Introduction

Family Group Conferences are a vital ingredient in both the care and protection and youth justice processes. This paper will examine the statutory scheme that conferences play in judicial decision making and will highlight those aspects of conference outcomes that Judges most want to see. The paper will furthermore examine what Judges do when conference outcomes seem inadequate, or are unable to be properly implemented in the course of declarations, reviews, and youth justice cases.

I will also look at the possibility of introducing the Family Group Conference model into two other areas of work of the Family Court. The first is in the conciliation branch of childcare disputes. The legislation places great emphasis on the Court involving children in decisions that affect them. However most decisions are made by the parents through conciliation without the involvement of the Court itself, and there is no formal way to ensure children are involved during this process. The Family Group Conference may be a successful way of involving children during conciliation, and also a way to involve other family members who can play a part in the child’s upbringing.

We should also consider the implications of using a conferencing model for the resolution of some family violence cases. Currently the focus is on keeping the victim and perpetrator completely separate. However there may be benefits through involving the wider family of both the victim and the perpetrator. Families can provide the best protection, and in many cases it is
in fact families that really keep victims safe. A conference involving all of those connected with the parties may yield the most reliable solution.

Family Group Conferences in Context

The Family Group Conference (“FGC”) was a wholly new concept when introduced in 1989. The aim was to take power out of the hands of the State and judiciary and place it with the family and whanau. The intention is that families undertake the responsibilities of childcare as much as possible, with State intervention kept to a minimum.\(^1\) Section 13 of the Children Young Persons and Their Families Act (“CYPF Act”) states that the primary role for caring for a child lies with that child’s family, whanau, hapu, or iwi. Those people are to be assisted in that role, and any intervention by the state must be to the minimum level necessary to ensure a child’s safety and protection.\(^2\) Section 5(a) instructs that wherever possible, a child’s family should participate in decisions, and regard should be had to their views. Section 4(b) emphasises that State agencies exist to assist families discharge their responsibilities to prevent children suffering harm, neglect or abuse.

The United Nations Convention on the Rights of the Child (“UNCROC”) is also pertinent. UNCROC now underpins many of the family law statutes in New Zealand, and is accepted as a useful tool for interpreting the CYPF Act.\(^3\) It is the most widely adopted human rights instrument ever written, with only the United States and Somalia yet to ratify it.\(^4\) New Zealand has, by ratifying the Convention, taken on a responsibility to adhere to it.\(^5\) The Court of Appeal has said that the CYPF Act is not inconsistent UNCROC.\(^6\) For example, article 18 of the Convention states that parents and guardians have the primary responsibility for the upbringing of their children, and that States shall provide appropriate assistance through the development of institutions,

\(^1\) see the long title of the Children Young Persons and Their Families Act
\(^2\) ss13(b)(i) and 13(b)(ii)
\(^3\) Child Youth and Family v JFM [2005] NZFLR 905, [18]
\(^4\) http://www.unicef.org/magic/briefing/uncorc.html (last accessed on 31 October 2006)
\(^5\) Tavita v Ministry of Immigration [1994] 2 NZLR 257, 266
\(^6\) B v DSW (1998) 16 FRNZ 522, 525
facilities, and services for the care of children. This mirrors the principles of the CYPF Act.

The FGC is the primary mechanism by which the principles of the Act, and New Zealand’s obligations under UNCROC, are put into practice. The FGC enables a child’s family to be primarily responsible for the direction of their children’s care, while assistance is provided as necessary from the State.

**The FGC in the Judicial Process**

The functions of a family group conference are threefold. They are:

(a) To consider such matters in relation to the care and protection of the child or young person as the conference thinks fit.
(b) To make decisions or recommendations and to formulate plans.
(c) To review decisions, recommendations, and plans and their implementation.⁷

The Chief Executive of the Ministry of Social Development must then give effect to the decisions, recommendations, and plans of an FGC by providing services and resources and action as necessary, unless it is clearly impractical or inconsistent with the principles of s5, 6, and 13.⁸

The Court is not involved in every case, but once an application is before the Court, it is ultimately for the Court to determine what is required for the protection of the child, and what is in the best interests of the child.⁹ The Court is not bound to follow the decisions or plan formulated by the FGC. However it is very rare that the Court does not adopt the decisions of an FGC. It is clear from the principles of the Act that the FGC is to retain as much decision-making power as possible. In this way the family can remain in control, with the Court taking an oversight role to ensure the child receives

