

Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us

Author

Hunter, Rosemary

Published

2006

Journal Title

Australian Journal of Family Law

Version

Version of Record (VoR)

Rights statement

© 2006 Lexis Nexis Australia. The attached file is reproduced here in accordance with the copyright policy of the publisher. Please refer to the journal website for access to the definitive, published version.

Downloaded from

<http://hdl.handle.net/10072/28446>

Link to published version

<https://www.lexisnexis.com.au/en/products-and-services/lexisnexis-journals/australian-journal-of-family-law>

Griffith Research Online

<https://research-repository.griffith.edu.au>



Articles

Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us

Rosemary Hunter*

The new Pt VII Div 12A of the Family Law Act mandates a less adversarial approach to trials in child-related proceedings. The Children's Cases Pilot Program, run in the Sydney and Parramatta Registries of the Family Court in 2004–2006, provides the template for the court's less adversarial approach under Div 12A. This article discusses the findings of the evaluation of the Pilot Program, in terms of the lessons that can, and cannot, be drawn concerning the operation of less adversarial proceedings under Div 12A. It specifically addresses the types of cases that entered the Pilot Program, the achievement of better outcomes for children, the costs of the Children's Cases Program, and the new roles played by judges, solicitors, counsel, children's representatives and mediators within a less adversarial approach to child-related proceedings.

Introduction

In March 2004, the Family Court instituted the Children's Cases Pilot Program (CCP) in the Sydney and Parramatta Registries, pursuant to Practice Direction No 2 of 2004. CCP introduced a judge-managed, less adversarial, more child-focused method of dealing with children's cases, which operated after cases had completed the resolution phase in the court. After an application for final orders is filed in the Family Court, cases proceed initially to the resolution phase, during which attempts are made to assist the parties to reach agreement through conciliation and mediation. If agreement is not reached, the case then proceeds to the determination phase, the first step of which is the issuing of a trial notice, and the case will then be prepared for trial. Under the pilot program, instead of receiving a trial notice, parties could elect to enter CCP which involved, among other things, consenting to suspension of the rules of evidence, and to remaining within CCP until their matter was finalised. CCP was subsequently rolled out in the Melbourne Registry, where it was also provided on a consent basis, from October 2005.

* Professor of Law, Kent Law School, University of Kent, UK; formerly Professor and Dean of Law, Griffith Law School, Griffith University. This article is based on my *Evaluation of the Children's Cases Pilot Program: A Report to the Family Court of Australia*, delivered to the court in June 2006. I am grateful to all of those acknowledged in the report for their assistance with the evaluation, and to the court for permission to publish from it. The views expressed in this article are mine alone and should not be attributed to the Family Court of Australia.

The new Div 12A of Pt VII of the Family Law Act 1975 (Cth), introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006, mandates a less adversarial approach to trials in child-related proceedings, and the Family Court has specified that its less adversarial approach is modelled on the CCP.¹ This article examines what can (and cannot) be learned from the CCP pilot in relation to how Div 12A will or should operate.

The CCP pilot was evaluated by myself and Dr Jennifer McIntosh. The evaluation was initially intended to focus on the first 100 cases entering CCP in each of the Sydney and Parramatta Registries, but in the event, it was 'ruled off' at the end of December 2005, before all of those 100 cases had finalised. For the purposes of the evaluation, a control group was selected of cases from the Sydney and Parramatta Registries that were finalised during the determination phase in the court, at the same time as the CCP pilot cases finalised. It was not possible to select the control group from cases commencing at the same time as the CCP pilot cases, because waiting for those cases to finalise would have delayed the evaluation for a considerable period. The evaluation ultimately consisted of the following numbers of cases:

Registry	Sydney	Parramatta	Total
CCP finalised	76	92	168
Control group	76	92	168
CCP unfinalised	24	8	32

My part of the evaluation involved the following elements:

- analysis of the take-up rate of CCP in each Registry, and reasons why parties chose not to enter CCP;
- statistical analysis of the processes and outcomes of the CCP and control group cases;
- a survey of parties to finalised CCP and control group cases, the results of which were entered into a database and statistically analysed;
- interviews with a wide range of stakeholders: CCP pilot judges, their Associates, CCP case coordinators, Family Court mediators² with experience in CCP cases, solicitors, barristers and child representatives with experience in CCP cases, expert report writers with experience in CCP cases, and practitioner and client representative organisations;

¹ See the Family Court's website, <http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/main_page_less_adversarial_trials/>. See also Practice Direction No 2 of 2006 — Child-related proceedings (Div 12A). CCP-type proceedings in child-related matters are now being progressively implemented in all Registries of the Family Court. However, the Federal Magistrates Court has taken the view that its procedures already satisfy the requirements of Div 12A and it does not plan to adopt the CCP model.

² When discussing the findings of the CCP evaluation, I have used the old term 'mediator' rather than the new term 'family consultant' to reflect the situation at the time the evaluation was conducted. For the same reason, I have generally used the old term 'children's representative' rather than the new term 'independent children's lawyer'.

- analysis of the legal aid implications of CCP.

Dr McIntosh's part of the evaluation focused on the impact of CCP on parenting capacity and children's well-being, based on telephone interviews with parents in the CCP and control groups.³

The evaluation provides useful information on the likely operation of the new Div 12A proceedings. However in some respects, the CCP pilot was conducted under exceptional circumstances — eg, on a consent basis, and enjoying a considerable commitment of court resources and a high level of judicial commitment and effort — which might limit the generalisability of its results. This article sets out some of the results of the evaluation, and explores the extent to which those results are likely to be carried over into a mandatory, less adversarial regime in child-related proceedings.

The types of cases that entered the pilot

As noted above, entry into the CCP pilot was by consent, which meant that parties, and where relevant their legal representatives, had a choice as to whether or not to opt in to the program. In fact, the take-up rate of CCP was not high, with only 33% of eligible children-only cases in Parramatta and 26.3% in Sydney entering the program.

Cases involving both children and property

Cases involving both children and property issues were eligible for CCP, on the basis that the children's issues would be dealt with under the CCP procedure and the property issues would be dealt with separately. But only a handful of cases involving both children and property (11 cases in all) entered the program, as the prospect of bifurcated proceedings was a significant disincentive. In 10 of the 11 cases, the property issues settled, and in nine of those 10 the property settlement occurred at the same time or after the children's issues were resolved. However the numbers were too small to enable any kind of assumption that this would usually be the case. The CCP pilot therefore provided insufficient experience in handling cases involving both children and property to provide meaningful guidance as to how such cases might best be dealt with under a mandatory, less adversarial regime in child-related proceedings.

