act 1989.

<sup>99</sup> P Geraghty (ed) *Butterworths Family Law in New Zealand* (9 ed, Butterworths Wellington, 1999) 1010.

<sup>100</sup> Section 21 (a) CYPF Act 1989.

<sup>101</sup> K Harvey, M Paterson *An Evaluation of the Organisation and Operation of Family Group Conferences* (Department of Social Welfare, Wellington 1991) 6.

need to be adopted for custody and access FGCs. As it is not the primary aim of these conferences to protect children from harm but to ensure that living arrangements comply with the children's interests the range of acceptable solutions will be broader. A prior discussion among professionals about "bottom lines" of arrangements will not be necessary.

Similarly to the contemporary section 21 of the CYPF Act, the Care Coordinator will have a statutory duty to make all reasonable efforts to consult with the child's family, whanau or family group to discuss the date, time and place of the meeting and the procedure to be adopted at the conference.<sup>102</sup> Preparation of the FGC will be the most crucial part of the process. To ensure the participation of the family at the FGC family members must be informed of and encouraged to attend the meeting. Family members need to be informed about the process and their role in order to enable them to contribute constructively in the group discussion. Coordinators report spending an average of 3-5 hours preparing for each FGC.<sup>103</sup> The law should ensure that prior to the FGC the Coordinator collects as much information about a case as possible. A statutory requirement for Coordinators to visit children and the family at home prior to the meeting should therefore be introduced. During the home visits Coordinators will explain to the family what will be discussed at the conference and what the principles of the process are. The family should be encouraged to make preliminary considerations about how they intend to handle the living arrangements for the children. Home visits provide the Coordinator with the background knowledge necessary to assess whether or not proposals of the family meeting comply with the best interests of the children. Home visits may also enable the Coordinator to find out what specialists reports, if any, will be needed at the conference.

The actual procedure at the FGC will be determined by the conference. The procedure should conform with the procedural rules of natural justice.<sup>104</sup> There should be a time limit for FGCs.<sup>105</sup> It can be expected that after about four hours it may become difficult to reach good decisions and it will be preferable to interrupt the process and fix a new date to continue.

Research about FGCs showed that the procedure normally goes through three stages.<sup>106</sup> The meeting will regularly begin with an information-giving stage. The Care

<sup>102</sup> Section 21 (i)-(iii) CYPF Act 1989.

<sup>103</sup> according to Allan McRae, Youth Justice Co-ordinator, Wellington (Interview 1 March 2001).

<sup>104</sup> Section 26 (1) CYPF Act 1989.

<sup>105</sup> according to Allan McRae, Youth Justice Co-ordinator, Wellington (Interview 1 March 2001).

<sup>106</sup> K Harvey, M Paterson, above n 101, 22.

Coordinator informs the attendants about the case, their role at the conference and the aims and principles of the process. If specialists attend they present their expert knowledge to the family. After this stage there will be a private discussion between the family group. If parents wish they should have the possibility to ask for private deliberations to discuss the possible living arrangements for their children among themselves. The aim of this stage is to establish a plan for the care of the children during and after the process of their parents' separation. After the private discussion the family presents their plan to the other attendants. The solution will be discussed between all people who are present. During the whole FGC the Coordinator assumes the role of the facilitator who looks after the process. The Coordinator may make recommendations and proposals during the discussion of the plan. Coordinators, however, will not have the power to impose decisions.

#### 6. Care plans

The Coordinator will have a statutory duty to ensure that all arrangements made for the children are in their best interests and in accordance with the principles set out above. To prevent plans which conflict with the welfare of the child the Coordinator has a legal right to veto decisions. The care plan must contain a minimum of provisions. A valid plan deals with issues such as with whom the children will reside and who will make decisions for them. Specific functions of parenting are set out and the responsibility for those functions is distributed to either parent or a member of the extended family. The plan sets out detailed arrangements about how the relationship with the non-residential parent will be maintained. Apart from this plans may contain other provisions which are assumed to be in the best interest of the children. For example plans may provide for counselling for children in order for them to come to terms with their parents' separation. The separation of parents often, for the children, means the loss of a familiar environment, school and friends. It also means bearing the separation from the non-custodial parent with whom children may have established a loving relationship. Counselling for children may be particularly helpful if they have been subjected to physical, sexual or psychological abuse. It will also be important in cases in which domestic violence or high conflict between the parents occurred.

As the care plan is focused on establishing living arrangements for children plans should not be required to provide for the financial maintenance of children. It



appears to be too complex for the FGC forum to make custody and access arrangements and, in addition, to resolve the financial aspects of child care. Financial issues will therefore continue to be decided under the Child Support Act 1991. However, if a family proposes financial arrangements at the meeting such agreements should become part of the plan. Appropriate financial arrangements proposed by the family should override the provisions contained in the Child Support Act.