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⁷ s28 CYPF Act
⁸ s34 CYPF Act
⁹ see *DGSW v H and S* [1991] NZFLR 373, 375
sufficient protection, only stepping in further if required. FGCs are fundamental to initiating the Court process. No application can be made for a declaration that a child is in need of care and protection, and the Court cannot make a declaration, until an FGC has been held.\textsuperscript{10} There are exceptions to this but they are quite limited. So although the Court becomes ultimately responsible once involved, the FGC remains highly significant and the Court will seek to have an FGC set the direction of any care plan.

In \textit{Re Children}\textsuperscript{11} it was said that there is a clearly defined point where the responsibilities of the Department and the family end and the Family Court’s responsibilities begin. While the decision of the FGC or the recommendation of the social workers will no doubt in many cases be very influential, in the end the Court must decide the issue, taking into account the principles of ss4 and 5, and the welfare of the child. This is a safeguard against the FGC coming to a binding decision based on an imperfect grasp of the facts, or on expediency, or disproportionally influenced by a sense of family loyalty. It is also a safeguard against the uncritical acceptance of fashionable or ephemeral ideals. The decision of the FGC indicates what the family will accept, but it does not follow that the decision is necessarily in the best interests of the child or young person, which is ultimately what the Court must be convinced of.

So what constitutes a good FGC outcome where the Court can simply adopt the FGC plan, and further, in what situations will the Court need to go beyond the plan?

The first aspect is ensuring good participation. A plan will be potent if a wide range of family and others closely connected to the child, along with appropriate professionals, have input into the conference.

\textsuperscript{10} ss70 and 72 CYPF Act
\textsuperscript{11} (1990) 6 FRNZ 55
**Invitation and Preparation**

The person responsible for organising an FGC is the Care and Protection Co-ordinator, or the Youth Justice Co-ordinator, depending on the type of proceeding. Those entitled to attend care and protection FGCs, and thus must be invited by the Co-ordinator, are:

- a) The child or young person.
- b) A parent or guardian of, or a person having the care of, the child or young person.
- c) A member of the family, whanau, or family group.
- d) The Care and Protection Co-ordinator.
- e) Where there is an FGC after a report under section 18(1) from a Social Worker or a member of the Police, that Social Worker or member of the Police, or any Social Worker or member of the Police who is acting for that person.
- f) Where the conference has been convened on the basis of a referral of a matter under section 19(1)(a) of this Act by any body or organisation, a representative of that body or organisation.
- g) Where the conference relates to an agreement about who should have the care of the child under s145, a representative of the person who has the care of the child, or who it is proposed should have the care of the child.
- h) If the child or young person is under the guardianship of the Court under the Care of Children Act 2004, any person appointed as agent for the Court under that Act, or any representative of that person.
- i) Any barrister or solicitor or lay advocate representing the child or young person.
- j) Any person whose attendance at that conference is in accordance with the wishes of the family, whanau, or family group of the child or young person as expressed under section 21 of this Act.\(^\text{12}\)

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\(^{12}\text{s22 CYPF Act}\)
“Family group” is defined very broadly in the Act, including extended family which the child has either a biological or significant psychological attachment to, or members of the child’s whanau or culturally recognised family group.\(^{13}\) The aim is to have everyone present who has a significant connection with the child. This will differ in every case, so the co-ordinator must consult the child and their family to establish who should be invited to participate in the FGC.

No emphasis should be given to biological family over those with whom the child has a significant attachment.\(^{14}\) The people with whom the child is most connected, regardless of blood ties, will be able to make the best decisions and provide the best possible outcome for that child.

The co-ordinator must ascertain the views of anybody who should be at the conference but is unable to attend and make those views known at the conference.\(^{15}\)

It is also important to have a range of professionals present to provide the family with the assistance they require from the State or non-government organisations. This could be experts on education, substance abuse, or a psychologist. This enables the family to get professional guidance on the areas where their children are most in need of support, and will result in a good plan that is likely to have a real impact.