Interviews with lawyers and judges also revealed sharply divergent views as to how such cases should be dealt with once Div 12A came into effect. Some practitioners considered that the CCP procedure could work just as well for property matters, some considered that the two issues should be kept strictly apart, some considered that whether they should be run together or not would depend on the nature of the property issues in dispute, and some were simply puzzled and confused as to what might occur in such cases.

In the event, the evaluation simply recommended that the court issue guidelines and/or directions for practitioners as to how property matters will be dealt with where they arise in conjunction with child-related proceedings. At the time of writing, this had not yet occurred.

³ See The Hon Justice D Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *AJFL* 127.

Differences between CCP and Control group cases

Solicitors, barristers and registrars interviewed for the evaluation suggested a range of reasons why parties might have declined to enter CCP in children-only cases when offered the opportunity to do so. These reasons included:

- tactical — the party enjoying or wishing to establish a status quo would not agree to enter a process that would bring the matter to finalisation more quickly than in the ordinary course;
- concern about disadvantage to vulnerable clients — including those with a mental illness or intellectual disability, those who were intimidated by and/or fearful of the other party due to a history of violence in the relationship, those who lacked self-esteem and were very emotional and/or disorganised due to a history of emotional abuse in the relationship, and those who were culturally conditioned to gratuitous agreement;
- belief that only some kinds of cases were suited to CCP — those involving relatively simple or narrow issues, those in which the parents had a good relationship, those in which both parties were highly educated, intelligent, articulate and strong, and those in which one or both parties were self-represented — and that some kinds of cases were particularly unsuited — complex cases, and cases involving high conflict, serious allegations of domestic violence or child abuse, abduction, alienation or other serious issues of parenting capacity; and
- parties not possessing the necessary goodwill and willingness to cooperate with each other.

These reasons suggest that the cases entering CCP may have differed from those not doing so in systematic ways. While the information available did not allow some hypothesised differences to be tested, a number of differences did clearly emerge. First, while both parties were represented in the majority of cases in both the CCP and control groups, a significantly higher proportion of CCP cases than control group cases had either the applicant or both parties self-representing. Overall, 30.4% of CCP cases compared to 19.6% of control group cases had one or two self-represented parties.

Secondly, CCP cases had significantly fewer issues in dispute than control group cases (an average of 2.08 compared to 2.45 issues per case), and significantly fewer disputes about residence (75.6% compared to 85.1%) and specific issues (38.7% compared to 63.1%). Further, in the few cases with property attached, the value of the property tended to be lower in the CCP cases.

Thirdly, the McIntosh study found that parties in the control group were more likely than those in the CCP group to have been engaged in chronic, repeat litigation over contact and residence.⁴ Analysis of the reasons given in the party surveys as to why parties chose to enter CCP also revealed a

⁴ J E McIntosh, *The Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child wellbeing — Final Report to the Family Court of Australia*, March 2006, p 12.

relatively high level of child focus and interest in cooperation among these parents.

In at least some measurable respects, therefore, the CCP cases were not typical of the full range of children's cases reaching the determination phase in the Family Court. What are the implications of this? As far as could be determined, the more streamlined process achieved through CCP — fewer case events, fewer subpoenas issued, fewer affidavits filed, and faster time to finalisation — resulted from the procedure itself rather than the kinds of cases being dealt with. These features of the process were highly associated with each other, but had much lower statistical associations with case characteristics. This suggests that the streamlined aspects of the procedure should be able to be maintained when the full range of children's cases is being dealt with (subject to the caveats noted below), rather than being merely an artefact of the pilot program.

On the other hand, it is also clear that, as with cases involving both children and property, experience in the pilot program with some types of cases was limited, and the court may need to modify the basic CCP model in order to cater for these. The evaluation recommended that judges be aware of and adopt particular strategies to deal with less articulate people, people speaking through an interpreter and people from 'other' cultural backgrounds (to facilitate their participation in the process), people with a mental illness (to facilitate their participation and/or prevent disruption), and uncooperative parties and high conflict cases (increasing the level of formality and moving quickly to the final stage of the hearing and a judicial decision). Complex cases need to be dealt with flexibly according to their characteristics and needs, while in cases involving allegations of child abuse, it will be necessary to make clear the relationship between Div 12A, s 60K and the Magellan program,⁵ and to apply the rules of evidence in determining whether serious allegations are proven or whether there is an unacceptable risk of child abuse.

Cases involving allegations of domestic violence

Cases containing allegations of domestic violence pose possibly the greatest challenge for Div 12A proceedings. While CCP was premised on the view that Family Court disputes are a product of (mutual) parental conflict, and that parties need to set aside that conflict, and if possible mend their parental relationship, in order to promote their children's welfare, this premise does not hold in domestic violence cases. Rather than involving mutual conflict, such cases involve one of the parties exercising power and control over the other. In this situation, children are likely to be damaged by the abuse perpetrated by one of their parents against the other.⁶ This problem cannot be resolved by

⁵ For most of the CCP pilot period, the Magellan program was not running in Sydney or Parramatta, as the court had not secured the agreement of the NSW Department of Community Services to participate. When Magellan did commence in the Sydney area, it applied only to families living in selected areas (covered by particular DOCS offices), and also tended to be understood and deployed as a complete alternative to CCP, whereas after 1 July 2006, it became necessary to amalgamate the two. Thus, again, the pilot was able to provide little guidance on the potential relationship between Magellan and the CCP.

⁶ See, eg, L Laing, *Children, Young People and Domestic Violence*, Australian Domestic & Family Violence Clearinghouse Issues Paper 2, 2000; P G Jaffe et al, *Child Custody and*

'setting aside' the 'conflict'; rather, it is necessary to ensure the safety of the child and the abused parent from (the effects of) further abuse. Moreover, 'mending' the parental relationship would have to entail the abusive party taking responsibility for their behaviour and relinquishing control over the other party. Further, in cases involving domestic violence, the implicit premise of CCP that contact with both parents is good for children also does not hold, since ongoing contact with a violent parent is likely to be damaging to children.

In addition, women who have been targets of violence may find it extremely difficult to respond to the invitation in Div 12A proceedings to speak directly to the judge, particularly to express their concerns in the presence of their abuser. Women who have experienced or are experiencing violence often do not disclose the full scope of that experience,⁷ and may be very unlikely to explain all the reasons for their proposals for their children. When the perpetrator is sitting close to her in the same room, the target of violence is likely to be intimidated and inhibited from speaking about the violence. Moreover, women who have been subjected to sustained emotional and/or severe physical abuse are likely to have very low self esteem, be extremely emotional, angry, fearful or traumatised, and/or have difficulty ordering their thoughts.⁸ Hence, they are likely to present very poorly in court — as disordered, incoherent or emotionally fragile — often in contrast to the perpetrator, who is able to appear calm, rational, reasonable, confident and articulate.⁹ Thus, the perpetrator is more likely to be agreeable to the court, and to have their version of events believed.