It is crucial that while establishing a plan the resources for its implementation are located. Wider family members may be willing to provide temporary care for the children in order to protect them from the harmful process of their parents' relationship breakdown. They may also take over functions to ensure that the provisions of the plan will be fulfilled. Plans should therefore be as detailed as possible. If it is foreseeable that physical separation of the parents, new partners, moves and so on will require changes of the plan, a date to reconvene the FGC should be included.

At the FGC agreement is normally reached by consensus. The Coordinator, the children, parents and other persons who are directly involved in the care plan will have a legal right of veto.

If the FGC is not able to reach a permanent agreement in one or more of the issues at stake the family will be required to establish a temporary care plan which contains a date on which the meeting will be reconvened to review the plan. Temporary care arrangements will have a maximum duration of six months. Alternatively the plan may contain a recommendation for the Family Court to refer unresolved issues to another dispute resolution procedure, for instance to mediation. The FGC may also make recommendations for the judge's decision if as a final resort, outstanding matters must be decided by the Family Court.

### *7. Revision and monitoring of plans*

A plan upon which agreement has been reached should be able to be reviewed without Court intervention. As under the legislation for care and protection cases a provision should be adopted which enables the Coordinator or two members of the FGC to make a request that the conference be reconvened for the purpose of reviewing decisions, the recommendations or the plan.<sup>107</sup> In custody and access decisions the child should have the legal right to request the revision of the plan. A FGC to review the care

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<sup>107</sup> Section 204 CYPF Act 1989.

plan for a child should only be reconvened on the request of other persons if the Coordinator is satisfied that there are circumstances which make changes necessary. This limitation is intended to prevent parents from making repeated applications.

Under the care and protection legislation the Coordinator has a statutory duty to ensure that any decisions, recommendations or plans formulated by the FGC are reviewed regularly.<sup>108</sup> A provision, however, for any formal monitoring or supervision of the decisions made by the FGC is missing under the Children Young Persons and Their Families Act. The care plan for custody and access will be required to contain regulations how the plan will be monitored. The community and wider family group may play an important role in the supervision of the plan. In order to avoid frustration, the Family Court should be given the power to enforce plans if parties fail to act in accordance with the provisions set out therein.

#### 8. Confidentiality

After a family meeting has been held the Coordinator will be required to keep a record of the details of the decisions and recommendations and of the plan made at the FGC. The Coordinator has to ensure that a copy of the record will be sent to all persons who were present at the conference or had a right to attend.

In order to allow free discussion of the matters in issue it will be crucial that the procedures at the FGC are privileged.<sup>109</sup> No evidence of any information, statement or admission disclosed or made in the course of the discussion will be admissible in any court or before any person acting judicially.

#### C. Summary

This paper proposes a system for mandatory FGCs upon every application for guardianship, custody or access to the Family Court whether or not the parties are married or live in a de facto relationship. FGCs will be held as soon as possible after application for guardianship, custody and access to the Family Court whether or not parents are seeking a divorce order and whether or not they jet obtained such an order or not. Cases will be referred to a Care Coordinator who will have a duty to convene the

<sup>108</sup> Section 424 (f) CYPF Act 1989.

<sup>109</sup> Similar to section 37 CYPF Act 1989.

family meeting and to contact all persons entitled to be present. Attendants of the FGC include the parents or appointed guardians of the child, the children themselves or their representative, the Coordinator who will assume the role of a facilitator and wider family members. The aim of the conference will be to establish a care plan for the children which complies with their best interests. A plan must cover a minimum provisions about the living and contact arrangements of the children. If the family fails to reach a permanent agreement about all issues at stake, a temporary caring plan may be easier to be established. Unresolved matters will be referred to the Court or plans may provide for the parents to resolve outstanding matters through counselling or mediation. The FGC, however, will be able to make recommendations for the judge's authoritative decision.

Although both, the proposed FGC model and the existing statutory FGC proceedings for care and protection cases, are based on the same principle that the "best interest of the children" must be the first and paramount consideration, there are some significant differences.<sup>110</sup> One difference lies in the initiation of the proceedings. While custody and access FGCs would be held mandatory in each case after application for a guardianship, custody or access order to the Family Court, the Care and Protection Coordinator under the CYPF Act 1989 has a certain discretion to convene a family meeting.<sup>111</sup> Further, in custody and access FGCs the influence of professionals will be weaker than under the legislation for care and protection. A prior discussion of the case with a professional body to determine "bottom lines" of arrangements does not need to be adopted.<sup>112</sup> Custody and access plans allow for flexible solutions as long as the arrangements comply with the best interests of the children. Attendants of custody and access FGCs do not necessarily include professionals other than the Care Coordinator.<sup>113</sup> As a consequence the Care Coordinator's role is much wider than the role of the Coordinator under the CYPF Act.<sup>114</sup> Duties include the responsibility to

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<sup>110</sup> Section 6 CYPF Act 1989 contains the "best interest" principle as paramount consideration for care and protection FGCs.