As far it is practicable and consistent with the principles of the Act, the wishes of the family, whanau, or family group are to be followed when deciding on the practical aspects of the conference such as venue and date, who should attend (subject to s22), and the procedure to be followed.\(^{16}\) While there is a discretion for the family to decide on their own procedure, a good conference procedure must conform with the principles of natural justice,\(^ {17}\) such as a fair

\(^{13}\) s2 CYPF Act

\(^{14}\) see CMP v DGSW [1997] NZFLR 1, (1996) 15 FRNZ 40

\(^{15}\) s24 for care and protection proceedings, and s254 for youth justice proceedings

\(^{16}\) s21 CYPFA

\(^{17}\) Family Law Service, Children, Young Persons, and Their Families, 6.561
chance for input from all participants, and allow for the principles of the Act to guide the outcome.18

The importance of the family’s role and attendance at an FGC can be starkly seen in Application by A.19 It was held that an FGC cannot be held without any family members present. This is crucial, as unless one of the limited exceptions is made out, for example in matters of urgency where an interim custody or restraining order is warranted, an application for a declaration cannot be made unless an FGC has been held, and the Court cannot make a declaration unless an FGC has been held.20 In Application by A, the FGC was said to be an essential step in care and protection proceedings. At the heart of the Conference its membership is exclusive to family and outsiders present by invitation of the family. It was held to follow that:

“The Act then, does not provide for the case where a Conference is convened and no family members attend, because there cannot be a Conference without family members.”

In this case the FGC could not be held because no family members were willing to attend and carry out the functions of the FGC. The Judge did not believe that the Act provided protection for the child unless one of the limited exceptions arose which would give the Court jurisdiction under s70.

This decision has been distinguished in Youth Court proceedings by the High Court in H v Police.21 In H v Police the High Court said that the over-arching thrust and concern of the legislation is to involve young peoples’ families as much as possible in any resolution of the situation once it is either admitted that an offence has been committed, or that is proved at a hearing. However FGC attendance is not compulsory. Family members may very well elect for their own good reasons not to take part. It is sufficient to establish jurisdiction

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18 ss28, 29, and 260 CYPF Act, and Child Law, Family Group Conferences, NT5.1.02
19 [1990] NZFLR 97, alt cite Re a Child (1989) 6 FRNZ 44
20 ss70 and 72 CYPF Act
21 [1999] NZFLR 966
in the Youth Court if the opportunity to attend a conference has been properly
given, and a conference convened. It was not the intention of Parliament that
a young person or their family could avoid the laying of an information in
respect of alleged offending simply by staying away from a conference and
then arguing that because of their absence no conference had taken place. In
this case a conference convened and attended by a youth justice co-ordinator
and a youth aid police officer was able to make valid decisions, as the
opportunity to attend had be given to the family. In Application by A no
conference had been convened as the family had made it clear that no matter
where or when it was, they would not be attending.

If the interpretation in Application by A is correct, it seems as though the
family can prevent a declaration that a child is in need of care and protection
being made by refusing to attend an FGC. Similar reasoning to that in H v
Police may apply to care and protection cases. The family is to be given
every opportunity to direct the decision-making process but if they refuse this
opportunity, the State must be able to take over and protect the children. Just
as it cannot have been the intention of Parliament for a family to be able to
prevent an information being laid, it cannot have been the intention of
Parliament that a family could wilfully prevent the protection of a child.

With such a focus on family involvement, one must be cautious of inviting only
family members, without adequate consideration of others that have a
significant connection to the child. Otherwise the conference may not
properly consider all of the relevant issues, and the Court will be unable to
simply adopt the conference plan. For example, earlier this year in SH v KM
WM RT TM CYFS a child, O (9 months), had been placed outside the family
in the temporary foster care of Mr and Mrs M. An FGC was held to determine
the long-term care arrangements but Mr and Mrs M were not invited to attend.
It was decided at the FGC that O should be placed within her whanau. Mr
and Mrs M opposed this, and applied to the Family Court to halt the

22 see also Police v L and G Youth Court, Wellington, 11 July 1990, Judge Carruthers
23 FC CHCH FAM 2006-009-002310 11 August 2006
impending transition, CYFS having threatened to involve the Police to ensure the child was handed over.