Thirdly, the messages conveyed to parties in CCP to look to the future rather than the past, to focus on the children rather than on the adult conflict, and to avoid adversarialism, may inhibit a party from raising the issue of violence because to do so may appear provocative or antagonistic. This problem was inadvertently disclosed by one of the CCP pilot judges, who noted that on the first day of a CCP hearing, people are:

Domestic Violence: A Call for Safety and Accountability, Sage, Thousand Oaks, CA, 2003; N Bala, 'Spousal Abuse and Children of Divorce: A Differentiated Approach' (1996) 13 *Canadian Jnl of Family Law* 215; A B Levin, 'Comment, Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?' (2000) 47 *UCLA L Rev* 813; J McIntosh, 'Thought in the Face of Violence: A Child's Need' (2002) 26 *Child Abuse & Neglect* 229.

⁷ See, eg, H Astor, 'The Weight of Silence: Talking About Violence in Family Mediation', in M Thornton (Ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995, p 175; Keys Young, *Research/Evaluation Study of Family Mediation Practice and the Issue of Violence: Final Report*, 1996.

⁸ See, eg, H McGregor and A Hopkins, *Working for Change: The Movement Against Domestic Violence*, Allen & Unwin, Sydney, 1991, pp 100–1; K Kinports and K Fischer, 'Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes' (1992) 2 *Texas Jnl of Women and the Law* 163 at 204. This is also the basis on which expert evidence on 'battered woman syndrome' is sought to be introduced in criminal cases.

⁹ This point was made by solicitors interviewed for the evaluation, and was also made by solicitors and barristers, and borne out by my observations, in an earlier study: R Hunter, 'Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence', JSD dissertation, Stanford University, 2005. See also *T v S* (2001) 28 Fam LR 342.

very careful still about what they say and they try and be as conciliatory as possible. They try and avoid being derogatory or saying adverse things about the other party's parenting, to such an extent that on some occasions you sit there thinking, 'well, why are they here?' . . . And if you do send them outside with the mediator because you think 'well they really haven't got a dispute; I'm sure they can work it out', the mediator comes back and says, 'Well look, we've got a problem about domestic violence. It hasn't been mentioned here'.

Fourthly, a key element of the CCP model is the early identification of the issues in dispute, to which subsequent reports and evidence gathering are directed. Thus, if violence is not identified as an issue on the first day of the hearing, the context of violence and its impacts on parental behaviour and the children's wishes and well-being will then not be addressed in the Family Report and the parties' affidavits, and it will not be the subject of further evidence gathering via witnesses or subpoenaed documents.

Finally, while the court tends to rely on lawyers to protect vulnerable clients, this protection may not be effective. Not all legal representatives are attuned to issues of violence, take instructions on that issue, or act to ensure the safety of their client and the children.¹⁰ Or they may discourage their client from raising the issue of violence in court because the client risks being perceived as an 'unfriendly parent' within the terms of the new s 60CC(3)(c). Obviously, too, targets of violence who are self-representing will not be protected by legal representation.

For all of these reasons, it is arguable that a modified procedure is required in cases raising issues of domestic violence. Some, but not all, of these cases will enter the court via the new s 60K process. But there will inevitably be some matters that come to the court via Family Relationship Centres, where the issues of violence have not previously been identified, have been downplayed, or have worsened in the post-separation period. As a result, careful screening for violence by the court in child-related proceedings before they reach the determination phase is required. And where issues of violence are identified, the potential problems identified above need to be actively mitigated. That is, safety should be a priority, messages about avoiding parental 'conflict' and focusing on the future should be avoided, appropriate measures should be adopted to maximise the ability of the target of violence to convey her concerns, and the context of violence should be fully addressed in the evidential process. If there is a dispute as to the truth of the allegations of violence, consideration should be given to making an early factual determination on this single issue, if that is a necessary underpinning for the rest of the proceedings.

¹⁰ See, eg, N Seuffert, 'Locating Lawyering: Power, Dialogue and Narrative' (1996) 18 *Syd LR* 523; K Rendell et al, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family*, Womens Legal Service Inc, Brisbane, 2002 reprint, p 80; M Kaye et al, *Negotiating Child Contact and Residence Arrangements Against a Background of Domestic Violence*, Families, Law and Social Policy Research Unit, Griffith University, Brisbane, 2003, p 41; Jaffe et al, above n 6, p 38; C Dalton, 'Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities' (1997) 31 *New England L Rev* 319; R L Valenta, 'Addressing Domestic Violence: The Role of the Family Law Practitioner' (1995) 29 *Family Law Quarterly* 187; K Waits, 'Battered Women and Family Lawyers: The Need for an Identification Protocol' (1995) 58 *Albany L Rev* 1027; Hunter, above n 9, Ch 6.

Achieving better outcomes for children

The primary objective of CCP was to achieve better outcomes for children, by means of less adversarial and more child-focused court processes, and either directly or indirectly providing assistance to the parties that would enable them to parent more cooperatively in the long term. That is, rather than making value judgements about what types of post-separation arrangements are best for children (which in theory should depend upon the variables involved in each individual case), the program focused on the elements of the court process that have the potential to impact upon children's well-being. Child experts interviewed for the evaluation, for example, argued that children will be better off if the court proceedings between their parents are not prolonged, minimise adversarialism and do as little damage as possible to the parental bond. In addition, proceedings should be explicitly child-focused, provide assistance to achieve cooperative future parenting, and effectively resolve the dispute and avoid future returns to court. Children will also be better off if their parents are satisfied with the way their case was conducted and with the outcome arrived at.

Successes of CCP

The evaluation showed that many of these desirable features were achieved in the CCP pilot program. The median time to finalisation of CCP cases was around half that of the control group cases (5.4 months compared to 11.6 months). In addition, the availability of judges to deal quickly with any issues that arose during the course of proceedings helped to minimise distress or risk to children. CCP proceedings were certainly less adversarial, especially in the early stages of the hearing, and were well designed to place the focus squarely on the children. Aspects of the process that resulted in a greater child focus included the concern to find flexible, child-focused solutions, the reduction in adversarialism and early identification of issues around the achievement of a workable resolution for the child, the explicit focus by the judge and mediator on the children's needs, the enhanced role of the children's representative to develop strategies in the child's best interests (discussed further below), and the practice often adopted of commencing the final stage of the hearing with cross-examination of the Family or Expert Report writer, which helped to set the tone about focusing on the children.

