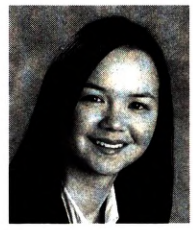
Doin' it for the kids:

the role of judges in the Children's Cases Program[1]



By **Carolyn Cheng**, Solicitor, Middletons

Children's proceedings under the *Family Law Act* 1975 (Cth) are unique.[2] The person who matters most and whose best interests are the paramount consideration of the Court,[3] the child, isn't a party.

It is therefore unsurprising that the adversarial system, which focuses on the parties and achieving justice between them, is not the ideal process for determining children's disputes. Conflicts are often entrenched by a system that is combative, that permits the filing of material which concentrates on grievances, allows parties to dictate the terms and timing of litigation, and which focuses upon adjudication at a final trial.[4] The importance to children, of conflict between their parents being minimised, and other advantages associated with an agreed solution are often lost.

In its report *Every Picture Tells a Story*, the House of Representatives Standing Committee on Family and Community Affairs tapped into a community perception that change is desperately needed:[5]

> "[T]he dynamics and emotions of family separation make adversarial litigation inappropriate. It does not work because it tends to be uncooperative and combative at a time when future cooperation for successful shared parenting is so critical. It is predicated on a win/lose outcome... the process seems to destroy families and escalate disputes".

The Children's Cases Program (**CCP**), which has been trialled at the Sydney and Parramatta registries of the Family Court of Australia since March 2004, recognises the shortcomings of the adversarial system in children's matters. It seeks to overcome them by drawing heavily on the inquisitorial model used in the European civil law system, and by requiring judges, in particular, to alter their roles.

The role of the judiciary

In 2000, members of the Family Court travelled to Europe and undertook a critical, comparative study of how children's cases are determined in Australia and European countries, such as Germany. The study group found that key features of the European system include:[6]

(a) a much stronger emphasis on the role of the judge compared to the parties in managing a case and determining what evidence is relevant; and
(b) greater flexibility for the judge to shift between deciding issues and helping the parties to reach an agreed outcome.

The study group's findings were referred by Nicholson CJ to the CCP Steering and Working Groups, and the two key features of the European system that were identified above are now key features of the CCP.

A single judge is assigned to each CCP matter. That judge is actively involved in the matter from its entry into the program until its conclusion. At the first hearing date, the judge meets with both parties. His or her Honour invites them to sit at the Bar table, administers an ongoing oath and invites the parties to tell him/her about the case and the perceived issues. The parties are encouraged to speak directly to the judge in their own words. If a party is uncomfortable doing so, however, counsel or a solicitor can speak on their behalf. This opportunity to speak allows the parties to feel that they have been heard. It also gives the Court an insight into the emotional states of the parties. An orderly discussion then occurs between the judge, the mediation consultant and the parties. Often matters are resolved by agreement at this stage. If an agreement is not reached, the relevant issues are clearly identified and orders are made in relation to subpoenas and the preparation of trial material (affidavits and witness statements). Subpoenas and affidavits can only be filed if the judge grants leave for this to occur. The judge may also limit the contents of affidavits to specific issues, and/or ask the parties to obtain particular evidence.[8]

In contrast to normal litigation, the parties have much greater access to the judge. The matter can be relisted for further hearings at any time by arrangement with the case coordinator. The format and venue of hearings are determined by the judge according to what he or she thinks is best in a particular case. Some hearings may be orderly discussions, while others may be more like traditional trials. The judge also has the ability to interview the child[9] and/or hold private discussions with a party, provided that the discussions are recorded and transcripts made available to other parties. The order, sequence and manner of questioning is similarly a matter for the judge to determine. Objections to evidence are only permitted on the grounds of illegality, privilege or such other serious matter.[10]

A judge can directly question the parties, and may use mediation techniques to encourage an agreed resolution at any time. The use of mediation techniques will not disqualify a judge from continuing to hear or determine a case. Judgment can be given in parts that are limited to particular issues. The concept of one climatic trial and judgment has been done away with.[11]

Evaluation of the CCP trials in Sydney and Parramatta has not been completed. Early feedback indicates, however, that matters in the CCP are being finalised sooner than cases outside the program, and that hearings take less time in the CCP. In Sydney, for example, hearings in the CCP have ranged between 1 and 5 hours duration whereas hearings outside the CCP have ranged between 1 and 10 days duration.[12] The greater use of mediation techniques and the conciliatory emphasis of the program has also resulted in more matters settling. Of the 98 cases which had been finalised in the CCP up until September 2004, only 11 required judicial decision (sometimes on only on a few issues).[13]

The future – in the Family Court and beyond

Since it commenced operation, the Family Court has been at the forefront of legal change in Australia. The Family Court was the first Australian Court to embrace mediation and alternative dispute resolution, and to recognise that lengthy trials do not necessarily produce the best outcomes for one or both parties. The CCP is another example of Court responding to the concern of stakeholders and recognising that traditional approaches are not necessarily the best approaches.