<sup>111</sup> Section 18 CYPF Act 1989 requires the Coordinator to convene a mandatory FGC if a referral has been made by a social worker or police officer. According to section 19 CYPF Act 1989 the Care and Protection Coordinator has a discretion to convene a FGC after referrals from other persons or the Court.

<sup>112</sup> Under section 21 (a) CYPF Act 1989 the Care and Protection Coordinator is required to consult with a Care and Protection Resource Panel prior to a FGC.

<sup>113</sup> Under section 22 CYPF Act 1989 a social worker, member of the police, any body or organisation concerned with the welfare of children will be present at the FGC in addition to the Care and Protection Coordinator.

<sup>114</sup> Section 424 CYPF Act 1989 lists the duties of Care and Protection Coordinator. Their role includes to convene the FGC, consult with the Care and Protection Resource Panel, record and review decisions, recommendations and plans of the conference.

ensure that living arrangements proposed by the family conference comply with the children's best interests. For this purpose the Care Coordinator will be given a right to veto decisions, recommendations and plans made at the meeting.<sup>115</sup>

## VI. HOW DOES THE FAMILY GROUP CONFERENCE MODEL DEAL WITH THE ISSUES OF THE CURRENT LAW?

### A. Family Group Conferences and Private Ordering

The introduction of FGCs for custody and access decisions does not change the system of private ordering for custody and access. As under the current law, custody and access will principally be considered as a private matter. The emphasis in the proposal to use FGCs for custody and access decisions is for the family and family group to make their own decisions as to how care arrangements for children affected by the separation of their parents should be handled. The private ordering approach will become less parent and more child focused than under the current system. The FGC model contains mechanisms to ensure that the children's needs are not overlooked. As under the present legislation the role of the state represented through the courts is limited. "It is to assist the family to make the decisions that have to be made."<sup>116</sup> The state should however maintain the ultimate responsibility for the caring of children and it should be the Family Court's responsibility to make the final decision if parents are not able to agree about care arrangements for their children.<sup>117</sup> In the proposed model the Court should be given a clear power to punish disobedience of its orders. Under the present legislation the Court's powers are limited.<sup>118</sup>

It would appear to be contrary to the Government's family policy and inconsistent with the legislation for related procedures concerning children, for instance with the care and protection legislation, to make custody and access issues a more public matter.

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<sup>115</sup> Under the CYPF Act 1989 there is an important restraint on the FGC autonomy in cases where the conference is convened under section 18(1) CYPF Act 1989, on the basis of a report from a social worker or member of the police. In these cases the Coordinator is required under section 30(1)(a)(ii) CYPF Act 1989 to seek agreement from the referring person.

<sup>116</sup> *DSW v H* (12 January 1990) unreported District Court, Auckland Registry, CYPF 4/90.

<sup>117</sup> *Re CYPF* (1990) 6 FRNZ 55, 57.

<sup>118</sup> Section 19 Guardianship Act 1968. In particular under subsection 5 are clear problems of enforcement under the current legislation if either parents decides not to comply with a joint custody order.

As discussed above control mechanisms for privately made agreements are weak under the current law. FGCs have similarly been criticised as a "splintered and haphazard process."<sup>119</sup> The proposed system, however, contains provisions which ensure that decisions, recommendations and plans are in the best interest of the children. The presence of the wider family group at the meeting will contribute to ensure that arrangements made for children in fact comply with their interests. Arrangements for children will be based on a broader consensus than under the current legislation, where only the parents and a counsellor, mediator or judge are involved in the decision-making process. Further, there will be a clear statutory duty for the Coordinator to make sure that the children's best interests are met. The requirement that the Coordinator agrees to the families' decision, and the Coordinators' right to veto decisions, provide further checks on the quality of plans.

It appears to be helpful to establish a series of principles about the handling and content of the "best interest principle" for Coordinators and judges to provide some guidance and contribute to a consistency in decision-making. There should, however, not be a presumption of any kind and the possibility of taking case by case elements of welfare into account should not be limited. Factors which made up the best interest of the child may vary depending on the circumstances of particular children within their families and of families themselves.<sup>120</sup> The concept of welfare is a broad one and all aspects must be considered.<sup>121</sup> The emotional and psychological aspects of welfare will usually assume primary importance.<sup>122</sup>

While material considerations have their place, they are secondary matters. More important are the stability and security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents.