CCP also had the potential in various ways to assist parties to achieve cooperative future parenting. These included: giving parties a means of communication during the early stages of the hearing; the judge and mediator helping the parties to reach an agreement and to start working together; the goodwill generated by the less adversarial, more cooperative process; the message given to parents that they are jointly responsible for resolving their problems; the education provided to parents about the impact of conflict on their children; and referrals to parenting programs and courses run by community-based organisations. The impact of these measures depended, of course, upon the receptiveness of the parties, and transformative results could not be expected in every case. But the fact that the process included these measures at least increased the chances that parents might be assisted to parent more cooperatively in future.

Further light on the issue of cooperative future parenting was shed by Dr McIntosh's component of the evaluation, which found that CCP was 'associated with greater protection of parental capacity than is the case with the Mainstream approach', and that the process appeared to create "no further harm" to the nature of [the parties'] co-parenting relationship, and to their children's adjustment, post court'.¹¹ By contrast, control group parties reported much poorer outcomes in terms of parenting relationships and children's psychological functioning. The study concluded with:

cautious optimism for the [CCP] process, from the perspective of its capacity to better respond to and safeguard the psychological vulnerabilities of the co-parental relationship, post separation than has been the case in the traditional, adversarial Family Court process.¹²

Finally, the party survey demonstrated significantly greater satisfaction with both the process and outcomes of their cases among CCP parties than among the control group parties. CCP parties were more likely to say that they had a good understanding of the court procedure, that they felt comfortable with the procedure in court, that the court listened to their side of the story and that the methods used to resolve their case were fair, and to express satisfaction with the time taken to finalise their case.¹³ They were also more likely to say that the result of the case was in their children's best interests, and to express overall satisfaction with the result of their case.¹⁴

Less successful aspects — durability of outcomes

These very encouraging findings are subject to three important caveats, however. First, the evaluation did *not* find that outcomes in CCP cases were more durable than those in the control cases. Many assume that outcomes are likely to be more durable if they are reached by means of agreement between the parties rather than judicial determination. However the rates of agreement vs determination in the CCP and control group cases were virtually identical. Fifty-seven percent of CCP cases and 55% of control group cases were resolved by agreement between the parties, while 32% of CCP cases and 33% of control group cases were resolved by judicial determination. CCP cases were somewhat more likely to be partly settled and partly determined (10% vs 4%), while control group cases were somewhat more likely to be dismissed or struck out (7% vs 1%), but these differences occurred only at the margins.

Moreover, a *higher* proportion of CCP than of control group cases experienced subsequent litigation within the evaluation period: 10% of CCP cases (n=17) compared to 4% of control group cases (n=6). In particular, CCP cases were more likely to involve subsequent contravention or variation

¹¹ McIntosh, above n 4, p 35.

¹² Ibid, p 39.

¹³ On a five point scale, where 1 = strongly disagree/very dissatisfied, and 5 = strongly agree/very satisfied, the mean scores for CCP and control group parties were as follows: good understanding of court procedure: 3.49 vs 3.00; comfortable with procedure: 3.27 vs 2.76; court listened to my side of the story: 3.32 vs 2.72; methods used to resolve my case were fair: 3.27 vs 2.61; satisfaction with time: 2.83 vs 2.10.

¹⁴ On the same five-point scale, the mean scores for CCP and control group parties were: result in children's best interests: 3.43 vs 2.90; overall satisfaction: 3.24 vs 2.69.

applications (n=12) than were control group cases (n=2). Notably, a number of these CCP cases had been settled between the parties rather than judicially determined. Further investigation found an association between early settlement of CCP cases (either at or immediately after the first hearing day) and subsequent breakdown of the orders. This suggests that parties may have experienced some pressure to settle, but in responding to that pressure, the agreement reached did not represent a workable, durable solution. The lesson to be drawn from this seems to be that judges (and lawyers) need to be careful in Div 12A proceedings not to exert undue pressure on parties to settle their cases, and that the focus should be on the *quality*, not the quantity of settlements achieved.

Future predictions and the need for further research

The second caveat is that it would be unwise to attach too much weight to the findings of the McIntosh study, as acknowledged within that study itself. The study was specifically designed to be 'exploratory', which means that its findings are suggestive rather than conclusive. In particular, the study was based on a small sample of 12% of the parents in the CCP pilot cases and 10% of the parents in the control group cases finalised during the evaluation period. At this level, the sample is unlikely to be representative. It is possible, for example, that the CCP parents who agreed to participate were those who were particularly happy with the CCP process, while the control group parents who agreed to participate were those who were particularly unhappy with the mainstream process. Indeed, there was some evidence of this in the main party survey.¹⁵ This would have the effect of sharpening the perceived contrast between the two processes, and casting the CCP process in an unusually favourable light. Further research is clearly required in order to achieve greater certainty about the impact of Div 12A proceedings on parenting capacities and children's adjustment.

The third caveat is that the speed of proceedings attained during the CCP pilot has already proved to be unsustainable. All elements of the process — initial hearing dates, the preparation of Family Reports, scheduling of subsequent, brief hearings at short notice, and final hearing dates — were expedited during the pilot, but could not continue to be expedited. By the time the final stage of the evaluation was conducted in the first half of 2006, it was becoming much more difficult to get hearing dates for CCP matters and timelines were already extending.

Two additional factors would also affect the length of Div 12A proceedings after 1 July 2006. First, the evaluation showed that the opportunity cost of having a Family Court mediator present during the first day of the hearing was to significantly extend the time taken to prepare Family Reports in non-CCP cases. Once all children's cases were dealt with under Div 12A, the distinction between CCP and non-CCP cases would disappear, and all cases would be affected by the more limited time available to family consultants to prepare

¹⁵ Compared to an earlier study of Family Court parties' satisfaction conducted in the late 1990s, the control group parties in the CCP evaluation seem to have been more disgruntled with the Family Court process. See R Hunter et al., *Legal Services in Family Law*, Justice Research Centre, Sydney, 2000, pp 56, 184, 187, 284–5.

Family Reports. Secondly, the CCP pilot judges had adopted the practice of listing short hearings in CCP cases (to deal with any problem that might have arisen, give directions on a particular issue, etc) outside normal court hours, so that the hearing of their other cases was not disrupted. But this practice had resulted in judges assuming a significant additional workload, which in many cases would be unsustainable. Ultimately, these short hearings would also have to be listed during court hours, which would put further pressure on timelines. While this can to some degree be mitigated by modifying the listing system to deal more efficiently with Div 12A cases, further delays would seem to be an inevitable result.