It was held that the Ms should have been invited to the FGC. They were clearly people having the care of the child under s22(1)(b)(1), as well as being part of the “family group” as defined in s2 as a person with whom the child has a significant psychological attachment. Apparently it was a policy of the Dunedin office of the Department not to invite foster parents. The Judge stated that this seemed at odds with the extended definition of family group, and also with the dicta in CMP v DG-SW where it was held that biological family are not to receive emphasis over others with whom the child has a significant attachment. This was not an effective FGC as there was no assessment of O’s attachment to the Ms. As all of the relevant issues were not considered, the Court could not rely on the decisions of the FGC.

It was also held that the Department had proceeded in an erroneous manner, as the principles of s13 were mechanically applied and given paramountcy. The Department was set on placing the child with a member of their whanau. Section 13 says that this is generally in the best interests of children. However Judge Strettell pointed out that sections 5 and 6 contain the paramount considerations. That is, the welfare of the individual child must be given primacy, and must be assessed having regard to their own unique circumstances, rather than applying an ideal of what is in the best interests of children generally. Here the department proceeded on an assumption of whanau placement and in so doing did not properly assess O’s needs. The Judge said that one would think such a fundamental and clearly defined principle of family law, the paramountcy of the individual child’s welfare, would not need to be re-emphasised in this way but the actions of the Department in this case required it.24
In terms of youth justice, attendance by the proper parties is just as important. For example, it has been held that failure to consult with and invite the victims to an FGC led to a miscarriage of justice.\textsuperscript{25}

The message to be taken from these decisions is that an effective FGC must involve all of the people significantly connected to the child. Those people must at least be given the opportunity to attend, which they may themselves choose not to exercise. The FGC must then follow a process that allows for the interests of the particular child to be fully assessed. In care and protection cases we must never forget the most fundamental principle of the individual child’s best interests being the paramount consideration.\textsuperscript{26} While the Act provides guiding principles to aid in the assessment of what is in the child's best interests, those principles cannot be assumed to apply in every case, so in every case they must be tested against the circumstances of the child. The Court will then most likely be able to fully rely on the outcome of the FGC, without further intervention.

**Further elements of a successful plan**

As I have said, the Court is not bound to follow the plan. However it is very rare that the Court will not adopt a plan, given the significant place of the FGC within the Act. The Court has said that heavy weight must be given to a recommendation made by a group at an FGC.\textsuperscript{27}

A successful plan needs to be specific as to what issues were addressed, what outcomes are sought, and why this is in the best interests of the child. The means by which those outcomes are going to be achieved need to be specified in as much detail as possible. For example, if it was agreed that a child is in need of care and protection and that a declaration from the Court to that effect is required under s67, then the conference needs to specify this,

\textsuperscript{25} Police v N [2004] NZFLR 1009, [47]
\textsuperscript{26} s6 does not apply to the Youth Justice Parts of the Act 642, 650
\textsuperscript{27} Police v P and T (1991) 8 FRNZ
and also specify exactly what grounds under s67 apply. This makes it much easier for a Judge to later make a decision.

When the Court has made a declaration under s67 and is considering a services order under s86, a support order under s91, a final custody order under s101, or appointing an additional guardian under s110, the Court must look at whether the plan accords with the requirements of s130 of the Act. So if an FGC considers that such an order is necessary, or is likely, the plan must cover the areas specified in s130. They are:

(a) Specify the objectives sought to be achieved for that child or young person, and the period within which those objectives should be achieved
(b) Contain details of the services and assistance to be provided for that child or young person and for any parent or guardian or other person having the care of the child or young person
(c) Specify the persons or organisations who will provide such services and assistance
(d) State the responsibilities of the child or young person, and of any parent or guardian or other person having the care of the child or young person
(e) State personal objectives for the child or young person, and for any parent or guardian or other person having the care of the child or young person
(f) Contain such other matters relating to the education, employment, recreation, and welfare of the child or young person as are relevant.

The Court must also ensure that the plan is consistent with the principles of the Act, as set out in ss5 and 13.