In order to be valid plans will have to contain a minimum of information about the children's living arrangements. For instance plans will be required to contain detailed

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<sup>119</sup> G Geddis "A Critical Analysis of Family Group Conferences" (1993) 3 BFLJ 142.

<sup>120</sup> See for example *C v E* (11 May 1987) unreported, Family Court, Palmerston North, 054/53/83: Welfare must always be looked at in the individual circumstances of a particular child with a particular mother, father or brothers and sisters and in the concrete particular surrounding circumstances of a case.

<sup>121</sup> *G v G* [1978] 2 NZLR 444, 447. An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. All aspects of welfare must be taken into account and that will include consideration of the child's physical and mental and emotional well-being and the development in the child of standards and expectations of behaviour in our society.

<sup>122</sup> *Walker v Walker and Harrison* [1981] NZ Recent Law 257.

information as to how contact with both parents will be maintained. Such requirements will help to ensure that plans correspond with children's needs.

The concern that families might be too dysfunctional to make good decisions for the care and protection of the children does not seem to have manifested in practice.<sup>123</sup> It has been found that conflict between the attendants of a meeting is not necessarily bad when handled properly and a good outcome for both the child and the family may still result.<sup>124</sup> Even dysfunctional families may have some undiscovered strengths. Experience gleaned from care and protection FGCs suggests that the process will encourage divorcing parents to focus on the needs of their children and make appropriate arrangements.<sup>125</sup>

### ***B. Family Group Conferences and other Issues in the Current Law***

#### *1. How do family group conferences address problems of counselling, mediation and court hearing*

The FGC model requires that the Family Court is to be kept as the last resort for decision-making. Court hearings, which are detrimental to children, are avoided to the greatest extent possible. As under the current system it can be expected that only a small percentage of cases will proceed to the Family Court. The FGC model has the advantage that if no agreement can be reached, the conference may make recommendations for the judge's decision and list the reasons for the disagreement. The FGC report will then provide judges with further information about a case and serve as the basis of their decisions. Additional information contained in the report will contribute that the judgment in fact complies with the children's needs.

A further benefit of the proposed system is that FGCs are clearly focused on children. In contrast to mediation and counselling the primary aim of the family meeting will be to make care plans for the children and not to promote reconciliation or conciliation between the parents. Parents will be forced to concentrate only on the children and their needs rather than on their own rights. The proposed FGC model gives

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<sup>123</sup> M Harvey, K Paterson, above 101, 59.

<sup>124</sup> M Connolly "An Act of Empowerment: Children, Young Persons and Their Families Act 1989" (1994) 24 *British Journal of Social Work* 87.

<sup>125</sup> E Cole "Key Policy Decisions in Implementing Family Group Conferences: Observations drawn from the New Zealand Model" in M Hardin (ed) *Family Group Conferences in Child Abuse and Neglect*

little opportunities for professionals to influence the decision and no authority figures will be present. It is therefore less likely that decisions will be imposed on parents.

## 2. Delays

A number of short timeframes set out for the proposed FGC model will help avoiding delays. Care Coordinators will have a statutory duty to convoke a family meeting within a fixed time, for instance three weeks, after a matter has been referred to them. If no agreement can be reached another timeframe will ensure that not much time elapses until a conference is reconvened or a hearing at the Family Court takes place. The requirement to sort out custody and access arrangements immediately after an application for guardianship, custody or access to the Family Court ensures that these matters are determined at the beginning of separation proceedings and children will be prevented from a long period of insecurity about their living-circumstances.

FGCs are an opportunity to reduce the issues of divorce which will subsequently have to be resolved through counselling, mediation or a Court hearing. It may well be that as a consequence the number of counselling sessions or the length of time for mediation and Court hearings can be reduced.

## 3. The problem of bias

As seen above the present alternative decision-making processes appears to give little opportunity for the voices of women to be heard. The power remains located within patriarchal structures. There is a question as to the extent to which FGCs replicate this feature. Fears about the disempowerment of women in family meetings have not been supported by researchers. Researchers reported about active participation of women in the process in contrast with their non-participation in the judicial procedure.<sup>126</sup> It could be argued that women's participation reflects women's responsibilities for caring for children rather than a process of empowerment. The participation, however, can equally be interpreted as a recognition and positive endorsement of the value of women's role as caregivers. FGCs seem to be more likely

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Cases: *Learning from the Experience in New Zealand* (ABA Centre on Children and the Law, Washington 1996) 124.

<sup>126</sup> J Pennell, G Burford "Attending to Context: Family Group Decision Making in Canada" in J Hudson (ed.) *Family Group Conferences - Perspectives on Policy and Practice* (The Federation Press, Australia 1992) 212.

than more formal dispute resolution fora to give effective voice to those traditionally disadvantaged. It must be noted, however, that the FGC model enshrines conditions which may work against this goal. Central to this issue is the role of the professionals, in particular the Coordinator, and their management of the process.