The CCP is "the most important step in litigation for possibly a hundred years or longer"[14] because it facilitates

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Legal update: *Solicitors v Barristers* (2005) LIV 2506

(The "Inaugural Reclink Legal Challenge Football Cup" Case, 25 June 2005)

By **Jacinta Cullum**, Solicitor, Henty Jepson & Kelly

An age-old feud between the two branches of our noble profession was sent to trial on 25 June 2005, when a team of Solicitors battled it out against a team of Barristers, in a footy match at Punt Road Oval.

The blockbuster not only raised in excess of $8000 for charity Reclink (see www.reclinkfooty.com for more info), but also some age-old questions. Would the tireless preparation and attention to detail Solicitors pride themselves on, be enough to conquer the "on your feet" experience of those from the Bar? Could these men who are known for their more for their brains, just as easily prove a point with their brawn?

Jacinta Cullum (while tending the sausage sizzle, and running out oranges at half-time) investigated the situation, and reports . . .

The parties to the dispute gave their appearances in accordance with the Rules, some running very close to the boundary line, however, sporting various strange mis-matched ensembles, others in (rather too) tight shorts or crazy coloured socks.

Umpire J commenced proceedings with a blow of his judicial whistle and the grudge match began. Despite the slippery conditions, a surprising amount of skill and enthusiasm abounded in the evidence given by both sides. However, the Barristers and their "silky skills" (pun definitely intended) had a much more convincing argument on the day, the jury coming back with a verdict in their favour.

The Solicitors were sentenced to 12 months of hanging their heads in shame, having being beaten by their be-robed opponents.

Asked to comment on their victory, one of the Barristers was quoted as saying, "We're just taking it one wig at a time".

The Solicitors have subsequently lodged an appeal, on the ground that the decision was "just not footy" (similar to the "vibe of it" precedent laid down in "The *Castle case*"). The matter is due to be re-heard at about the same time next year. Any other practitioners wishing to lend their assistance in the further hearing of the matter (in a playing, or volunteer capacity) should keep their eyes glued to all LIV publications . . . ■

Illustration: Emily Eaton

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decision making that is in the best interests of the children, and because it is a landmark example of comparative legal study transforming Australian legal processes.[15] ■

1. This article examines the role of judges in the CCP; it is not a step-by-step guide to the CCP. For a detailed description of the proceedings in the CCP program, see Justice Mark Le Poer Trench, "Children's Cases Project", 11th National Family Law Conference, Gold Coast, September 2004.
2. For obiter dicta on how children's proceedings differ from typical inter-partes ligation see *Reynold v Reynolds* (1973) 1 ALR 318 at 323 (per Mason J) and *M and M* (1988) 166 CLR 69 at 76.
3. *Family Law Act* 1975 (Cth) s65E.
4. Geoffrey Davies, "A blueprint for reform: some proposals of the Litigation Reform Commission and their rationale" (1996) 5(4) *Journal of Judicial Administration* 201; Chief Justice Diana Bryant, "The Future of the Family Court", The Third Annual Austin Asche Oration, 23 November 2004 8.
5. Standing Committee of Family and Community Affairs, House of Representatives, *Every Picture Tells A Story: Report on the inquiry into child custody arrangements in the event of family separation* (2003) 65-66.
6. Danny Sandor, "A fresh approach to children's hearings" (2004) 42(4) *Law Society Journal* 54, 54.
7. Family Court of Australia, "Practice Direction No. 2 of 2004 – The Children's Cases Program"; Le Poer Trench J, above note 1 above, 412-417; Bryant CJ, above note 4 above, 14-18.
8. Note 7 above.
9. The child must consent to being interviewed.
10. Note 7 above.
11. Note 7 above.
12. Gayle Meredith, "The Children's Cases Program pilot: was it a success and is it the way of the future?" (2005) 18(2) *Australian Family Lawyer* 11, 14.
13. Family Court of Australia, "The Children's Cases Program: News and Reviews", September 2004 2.
14. Deputy Chief Justice John Faulks, cited in Bryant CJ, above note 4 above, 5.
15. The CCP will be trialled in the Family Court of Australia at Melbourne from 3 October 2005. Participation in the CCP is voluntary and requires the consent of all parties. In order for the CCP program (or a variant of it) to become the standard process for determining children's disputes, amendments to the *Family Law Act* 1975 (Cth) are required.