Where the plan cannot be followed

What follows are some examples of where Judges have been unable to follow the plan made at an FGC. In some situations the plan may not be realistic given the severity of the situation. Or the FGC may not have followed a process, or covered all of the issues, to convince the Court that its planned
outcomes are practicable and in the best interests of the child. Looking at these examples will show what to avoid to ensure that the FGC is as effective as possible so that the Court can adopt the plan without problems or delays. Avoiding delay is crucial as it is so corrosive, hence the Act requires that all decisions affecting a child or young person should be made and implemented within a time frame appropriate to the child's sense of time.\textsuperscript{28}

The plan the parents agreed to in \textit{CYFS v H Children}\textsuperscript{29} is an example of where the plan did not provide sufficient protection having regard to the severity of the situation. Nor did was the plan specific enough about how the proposed protection would be provided. The parents used alcohol heavily. On one occasion the mother was found with her children, the youngest five months old, in the family van, slumped over the steering wheel with a breath alcohol level of 925 micrograms. The limit for driving is 400 micrograms of alcohol per litre of breath.\textsuperscript{30} The Department had been involved with the family for ten years.

The FGC plan was designed to avoid the involvement of CYFS, with support provided to the parents by a social services agency, their church, and whanau. The plan did not intend the Court to make a declaration but rather relied on the parents fulfilling promises of abstinence. The family was about to leave the region, with no indication where the support services were to come from in the new town.

The Judge emphasised that the plan was not to be discarded, and that the trust placed by the parents in their church and whanau in a supervisory role was to be retained. However it was felt that without supervision from CYFS there was a risk that the family would “slip through the cracks” and the children remain at risk. A declaration was made, and an adjournment ordered for the filing of a new plan after specific service providers had been established.

\textsuperscript{28} s5(f)
\textsuperscript{29} FC LHTT FAM 2004-032-000432 14 September 2004
\textsuperscript{30} s11 Land Transport Act 1998
In *Re Children*31 an FGC decided guardianship and custody of a child should be vested in the children’s grandparents. Again the plan was not followed, in part because the family sought to exclude State assistance when a supervisory role was required. It was unclear if the grandparents fully understood the proposals of the Department. Their consent with full understanding was required and had no been provided to the Court, so it would not be appropriate for the Court to rubber stamp the plan. The children were ten years old and were sure to have their own views about their future. However the family did not want to ‘expose’ the children to the environment of the Court to ascertain those views. This was said to be understandable but unacceptable. The interests’ of the parties, and particularly the children, could not be properly protected by the Court if those concerned isolated themselves from the Court.

In the Youth Court, the Court must also decide whether an FGC outcome is so extreme or lenient as to lack parity with outcomes in respect of similar offences. The Court retains a residual discretion to impose additional orders where a Youth Court Judge felt that was necessary because of the seriousness of the offending.32 In *Police v XD*33 a young person was charged with burglary, possession of explosives and making a hazardous substance. An FGC was held and proposed a s282 discharge, which means the charge is dismissed and treated as if it was never laid. Shortly after, there was further offending, and again hazardous items were located and connected to X. X then appeared in the Youth Court. X was warned of the consequences of further offending, and that the Police no longer supported a s282 discharge. X then burglarised the local high school and was arrested and charged with burglary, possession of explosives and making a hazardous substance. X’s family did not want him to have a formal record. There was no agreement at another FGC as the family wanted a discharge but the Police sought formal

31 above, note 11
33 [2006] DCR 553
orders. The Judge held that a s282 discharge was not appropriate, so the plan from the first FGC could not be followed. The seriousness of the offending and the public interest required formal orders.

The FGC needs to ensure that the plan it decides upon can actually be implemented. In Police v C (A young person)\textsuperscript{34} it was impossible for the Court to make the orders suggested by the FGC. The plan called for 200 hours of community work supervised by a particular person. That person was going to charge $2000 but the most the Department could allocate to a single sentence of community work was $750. The Judge said this caused a potentially embarrassing situation for the Court and the Department where the Act was being used for private individuals to profit from the misfortune of a young person. The Department should not agree to the appointment of supervisors who make a profit out of supervision. It was not appropriate, as submitted to the Court, to reduce the amount of community work to 75 hours to fit the budget. Unfortunately the FGC had to be reconvened to recommend another outcome, or another person to undertake the supervision of the 200 hours. This caused delay, which would have been avoided if the original plan was consistent with what the Department knew was required.