### *C. Children's Rights under the UN Convention*

A meeting of the wider family gives more effect to the provisions and the rights of the children contained in the United Nations Convention on the Rights of the Child.

#### *1. Best interests of the child*

The use of an FGC model for custody and access decisions recognises a number of elements which are considered to be in the best interest of the child. Children may perceive the meeting of the family as an affirmation of love and concern for them by their family.

The welfare of the child will be the guiding principle of the proposed conference model. Decisions about living arrangements for children reached at the conference are based on broad consensus among the wider family group and the Care Coordinator. As described some other control mechanisms ensure that proposals made at the meeting comply with the interests of the children. The Care Coordinator may assume the most important role in this respect. Coordinators have the responsibility to assess proposals of the FGC. Their right of veto enables Coordinators to stop decisions which appear to conflict with the welfare principle. The possibility for children to participate directly in the decision-making forum is another element which contributes to ensure that the interests of the children are not overlooked.

#### *2. Participation of all parties*

The FGC procedure gives effect to the requirement that children are not separated from their parents unless a separation is necessary in their interest.<sup>127</sup> The FGC model also complies with the requirement that all interested parties can participate

<sup>127</sup> Article 9.1 UN Convention on the Rights of the Child.



and express their views in the forum which makes such a decision.<sup>128</sup> Only under exceptional circumstances, for instance where one parent refuses to co-operate, has died or disappeared the family meeting can decide to remove children without agreement of both parents.

### 3. *Ongoing relationship with both parents*

FGCs convened to decide about custody and access matters will be based on the premise that the best interest of the child is to maintaining an ongoing relationship with both parents. This principle is not only contained in the UN Convention<sup>129</sup> but is also reflected in research projects about the views of children on post-separation arrangements. These projects reported that children regularly want to remain in contact with both of their parents.<sup>130</sup> Children appear to have a strong preference for flexible and unrestricted contact with the non-custodial parent.<sup>131</sup> The Coordinator will therefore be required to ensure that care plans established at the conference contain detailed provisions as to how future contact with one or both of the parents will be handled.

### 4. *Participation of the child*

A major benefit of the FGC system is that the procedure provides an opportunity for children to participate directly in the making of decisions by which they are affected. The current legislation under the Guardianship Act assumes that the children's perspective is adequately, if indirectly, represented by considerations of adults. In the FGC model children should basically be given a right to attend the family meeting with certain restrictions. During the family meeting parents should be enabled to ask for private deliberations, if they wish to discuss a matter in absence of the child. There should also be a discretion of the Coordinator to exclude children from the conference if their presence is not appropriate and contradicts with their interests.

<sup>128</sup> Article 9.2 UN Convention on the Rights of the Child.

<sup>129</sup> Article 9.3 UN Convention on the Rights of the Child.

<sup>130</sup> M MacDonald *Children's Perceptions on their Parents' Separation* (Research Report No 9, Family Court of Australia, 1990).

<sup>131</sup> R Neugebauer "Divorce Custody and Visitation: The child's Point of View" (1989) 12 *Journal of Divorce* 153.

### 5. *Representation of the children*

The child's age, lack of maturity and the fact that the FGC dealt with sexual or physical abuse were mentioned as reasons for excluding children from care and protection conferences.<sup>132</sup> In these cases, or if a child wishes not to attend a family meeting, a representative will be appointed to fulfil the requirements contained in article 12 of the UN Convention. Research projects about FGCs in youth offending and care and protection cases has shown that the FGC model gives children a voice, and that children tend to participate especially when they are supported by their peers or encouraged by the professionals and adults who are present.<sup>133</sup> Again the successful inclusion of children at the conference will depend on the abilities of Care Coordinators and their process management.

### 6. *Parental Responsibility*

Article 18.1 of the UN Convention contains an obligation for states to ensure that both parents have common responsibilities for the upbringing and development of children. The current system of Court made custody and access orders encourages an adversarial rather than a conciliatory approach.<sup>134</sup> Custody and access orders create the impression that the parent in whose favour a custody order is made "owns" a child while the access parent has the right to "borrow" the child. Custody is the prize to be won at the end of the battle. The approach at the FGC starts from a different premise. An agreement about the living arrangements among all attendants is sought. It has been argued that the concept of establishing a plan together can help parents to shift the focus away from criticism of the other spouse's capabilities, based on past behaviour, to present and future orientated considerations as to how each former spouse intends to fulfil his or her role as a parent.<sup>135</sup> In listing different functions of parenting in the plan and distributing the responsibility for those functions to either parent or member of the wider family, parents will be forced to consider their common responsibilities for the upbringing and development of their children. It can be expected that the establishment

<sup>132</sup> K Harvey, M Paterson, above n 101, 15.

