

A system less adversarial: the Children's Cases Project

By the Hon Justice Mark Le Poer Trench

The Family Court of Australia is presently engaged in a trial of what is billed as a 'less adversarial method' of determining contested applications concerning children in the Sydney and Parramatta registries. The trial commenced in early 2004 and was the subject of Practice Direction No.2 of 2004.

The key ambitions of the project have been set out by the steering committee as follows:

- to develop a more judicially active and less adversarial approach to parenting cases which focus on the future best interests of the child;
- a speedier, more satisfying (for all persons concerned in the process) method of resolving children's matters;
- to achieve more sustainable outcomes;
- to provide a process which although in the 'determinative phase' of the pathway through the court, nonetheless encourages and promotes resolution by the parties themselves;
- to have all cases entered and the pilot determined within three months;
- to apply simplified less legalistic procedures to the process;
- to achieve cost savings for all interest groups;
- to achieve a more efficient and productive use of judicial time;
- to have the legal profession support the pilot; and,
- to reduce the number of appeals and children's cases.

Involvement at this stage is founded upon the consent of all parties to a number of substantive and procedural alterations to the rules common to adversarial proceedings in all other federal courts. In particular, parties are required to irrevocably consent to the following:

- that it is the judge's (not the parties') role to control the conduct of the whole of the proceedings, to determine the issues which need to be decided, the evidence required and the manner in which it is to be prevailed for the purpose of making Orders which are in the best interest of the child or children;
- that the parties may not withdraw from the programme without the leave of a judge;
- that the judge is not disqualified from hearing and determining the proceedings if they make a finding in relation to various facts and issues during the hearing;
- the judge will be able to use mediation techniques where it is considered that doing so will assist in determining the matter and the judge will not be disqualified from continuing to hear and determine the matter by having used these techniques;

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- the judge may speak with and address questions to the parties whether they are legally represented or not;
- the judge may hold private discussions with the parties providing those discussions are recorded and copies of the transcript of what has been said is available to the other parties if required;
- the judge will determine what evidence is required in relation to the disputed facts that the judge considers important;
- the judge may direct enquiries to be made and evidence obtained on any issue the judge determines is relevant to the decision;
- the judge determines the manner in which this evidence will be given;
- the judge will determine what witnesses are to be called and the issues about which the witness will give evidence;
- all relevant material put before the judge is to be conditionally admitted as evidence. The court will determine the weight to be given to the evidence;
- the order and sequence of questioning by the parties will be determined by the judge;
- judgment may be given in specific parts rather than one event at the conclusion of this hearing;
- perhaps most controversially, the parties consent to a waiver of the rules of evidence pursuant to sec 190 of the *Evidence Act 1995 (Cth)*; and,
- finally, whilst the parties do not lose their rights of appeal because their case is in the programme they do waive their right to complain about matters to which they have agreed and in particular their consent to participation in the programme.

There are presently four judges in the Sydney Registry and two judges in the Parramatta Registry conducting hearings in the trial programme and at this time and in the nature of the trial there is no one coherent approach to the process to be adopted to any hearing before any particular judge.

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It is anticipated that the results of the programme will be available in 2005.