A Judge may have to take into account factors that the FGC cannot properly consider, such as the interests of the wider community. In W & Ords v Registrar of Tokoroa Youth Court\textsuperscript{35} a Youth Court judge made a decision to refer nine youths to the District Court for sentencing, contrary to the recommendation of an FGC which wanted the Youth Court to undertake sentencing. This decision was appealed to the Court of Appeal. It was held that while the attitudes’ of the victims, the response of the Police, and the recommendations of the FGC are clearly matters a Youth Court Judge will take into account, the Judge is not bound to implement the plan. Part of the discretion is taking into account considerations relating to the public interest which may have been missed at the conference. Here the Judge had

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\textsuperscript{34} (1991) 8 FRNZ 652
\textsuperscript{35} (CA) CA166/99 23 September 1999
considered all the relevant matters, and concluded that it was in the public interest that the District Court undertake sentencing. There was a spate of similar offences before the Court, with thirteen charges of aggravated robbery before the Judge that one day. The Judge was entitled to conclude that offending had reached alarming levels and that the public required relief. The Court also sought guidance on the type of sentence that was appropriate for youths who commit such crimes. The District Court had a greater range of sentencing options, and the FGC recommendations can still carry significant weight in that Court. The Court of Appeal upheld the decision not to follow the recommendation of the FGC.

There are many reasons why a Judge may decide not to follow the decisions of an FGC. Plans are sometimes not realistic, and the Court has to exercise its oversight role to ensure that a child or young person receives the care and protection they need, or an outcome that is just for the child, the victims and the community. Sometimes the practicalities of implementing a plan mean that it cannot stand. Looking at what FGC procedures and decisions cause poor outcomes is instructive of what Judges take notice of, and what an effective FGC must cover.

**When the plan is not implemented**

In other situations plans are made that conform to all of the requirements but are simply not carried out, so the Court must take a greater controlling role. As already mentioned, the Department has a duty to carry out any plan made at an FGC unless to do so is clearly impracticable or inconsistent with the principles of the Act. Unfortunately this is not always as straightforward as one would hope. There are often chronic resource issues which despite the best efforts of the Department mean that a plan cannot be put into action. For example, in *Re C*[^36^] an FGC decided that a child needed a short-term placement beyond the family and a programme to aid his behaviour. CYFS were unable to specify the programme that would be provided as required by

[^36^]: (2004) 24 FRNZ 708
s130(c), as there were no programmes available. CYFS were also unable to get a psychological assessment carried out for three months. This was a breach of s5(f), which requires decisions be implemented within a timeframe appropriate to the child’s sense of time.

There were serious resource deficiencies within the Department and the local service providers. After the hearing, the Department had to be given further time to submit a plan that met s130. Some two months later, a satisfactory plan was filed. The most the Court could do under these circumstances was allow the publication of the decision so that the situation could be publicly recognised and hopefully improved.

In other situations, people do not carry out their obligations under the plan, and the Court is forced to step in and make the plan happen, or alternatively provide another solution where then plan cannot be implemented. It is all very well to come up with an excellent plan, but of course the action under that plan is what really counts. So a truly effective plan requires the ‘buy-in’ of those required to act.

In AD v SD37 both the parents of a child and the Department failed to undertake their responsibilities as agreed in an FGC, and the Court was required to implement the plan through orders. A review of a plan in July 2004 had decided that the child should be permanently placed with his father. In June 2005 the mother and father came to an independent agreement that the child should remain with the mother, as one of the child’s siblings had moved in with the mother and they felt it was important not to split them up. The social worker was of the opinion that this should not be allowed and that the children should be removed immediately, in accordance with the original plan. However this social worker resigned, and circumstances conspired so that the replacement could not properly attend to the family.

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37 FC LHTT FAM 2005-032-000746 31 October 2005
The matter came before the Court and the Judge decided that the child should be with the father and that the Court had to intervene to make this happen, as left to the Department, it was clear nothing would change in a timeframe appropriate to the child. The Judge made a custody order in favour of the father to be implemented in stages by a specified access regime until the child was in the fulltime care of the father.

In *Police v TGW* the Department simply refused to implement a plan that they had already agreed to. As a result, the Court ordered that the Department refund the Crown all of its expenses, including the appointment of counsel for the child and counsel to assist the Court. The original plan was negotiated with the Department and formed the basis of a consent order. The plan included that the young person would be living at a non-secure residence under s105, with a condition that secure care be available at another residence when necessary. Having agreed to this, the Department advised counsel for the child a month later that they would not implement the plan as only the Director General of Social Welfare can direct a child into secure care and this power cannot be transferred to another organisation. This meant that the non-secure residence could not put the young person into secure care according to the plan.