<sup>133</sup> J Wundersitz, S Hetzel above n 87, 124.

<sup>134</sup> Judge P v Dadelszen, "The Case for Change: 'Parental Responsibility' not 'Custody' and 'Access'" (1993-95) 1 BFLJ 263; Ministry of Justice, above n 1, 11.

<sup>135</sup> Family Law Council (Australia) *Letter of Advice to the Attorney-General on Parenting Plans* (Canberra, Australia 2000).

of care plans increases the likelihood of shared parenting.<sup>136</sup> FGCs should not be misunderstood as a process through which responsibilities of the parents are transferred to wider family members. FGCs in custody and access are rather based on the assumption that if parents are not able to fully care for their children, it will be in the interest of their children that wider family members assist parents in carrying out parental responsibilities.

#### *D. Recognition of the Different Cultural Values in New Zealand's Multicultural Society*

FGCs are designed to be flexible enough to allow for culturally appropriate processes and solutions.<sup>137</sup> The fact that they have been successfully adopted in various jurisdictions and cultures appears to confirm this benefit. The FGC model not only recognises the diversity of family forms but also complies with the cultural values of Maori and Pacific people. The wider family is included in decision-making affecting individuals and nuclear families. Research about FGCs held in New Zealand shows that Coordinators aim to run the family meetings in a culturally appropriate manner, for example by having the meeting conducted according to Maori protocol. FGCs are also able to be held in a culturally appropriate setting in order to assist family participation. The venue is usually based on the wishes of the family. A report showed that most FGCs were held at a district area welfare office, others in community rooms and some of them at the home of a family member.<sup>138</sup> For Maori people in particular FGCs are occasionally held in a marae.

#### *E. Summary*

Properly applied the FGC process provides solutions for the issues in the current law. The model does not change the system of private ordering for custody and access arrangements. The state does not intervene if parting parents are able to agree on living

<sup>136</sup> Family Law Council (Australia) *Patterns of Parenting After Separation – A Report to the Minister for Justice and Consumer Affairs* (Australian Government Publication Service, Canberra 1992) 38.

<sup>137</sup> W R Atkin "The Courts and Child Protection – Aspects of the Children Young Persons and Their Families Act 1989" (1990) 20 VUWLR 319, 320: "One of the main reasons for the shape of the reform is that Maori and Polynesian groups considered that the old system left out their basic understanding of human relationships which start with the wider family and not with the individual or the so-called nuclear family".

<sup>138</sup> K Harvey, M Paterson, above n 101, 19.

arrangements for their children. A family meeting will be held after an application for custody or access to the Family Court. Once the legal process has commenced, the wider family and the Care Coordinator play the most important roles in ensuring that care plans comply with the best interests of the child.

Through the introduction of FGCs long proceedings before the Family Court, which are detrimental for children, can be avoided to the greatest extent possible. If a FGC fails to reach agreement and an authoritative decision is unavoidable, a report about the conference will provide the judge with further information and background knowledge about a case in order to be in a better position to decide in accordance with the children's needs. As family meetings are held within a fixed timeframe after a custody or access application to the Court, delays will be reduced. To prevent children from a long period of insecurity about their living circumstances, custody and access matters will be settled first during the separation process. Children will no longer be affected by long waiting lists for mediation sessions and Court hearings. Research studies also showed that bias is only a minor problem at a family meeting. Two other benefits of FGCs are that the process is able to give almost full effect to the rights of children as expressed in the UN Convention on the Rights of the Child and that the process recognises the different cultural values of New Zealand's multicultural society.

## **VII. ISSUES CONCERNING THE FAMILY GROUP CONFERENCE MODEL**

### **A. Support and Costs for Family Group Conferences**

FGCs are based on the premise that extended family members can assist children and their immediate families to deal with the upbringing of children and with the establishment of living arrangements for a child if parents part. Assistance of the wider family is required in both, the making and the implementation of decisions. It has been argued that the introduction of FGCs is a cost-cutting exercise of the Government.<sup>139</sup>

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<sup>139</sup> M Connolly "An Act of Empowerment: The Children, Young Persons and Their Families Act 1989" (1994) 24 *British Journal of Social Work* 87.