The question then arises of whether the benefits achieved by a less adversarial, more child-focused process will nevertheless be maintained — or will they instead be diminished or negated — by the effect of cases remaining in the court, and children's and families' lives consequently remaining in limbo, for extended periods of time. In other words, can better outcomes for children be achieved by means of a less adversarial, more child-focused, but prolonged process? In particular, it should be noted that the findings of the McIntosh study were based on the experience of expedited proceedings. Would the same results be obtained based on much slower proceedings? We simply do not know the answers to these questions. While it is clear that a court process incorporating factors such as reduced adversarialism, greater child focus, assisting parties to parent cooperatively in future, speed, and durability of outcomes should achieve better outcomes for children, the relative weight and importance of these various factors is not at all clear. Again, this is a matter that requires further research. The evaluation suggested, however, that it should not simply be assumed that the positive aspects of the CCP process would be replicated in the absence of the speed factor. Rather, it would be more desirable for the court to work towards shorter and more predictable timeframes in child-related proceedings than currently exist.

The costs of CCP

Some of the resource issues for the court created by CCP have been indicated above — in particular, the opportunity cost of having a mediator present in court on the first day of the hearing, and the unsustainable practice of judges scheduling short hearings in CCP cases out of hours. One element of the CCP evaluation was to track its resource implications for the benefit of future resource planning, while another was to determine whether CCP represented a less costly procedure for the parties involved. These elements are discussed in this section in terms of financial costs for parties, costs to the court in relation to judicial time, and the legal aid implications of CCP.

Costs for parties

In addition to the primary objective of achieving better outcomes for children, a subsidiary objective of CCP was to make children's cases less costly for the parties. While it was difficult directly to measure the achievement of this objective because information on the actual costs of the CCP and control group cases was not available for the purpose of comparison, the interviews

with practitioners included questions about the comparative costs of CCP and mainstream cases, and the party survey also included questions about the costs of their cases.

Responses from practitioners were fairly evenly split between those who thought CCP was definitely cheaper for their clients, and those who thought it was not cheaper, cost much the same, or was more expensive. Reasons advanced as to why CCP might be less costly than mainstream cases included quicker time to finalisation resulting in lower solicitor-client costs, fewer and shorter affidavits, fewer court events, fixed times for attendance which are adhered to, resulting in less time wasted in waiting and not being reached, shorter final stage hearings, and less need to brief counsel for hearings. On the other hand, reasons advanced as to why CCP might be no less or more costly included the extra work and cost involved in the solicitor preparing the client for the first day of a CCP hearing (discussed further below), greater expense of briefing counsel from the first hearing day, the cost of short, piecemeal hearings between day one and the final stage, especially if the solicitor and/or barrister charged a full day's appearance fee for each one, and the need under the pilot scheme for parties in regional areas to travel to Sydney for hearings rather than having the case dealt with locally.

The party survey revealed that the promise of a cheaper process was the major attraction of CCP for 11% of respondents who chose to enter the program. Among those responding to the survey who were self-funding (ie, legally represented but not in receipt of legal aid), the cost of CCP cases did appear to be lower than the cost of the control group cases (CCP average \$15,780, maximum \$80,000; control group average \$40,614, maximum \$350,000). However, there was no difference between the CCP and control group parties in their subjective assessment of the amount of money they had paid for their case. Sixty-nine per cent of both groups thought the amount of money they had spent on their case was too high. By contrast, self-representing litigants in CCP were more satisfied with the cost incurred in their cases than were self-representing litigants in the control group.

In summary, it appears that CCP-type proceedings may represent an objectively cheaper process for the majority of litigants, but this does not necessarily translate into subjectively greater satisfaction with costs. Most self-funding parties to children's cases continue to believe that the costs of family law litigation are too high.

Judicial time

Key differences between the traditional court process and the CCP procedure were that the parties appeared before a judge immediately after entering the determination phase, that the same judge dealt with the case from then on until the point of resolution, and that the process was judge-managed rather than controlled by the parties. The judge's role in CCP was thus both qualitatively and quantitatively different from his or her role in traditional adversarial proceedings. One question that arose, therefore, was whether the quantitative difference was positive or negative. That is, did judges spend more or less time in CCP cases than in traditional adversarial proceedings?

Some of the lawyers interviewed as part of the evaluation assumed that the presence of the judge at an earlier stage and throughout the discontinuous

hearing inevitably meant that CCP would consume much greater judicial resources. Consequently, with the advent of Div 12A, timelines in the court would blow out even further, or the court would be compelled to return to the traditional system of having registrars deal with the matter prior to the final stage of the hearing. On the other hand, the theory of CCP was that greater judicial involvement would be offset by the fact that hearings would involve fewer actual court dates, and those court events would be shorter. Thus, CCP might be cost neutral in this regard, or might even achieve some judicial time savings.

In relation to judicial time, the evaluation attempted to investigate both hearing time and time spent in chambers. Hearing time in CCP and control group cases was systematically recorded. But it proved far more difficult to gain an accurate record of the time spent by the CCP pilot judges in chambers, in tasks such as preparation and judgment writing, in their CCP and non-CCP cases. Attempts to gain systematic accounts of the tasks undertaken during even sample periods of time proved impossible, and judges' impressions of this aspect of their workload varied. One judge, for example, was convinced that the cumulative time spent on CCP cases was considerably less than that spent on non-CCP cases, because the initial documents in CCP cases were slim, and those filed subsequently were more concise because the issues were narrowed and the evidence tightly controlled. A second judge, on the other hand, thought that after the first day, the amount of preparation time evened out between CCP and non-CCP cases. Other judges had little interest in this question and provided limited or no information. What did emerge were widely varying practices between judges in the way they scheduled and handled work in chambers, which are likely to vary even more among all of the Family Court judges, making generalisations impossible.

The problem of generalisation between judges also arose in relation to time in court. As noted above, CCP cases involved fewer court events, on average, than the control group cases. The figures on events and judicial time in CCP and control group cases are set out in the following table:

Time measure	CCP	Control
Number of events	654	1488
Proportion of events conducted by judge	85.9%	33.5%
Number of judge events	562	498
Total duration of judge events (minutes)	51,445	73,454
Average judge time per case	306	437

It can be seen that overall, the prediction that CCP would be at worst cost neutral and might even result in judicial time savings was correct. Although judges conducted a much higher proportion of events in the CCP cases, those events took less time overall, and hence the average judge time per case was more than two hours *lower* in the CCP cases.

But this average position did not prove robust under further investigation. First, the picture varied between the two CCP pilot Registries. While overall, judges conducted 33.5% of events in the control group cases, the figures for Sydney and Parramatta were 18.2% and 45% respectively. This is a substantial

difference. It might be expected, therefore, that a Registry in which judges normally conducted a low proportion of events in children's cases would experience less judicial time savings within CCP than one in which judges conducted a higher proportion of events. Indeed, when broken down by Registry, the average time saving in CCP in Sydney was only 30 minutes per case, compared to the average time saving in CCP in Parramatta of five and a half hours per case.