Reports appear to defeat this argument in showing that around 60% of the conferences were resourced by the Department of Child, Youth and Family Services.<sup>140</sup> FGCs are, however, a process which keeps costs relatively low. The biggest expense is the payment of the salary for the Coordinator and the hire of localities where meetings can be held. A Coordinator may be able to hold up to three conferences per week.<sup>141</sup> A clerk will be necessary per three Coordinators. Mail, specialist reports and the provision of a mean of transport for the Coordinator's home visits will create further costs. Financial help may be given to attendants who live outside the district area. Experience showed that for such attendants only a partial contribution, not full reimbursement is necessary and that family members are willing to spend their time and money if they believe that their attendance and contribution at the conference will benefit the child.<sup>142</sup>

### **B. Role of the Care Coordinator**

Arguably a weakness of the process is that a successful FGC depends to a great extent on the abilities of the Coordinators, their process management and their skills as facilitators. In care and protection conferences Coordinators' tread a fine line between being neutral facilitators and child protection workers.<sup>143</sup> In FGCs for custody and access the protection of the child is not the major issue. Coordinators have a duty to ensure that the interests of the children are paramount during the process and that arrangements comply with the children's interests and needs. In order to achieve these aims the Coordinator has the responsibility to ensure that a plan respects the principles set out for FGCs for custody and access decisions. These principles allow for a certain degree of supervision of the Coordinator's performance. The Family Court may take a supervisory role. If the Court has concerns about the Coordinator's abilities, the Family Court should be able to initiate an investigation. As an alternative method to ensure a good quality of the process two facilitators could be present at a FGC.

<sup>140</sup> G Maxwell, J P Robertson "Statistics over the first year of the Children, Young Persons and Their Families Act" in *An Appraisal of the First Year of the Children Young Persons and Their Families Act 1989: A Collection of Three Papers* (The Commissioner For Children, Wellington 1991) 14.

<sup>141</sup> according to Allan McRae, Youth Justice Coordinator, Wellington (Interview of 1 March 2001).

<sup>142</sup> P Ban "Implementing and Evaluating Family Group Conferences With Children and Families in Victoria Australia" in J Hudson (ed.) *Family Group Conferences - Perspectives on Policy and Practice* (The Federation Press, Australia, 1992) 143.

<sup>143</sup> S Frasier, J Norton "Walking the tightrope - the New Zealand Family Group Conference Way" (Paper presented at the Fourth Australasian Conference on Child Abuse and Neglect, Brisbane, Australia 1993).

### *C. Role of Referrers and Professionals*

One of the aims of the CYPF Act was the limitation of professional intervention in family matters.<sup>144</sup> The proper role of referrers and professionals has been an issue in care and protection FGCs. Particularly in cases where social workers from the Department of Child, Youth and Family Services make referrals there will often be a discussion prior to the FGC about what they will accept as the FGC's decision or plan in order to ensure the safety of the child. Although social workers reported that they are open to other suggestions, research studies concluded that limits were placed on family decision-making by the social workers' use of jargon and their presentations of strong views about final decisions.<sup>145</sup> Concerns have been expressed that professionals are taking over and distorting the FGC process in care and protection cases and it has been questioned who is effectively making the decisions the family, professionals, or both?<sup>146</sup>

In the proposed model for the use of FGCs for custody and access decisions the Family Court or a community institution will normally refer a case to a FGC. In contrast to FGCs for care and protection, under the proposed model referrers will not have a legal right to attend the meeting. Social workers and other professionals will only attend upon request if their specialist knowledge is required in order to determine the children's needs. Many FGCs for custody and access decisions may therefore be able to be held without specialist intervention. If expert knowledge is needed, professionals will assume the role of information-givers. Experts will be expected to provide factual, clear and specific information. If specialists are included, however, there will always be a fine line between informing and influencing family decisions.

### *D. Implementation and Monitoring of Plans*

The success rate of FGCs in care and protection cases is high. Experience has shown that in about 85% of the cases FGCs convened for care or protection reasons are able to reach agreement.<sup>147</sup> The high level of agreement does not, however, guarantee

<sup>144</sup> D Swain, above n 80, 156.

<sup>145</sup> S Rimene *The Children Young Persons and their Families Act, from a Maori Perspective - Thesis in Social Work* (Victoria University of Wellington, Wellington 1989) 63, 64.

<sup>146</sup> M McKenzie-Davidson "Family Decision-Making as a Preventative Solution in Child Protection" Paper presented at the 10<sup>th</sup> International Congress on Child Abuse and Neglect (Kuala Lumpur, Malaysia 1994).

<sup>147</sup> The General Manager's Office, New Zealand Children & Young Persons Service "Critical Analysis of FGCs - a Response" (1993) 1 BFLJ 7.

that decisions and plans are implemented. It is a core assumption of the FGC model that families are more likely to implement plans that they develop themselves and that they will monitor plans more thoroughly than social workers currently are able. In the children's interest, however, a statutory provision should be introduced which requires plans to contain a date and specify a form of review. Plans should also be required to contain a provision for regular monitoring of the children, in order to ensure that children continue to be happy about their living arrangements. The experience of FGCs in care and protection cases showed that members of the extended family are in the best position to promote the safety of the children.<sup>148</sup> Because they can put pressure on parents and usually have regular access to the children's home they can do more in providing frequent monitoring than can social workers.<sup>149</sup> Similarly, in plans about custody and access arrangements wider family members may play an important role in monitoring children's care plans in order to ensure that they are properly fulfilled and continue to remain in the interest of the children.

#### *E. Implications for the Substantive Law for Guardianship, Custody and Access*

Introducing a new procedure to decide about custody and access questions will also imply reforms of the substantive law and a reassessment of the strict concepts about custody, access and guardianship currently contained in the Guardianship Act 1968. For instance the provisions contained in sections 11 and 16 of the Guardianship Act will strongly limit the possibility for the family meeting to reach individual and flexible case by case solutions. The requirement under section 11 that other persons than the mother, father, step-parents or guardians of a child can only apply for custody orders with the leave of the Court will need to be replaced by a more open provision. Similarly access rights of other relatives under section 16 Guardianship Act will need to be extended.

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<sup>148</sup> E Cole, above n 125, 124.

<sup>149</sup> M Hardin "The Impact of Family Group Conferences" in M Hardin (ed) *Family Group Conferences in Child Abuse and Neglect Cases: Learning from the Experience in New Zealand* (ABA Centre on Children and the Law, Washington, 1996) 87.

## *F. Summary*

Some issues have to be considered while promoting the introduction of family meetings. It cannot be ignored, as some cynics have pointed out, that FGCs may be seen as cost-cutting measure of the Government. Although the process allows to keep costs relatively low this argument has been defeated by the fact that the Department Child, Youth and Family Services resources the majority of the family meetings.

Arguably, a weakness of the FGC model is that the success of the conference depends heavily on the abilities of the Care Coordinator. Measures to ensure the quality of the process will need to be considered.

While in FGCs for care and protection cases the role of professionals and referrers has always been controversial, in custody and access FGCs professionals have less influence and a clearly limited role as information-givers only. In contrast to care and protection FGCs referrers will not have a legal right to attend the family meeting.

Concerns connected with the FGC model surround the implementation and monitoring of care plans. Family meetings are an efficient method only if enough resources are available to fulfil the plans. It will therefore be crucial to consider these matters in advance and include appropriate provisions in the plan.

Adopting a FGC model to decide about custody and access arrangements for children, however, will also have implications for the substantive law in these areas. The strict concepts contained in the Guardianship Act 1968 will need to be reassessed in order for the family meetings to reach flexible decisions.

## **VIII. CONCLUSION**

As an overall conclusion it can be stated that FGCs are able to provide an alternative forum for custody and access decisions. Research about FGCs suggests that the process strengthens the family and increases the family support for the children. The procedure is able to deal with deficiencies contained under the Guardianship Act legislation and provide some remedies.

In contrast to the current decision-making for the FGC model contains the benefit that the family meeting is only be focused on children and on deciding about their living arrangements. The model acknowledges that the wider family will regularly have



background knowledge about a case and is therefore in the best position to make care arrangements for children which correspond with their interest and needs. The process gives more effect to premise that the welfare of the child must be paramount in all decisions affecting children.

FGCs comply with the UN Convention on the Rights of the Child and respect the rights of the children contained therein. In particular, effect can be given to the participatory rights of the children. The right to maintain an ongoing relationship with both parents can also be strengthened. Another advantage of the FGC model is the flexibility of the process. FGCs are culturally appropriate and allow the realisation of different cultural values represented in New Zealand's multicultural society.

A key element for the success of FGCs in custody and access matters, however, will be their place in the separation process. This paper suggests that the most benefit can be gained from a meeting of the family if it is held right at the beginning of the separation proceedings, after an application for custody or access orders to the Family Court. If agreement can be reached at the conference, FGCs afford an opportunity to narrow down the issues for resolution at a formal Court hearing and may contribute to shorten lengthy Court proceedings.

The introduction of family meetings to decide about custody and access arrangements for children, however, raises some issues which have to be considered thoughtfully in order to make it an efficient process. The dependence of the process on the Coordinator's abilities may be the most crucial one. Coordinators assume both at the conference, the role of process managers and control mechanisms. Expectations in the FGC model will be disappointed if Coordinators fails to perform their role properly. Another issue in the proposed model concerns the implementation and monitoring of care plans. Before the Coordinator approves a care plan it will be necessary to ensure that enough resources for its implementation and monitoring are available. Introducing an FGC model for custody and access decisions, however, will also have implications for the substantive law in these areas. Reforms will be unavoidable.

With these thoughts in mind a pilot project with FGCs for custody and access holds high promise.

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