The picture became even more complicated when the figures were broken down to the level of individual judges. Average judge time per CCP case varied substantially between the five pilot judges, ranging from 165 minutes to 388 minutes. Moreover, since the CCP pilot judges were hearing CCP cases 'part-time', and also hearing mainstream cases at the same time, it was possible to compare the time they individually spent on their CCP and control group cases. From this comparison, it emerged that three of the pilot judges spent less time on average in their control group cases than they did in their CCP cases. For these judges, therefore, CCP represented a time cost rather than a time saving.

Interestingly, too, among the control group cases, those run by the CCP pilot judges tended to take less time on average than did those run by non-CCP judges. This raises the possibility that the CCP pilot judges were particularly efficient, so that the pilot figures are not necessarily representative of what might occur when all judges are running Div 12A cases.

For all of these reasons, therefore, the CCP pilot provides very little basis for determining the likely judicial resource impact of Div 12A. We can only say that the impact of Div 12A proceedings on judicial time is likely to vary dramatically by Registry and between individual judges. The 'bottom line', of course, will be experienced by parties and their lawyers at the level of each Registry, subject to whatever resource-shifting (in terms of judges moving between Registries) is necessary or possible for the court to achieve. Whether there is overall neutrality, savings or costs in terms of judicial time remains to be seen.

Legal aid

For the CCP pilot, the Legal Aid Commission of NSW devised a specific grant structure for solicitors and children's representatives in CCP cases. The structure involved an initial lump sum grant for the first day of a hearing, equivalent to six hours' work by a solicitor; an intermediate, time-based grant for ongoing work on the CCP matter, paid at an hourly rate; and a grant for the final stage of a hearing, at the standard daily rate for solicitors or solicitor-advocates. Grants of aid were also available for counsel, at the standard daily rate, for the final stage of the hearing only. Presumably, Legal Aid Commissions in other states and territories will adopt similar structures for legal aid payments in Div 12A proceedings.¹⁶

¹⁶ For example, the Legal Aid Queensland Grants Handbook sets out a slightly differently structured fee scale for CCP cases, at <<http://www.legalaid.qld.gov.au>> (accessed 24 October 2006), while the Victoria Legal Aid Handbook refers to the fee scale adopted for CCP cases, but details could not be located on the website, at <<http://www.legalaid.vic.gov.au>> (accessed 24 October 2006).

The pilot program, unfortunately, did not provide a sufficient basis for determining the impact of CCP on the family law legal aid budget. First, children's representatives were appointed less often in CCP cases than in control group cases (46% vs 55%), but this may have been a product of the types of cases that went into CCP on a voluntary basis, as discussed above. In particular, the appointment of a children's representative was significantly related to the number of issues in dispute. Thus, the proportion of cases involving an independent children's lawyer under Div 12A may be very similar to that in mainstream proceedings prior to 1 July 2006.

Secondly, a number of the CCP parties were recorded as having received a grant of aid, but not a CCP-specific grant. The best interpretation of this data was that parties either had legal aid grants before entering CCP and continued with those grants, or that solicitors were not aware of the different grant structure for CCP and applied for regular grants of aid. Taking those cases into account, the proportion of CCP and control group cases in which neither party received a grant of aid was the same (50%). In cases in which at least one party received a grant of aid, CCP cases were more likely to have only one party aided, while control group cases were twice as likely to have both parties aided (23% vs 11%). However this again may have been an artefact of the type of cases that entered CCP on a voluntary basis, particularly the fact that the CCP group included a higher proportion of cases in which both parties were self-representing. Once more, therefore, the level of legal aid grants under Div 12A is likely to closely resemble the level of grants in mainstream proceedings aside from CCP.

The fact that a number of CCP parties had non-CCP legal aid grants also made it difficult to determine the average size of grants of aid in CCP cases, and hence to compare them to the average size of grants in non-CCP cases. At the time the evaluation concluded, the Legal Aid Commission had not yet been in a position to calculate the financial impact of CCP. Anecdotally, it was thought that CCP cases might be less costly for Legal Aid due to earlier resolutions and shorter final stage hearings. If so, there could be an argument for revising the Commonwealth family law legal aid guidelines to expand eligibility for grants of aid in child-related proceedings, particularly in order to ensure that the guidelines are congruent with the aim of achieving better outcomes for children (something which the current legal aid guidelines, means and merit tests do not prioritise). But this is speculative, and the overall legal aid impact of Div 12A proceedings remains to be determined.

Roles

The final aspect of CCP discussed in this article is that of the roles adopted by judges, solicitors, barristers, children's representatives and mediators in the process. Clearly, a less adversarial, more child-focused, judge-managed process involves, to some extent, a reinvention of roles in litigation. How, then, were these various roles formulated under the pilot program, and what can this tell us about roles in Div 12A proceedings?

Judges

The approach, skills and personality of the judge assumed a particular importance in CCP cases, because of their much more active role in managing

the process, interacting with the parties, defining the issues, determining which documents could be filed and which witnesses called, specifying the scope of reports, and controlling the course of the final stage of the hearing. The point that emerged most clearly from interviews with practitioners and court staff with experience in CCP, and with the pilot judges themselves, was that different judges did things differently. They were more or less (in)formal, more or less controlling and directive of proceedings, more or less keen for parties to reach agreement or to engage in programs run by community-based organisations, allowed more or less of a role for parties' representatives, were more or less flexible in relation to the set of issues identified on the first day, and so on.

Two points follow from this. First, the experience of CCP for parties and their lawyers depended to a considerable extent on the judge before whom they were appearing. If unchecked, this is likely to be replicated on a large scale with the national implementation of Div 12A proceedings, with attendant problems of unpredictability and uncertainty. Clearly, practitioners appearing regularly in the court would become familiar with the different styles and approaches adopted by the judges in the Registries in which they practice, but parties might be surprised to find that information provided about the operation of CCP does not match their experience, or dismayed to strike a judge whose style they find very difficult to work with.

Secondly, the model of CCP adopted by the two Parramatta pilot judges appeared to strike a 'happy medium' between the traditional judge's role and the CCP culture of the judge being more directive and directly involved. Practitioners with experience in the Parramatta Registry were almost unanimous in their endorsement of this model, which thus appears to represent 'best practice' in CCP. The evaluation in fact recommended greater standardisation of Div 12A proceedings around the approach taken by the Parramatta judges, in order to build upon experience in the pilot program.

In one respect, however, the CCP pilot provided very little guidance in relation to the judicial role, and that was with regard to the interviewing of children. While the CCP and now Div 12A Practice Directions provide for the possibility of judicial interviews with children,¹⁷ this occurred in only a handful of CCP cases. Some of the pilot judges were very reluctant in principle to engage in interviewing of children, taking the view that they were not adequately trained to do so, and could be (more) adequately informed about the child's wishes and views via the Family Report and/or the children's representative. Other objections to judicial interviews with children expressed by interviewees included concerns about the pressures parents might bring to bear on their children in such cases, concerns to insulate children as far as possible from court proceedings, concerns that children should not be made to feel responsible for decisions about their future, concerns about what would happen if the child made a disclosure to the judge that had not previously been made to anyone else, and concerns about lack of transparency and denial of natural justice to the parties.

The CCP cases in which judges did interview children involved different circumstances and the interviews were conducted for different purposes. One

¹⁷ Practice Direction No 2 of 2004, s 5.21; see now Practice Direction No 2 of 2006, s 9.2.

situation was where there was a narrow question concerning the children's views, and no children's representative. Rather than ordering a Family Report and waiting a considerable period of time for the result, the judge decided to speak directly to the children, and did so with a mediator present. The second situation was where the judge offered children the opportunity to speak to them if they wished. While most children declined this offer, the children in one case had decided to take up the opportunity. Again, there was a mediator present, and the discussion included agreement on what the children's parents would be told about the interview, with no option for anything to be kept 'secret' between the judge and the children. The third situation involved a breakdown in the relationship between two siblings, each of whom was aligned with one of their parents. The judge offered to mediate between the siblings, considering that a rapprochement between them would materially advance the matter. They agreed to participate, the parents consented, and once more, a mediator was present during the interview.

Thus, while the purpose of the interview in the first situation was evidence-gathering, the second was to provide a forum for the children to express their views to the judge if they wished, while the third was to mediate between the children. Arguably, only the second of these purposes provides a legitimate basis for judicial interviews with children. In the first instance, the judge could have obtained the children's views via the mediator without having to be present themselves. In the third instance, the judge stepped outside the judicial role and assumed the role of a 'helping professional' in attempting to resolve the family situation.

The limited experience of the CCP pilot program and the objections raised in the evaluation interviews suggest that the court should place more extensive boundaries around judicial interviews with children than are currently specified in the Practice Directions. These might include specifications as to the purpose of interviews (to allow children to be heard if they wish, rather than for forensic or diagnostic reasons), the need for both parents' consent, and for consultation with the independent children's lawyer if there is one, the age and level of maturity of children who may be interviewed, a requirement for a family consultant or independent children's lawyer to be present, and the provision of judicial training prior to the conduct of any interviews.

Solicitors

Solicitors interviewed for the evaluation described various new tasks and functions involved in CCP, including educating clients about the objectives of the program, particularly the need to focus on their children; preparing clients to address the judge on the first day of the hearing, and to answer any questions that might follow; picking up on areas that the client may have omitted when addressing the judge, and ensuring the judge is aware of the client's position on preliminary issues; participating in the identification of the issues to be addressed and evidence to be called; and generally assisting and supporting clients in court, giving advice, protecting them, and guiding and helping them to contribute to discussions with the judge. It was noted that solicitors need to put in greater effort early in a CCP case, in preparation for the first day of hearing. This can include explaining the process to the client and preparing them to participate, helping the client to complete the

questionnaire, and the solicitor gaining a detailed knowledge of the matter so as to be able to prepare a draft list of issues, indicate which witnesses might be called and what evidence they will give, and to make submissions on any issue that might be determined by the judge on the first day. Thereafter the solicitor's role tended to settle into a more familiar pattern.

While Parramatta solicitors generally expressed themselves to be satisfied with their role in CCP cases, some Sydney solicitors raised concerns about feeling marginalised in the process, with judges giving them little opportunity to participate, particularly in the early stages of a case. This had engendered some frustration. For example, if the judge was interested in hearing only from the parties and made the lawyers appear superfluous, clients started to ask 'What am I paying you for?'. This issue seems to have been borne out in the party surveys, with CCP parties who were dissatisfied with the cost of their case slightly more likely than control group parties to attribute this problem to the fees charged by their solicitors. The Parramatta experience suggests, however, that lawyers have a key role to play in CCP-type proceedings, and can very much facilitate the process, as indicated in the list of new tasks and functions set out above.

Counsel

As noted earlier, one factor that could make CCP more expensive for parties was if counsel was briefed from the first day of the hearing. In theory, since the hearing started on day one and everything said from that point onwards was received into evidence, there was a need for counsel to be present from the beginning. On the other hand, a party's financial circumstances might preclude this, and Legal Aid would not fund counsel until the final stage of a hearing. In particular, the short mentions, directions hearings and relistings that might occur between day one and the final stage of a hearing did not sit easily with the way counsel traditionally operate. The ability to deal with cases progressively and as matters arose was one of the strengths of CCP, but if a client wanted counsel present for a 45 minute hearing and that prevented the barrister from committing to any other work that day, then the client would be charged for a day's work, which would quickly escalate costs. A couple of barristers said that they might negotiate a reduced fee in such circumstances, but this had financial consequences for them. This issue may be alleviated after the advent of Div 12A, since if all children's matters are dealt with in the same way and according to a predictable listing procedure, it may be possible for barristers to schedule several short hearings per day and charge accordingly. But another difficulty was the logistical one that such hearings tended to be listed at relatively short notice, so that the barrister briefed in the matter might already be booked at the time. It is harder to see how this problem will be alleviated under the mandatory regime.

There was also a view that counsel's involvement was unnecessary in the early stages of a CCP case, whereas in the final stage they could perform their traditional role of leading evidence, cross-examining and making submissions, subject to a (greater or lesser) degree of judicial direction and intervention. Two kinds of concerns were raised about reserving counsel's appearances for the final stage of the hearing, however. The first was that in the early stages, a particular, less adversarial culture and dynamic had been built up, issues

identified, and a relationship established between the parties and the judge. But the advent of counsel reintroduced adversarialism and formality into proceedings, and counsel often wanted to run the case like an ordinary hearing, and needed to be reminded that the judge was in charge and that the parameters had been set by the previously identified issues. This requires barristers to become more familiar with CCP-type proceedings, and also for the judge to set the tone at the commencement of the final stage of the hearing, and to adopt strategies (such as the removal of wigs, barristers remaining seated, etc) to reduce formality.

The second concern was that counsel did not have ready access to records of previous events, evidence and decisions in the case. This was a particular problem in CCP given that everything said during previous events had been taken in evidence, and previous decisions may have finally disposed of some issues. In addition, decisions about how the final stage of the trial should progress had been made in counsel's absence, creating potential difficulties in the presentation of their client's case. Solicitors can, of course, take detailed notes and brief counsel accordingly, but this does not ensure complete coverage if parties have been unrepresented for some or all of the prior proceedings. If this continues to be a problem, it would be useful for the bench sheets prepared by judges' Associates for each hearing, setting out a summary of the evidence, the issues identified, and any orders made, to be routinely made available to parties and their legal representatives.

Children's representatives

Unlike the position of solicitors or counsel, there is some specification of the role of the independent children's lawyer in the current Div 12A Practice Directions.¹⁸ In the evaluation interviews, there was general agreement that children's representatives had an enhanced and more proactive role in CCP. This might include much more early preparation, including meeting with the children, preparing a list of issues, considering what report(s) might be needed, investigating the availability of experts, considering what subpoenas to issue, and determining what position to take in relation to the parties' proposals. There also appeared to be greater judicial reliance on the children's representative in identifying the issues needing to be addressed and in 'setting the agenda' for the court. In addition, the children's representative might be expected to facilitate discussions between the parties, arrange counselling and other referrals to community-based organisations, issue subpoenas, call witnesses and otherwise obtain information requested by the court, and/or to maintain a 'watching brief' on the child's life.

While some argued that the role of a children's representative had become more interesting and rewarding under CCP, others felt that it had become more onerous (and insufficiently remunerated), and less predictable, with different judges having different expectations of the children's representative. There were also concerns that rather than allowing the children's representative to perform an independent investigative role, some judges tended to use them as a 'research tool of the court' or as a management tool, being more directive towards them and dictating their role. Once again, the 'Parramatta model' of

¹⁸ Practice Direction No 2 of 2006, s 11.

CCP appeared to have struck an ideal balance in this regard, with judges expecting the children's representative to be more proactive, but avoiding the pitfalls of unpredictability, directiveness, and incursions on independence.

Mediators

As noted earlier, Family Court mediators had a significant new role during CCP due to their presence in court on the first day of the hearing. While this role was initially trialled in Sydney, with Parramatta adopting a more targeted/strategic approach to the use of mediators in court, it ultimately became a universal element of the CCP model. This role involved reading the file in preparation for the hearing, listening to the parties speak in court, and often commenting generally on issues raised by the parties at the judge's invitation. In some cases, the mediator would be asked to conduct separate discussions with the parties in the absence of the judge with a view to facilitating agreement, and to report back to the judge after those discussions had taken place. The mediator also participated in the identification of issues to be taken forward and decisions about whether and if so what kind of report may be needed, and the issues to be addressed in the report. The same mediator then prepared the Family Report, if one was ordered, and it was possible that mediators might also be involved in some degree of post-order supervision. As with independent children's lawyers, the role of 'family consultants' (as mediators have been renamed)¹⁹ is now partially specified in the Div 12A Practice Directions.²⁰

Some initial concerns were raised about the relationship between judges and mediators in CCP cases, but these seem to have been largely resolved during the course of the pilot. In particular, it was recognised that invitations to the mediator to comment on any issues emerging from what the parties had said should be open-ended rather than directive. In some circumstances, the mediator might consider it inappropriate to comment at all. And the judge should not, for example, suggest that the mediator talk to the parties about the damaging effects of conflict on children, as the mediator may consider that such a discussion would be inappropriate in the circumstances. In addition, it was recognised that the judge should invite the children's representative to speak (also in an open-ended way) before the mediator, as they might have important information to contribute that would influence the mediator's intervention.

The involvement of the mediator on the first day allowed the parties to hear a different professional perspective from that of the judge, could have an educative function through the provision of general, expert information about children's best interests, provided another source of insights and ideas for resolving the matter, and assisted in focusing on the children's needs. Interviewees generally reported that parties listened intently when the mediator was speaking, and responded positively. Even if what mediators said was quite confronting, there was a sense that they were accorded respect because of the authority invested in them by the judge. The majority of lawyers interviewed considered that the involvement of mediators on the first

¹⁹ See Pt III of the Family Law Act 1975, as recently amended.

²⁰ Practice Direction No 2 of 2006, s 12.

day was valuable and beneficial to the parties. They commented that mediators were educational and informative, impartial, friendly, even-handed and perceptive. Their involvement helped to focus the parties' attention on their children, and the information they gave about various options could help the parties to achieve an agreement on interim orders.

The remaining concern raised by mediators was, once again, that of different expectations from different judges, which were sometimes difficult to manage. In particular, expectations varied around mediation sessions on the first day of the hearing. Some judges invariably sent the parties out for separate discussions with the mediator, while others rarely did so, or did so only if they considered it would be fruitful. The latter appears to be the better practice, particularly in light of the evidence noted above concerning undue pressure to settle on the first day and the tendency of early settlements to break down. On the other hand, separate discussions without pressure to settle could be quite valuable in bringing up additional information and helping to refine the issues. In some cases, as suggested above, parties raised quite important issues in discussions with the mediator that had not been mentioned when speaking to the judge.

Some of the mediators interviewed also commented that having spent time in court on the first day was helpful when it came to doing the assessments for the Family Report. Under the Child Responsive Dispute Resolution Program currently being piloted in the Melbourne Registry of the court, this link between the parties and a single family consultant will be extended to the resolution phase,²¹ which also has the potential to enhance the value of the family consultant's input on the first day of the hearing, since they will have prior knowledge of the family and the particular issues involved.

While mediator involvement in CCP appears to have been a valuable addition, this also had resource implications and opportunity costs, as noted above. How the court will balance the use of family consultants within Div 12A proceedings will be a further challenge.

Conclusion

The CCP evaluation provided much valuable information as to how child-related proceedings under the new Div 12A of Pt VII of the Family Law Act might operate, and the likely impact of those proceedings on all those involved, particularly parties and their children. Nevertheless, there were a number of limitations of the pilot program, and of the evaluation, that make it difficult to predict what will happen in future. These relate to the handling of cases and parties with particular characteristics that may have excluded them from the pilot program, the timing of Div 12A proceedings and the impact of delays on other benefits of the new procedure, and the costs of Div 12A proceedings to parties and Legal Aid, and to the court in terms of judicial and family consultant resources.

The pilot provided a good indication of new roles for judges, solicitors, counsel, independent children's lawyers and family consultants within Div 12A proceedings, as well as identifying some clear pitfalls to be avoided.

²¹ See the Family Court's website, above n 1, 'Less adversarial trials'.

It is hoped that some standardisation around 'best practices' will occur, rather than a great diversity of practices and approaches within the broad parameters provided by the legislation and the Practice Directions.

It is also hoped that further research will be undertaken to provide a firmer basis for understanding the impacts of the new procedures and whether they do, in fact and over the longer term, provide a significant improvement over other methods of dealing with children's cases. With the proliferation of processes in disputes over post-separation parenting, from Family Relationship Centres to the different approaches taken by the Federal Magistrates Court and the Family Court to Div 12A, the need for an evidence base underpinning procedural experimentation and reform is stronger than ever.