Counsel for the child applied to the Court. The Court held that the Department were correct in that there could not be a condition regarding secure care, as secure care can only be given where the person is first placed in a s364 residence. There could however be a condition that the person be moved from a s105 residence to a s364 residence if required, meaning that the Director General would then at least have to consider secure care. The plan was amended to include this condition.

The Court was very critical of the Department’s conduct in this case, and ordered that the costs of the counsel for the child and counsel to assist be reimbursed to the Crown. Contempt of Court was not considered only

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38 (1998) 16 FRNZ 570
because of jurisdictional difficulties that exist for the District Court in punishing a person for contempt outside the Courtroom. The Department had led the Court down a carefully constructed path, leading to the agreed plan, and then refused to implement it. They should have sought a rehearing as soon as they became aware of the difficulties but instead made no contact with the Court and simply refused to abide by the order.

Utilising the FGC model in other areas

The FGC is a successful way of getting family members together to come up with their own solutions. The best solutions often include the involvement of wider family. This applies to many areas of family life, not only where there are care and protection or youth justice concerns, so the successful FGC model might usefully be adapted into other areas of family dispute resolution. If families can take this responsibility for their own family group we may be able to achieve better results than focusing solely on the immediate parties. There are two areas particularly where I think FGCs can be usefully incorporated. The first is in the counselling and mediation stages of childcare disputes, and the second is in some domestic violence cases.

Childcare disputes

Children need to be involved in the conciliation services of the Court. In July 2005 the Care of Children Act came into force. This Act brought the laws of childcare and guardianship into the present. The Act emphasises that children are entitled to certain rights, one of which is the right to participate in decisions that affect them. The Court is told that children must be given a reasonable opportunity to express a view, and that view must be taken into account. The Court has interpreted this as placing a heavy burden on us and we take very seriously the responsibility of ensuring that children are

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39 See also Atkin, B, “Family law getting fatter” (2003) 4 NZFLJ 181
40 s6 Care of Children Act
involved in the proceedings using means which suit their individual personality and circumstances.\textsuperscript{41}

However only 5\% of cases require the Court to make a decision. Most, 74\%,\textsuperscript{42} of all Court orders are made with the consent of the parties after a solution is reached in the conciliation arm of the Court. This is exactly the way in which the system is intended to work, with parties generally resolving their own disputes with the aid of the conciliation services. The Court is only intended to decide the most difficult and urgent cases where parents and guardians cannot do so themselves.

A problem now exists as a function of this system because the legislation dealing with counselling and mediation has not been modernised in the way that the Care of Children Act has modernised the Court process. The Family Proceedings Act 1980 does not provide for children’s involvement during conciliation. So the focus of the Care of Children Act on children’s rights of participation only filters through to a small number of children. Thus children need to be involved far more than they currently are in the conciliation functions of the Court.

One possible solution is an FGC type meeting as part of the conciliation services. This would enable children to be involved in cases which do not require a hearing.

Along with involving children, a conference would allow other family members to be involved. A purpose of the Care of Children Act is to recognise the part that other family members may have in the care of children.\textsuperscript{43} Section 4 states that the welfare and best interests of the child is the paramount consideration. Section 5 then gives some guidance on what should be taken into account when considering what is in a particular child’s best interests.

\textsuperscript{42} figures for the year September 2005 to August 2006
\textsuperscript{43} s3(2)(b)
Two of the six principles in s5 relate to a child’s relationship with their extended family group. The first states that a child should have a stable and ongoing relationship with his or her family, family group, whanau, hapu, or iwi.\textsuperscript{44} Further, this relationship should be preserved and strengthened, and the members of these groups should be encouraged to participate in the child’s care, upbringing, and development.\textsuperscript{45} It seems clear that to ensure these principles are put into practice, that the wider family group need to be actively involved in the process of deciding how they can be part of the child’s life. This would also allow to a greater extent than currently exists for whanau involvement, which is consistent with the realities of many Maori and Pacific families. An FGC would be a proven and easily adopted mechanism to make this happen.

**FGCs in Domestic Violence proceedings**

The second area where an FGC may be beneficial is in domestic violence cases. The Domestic Violence Act 1995 (“the DV Act”) has been strictly applied to keep the victim away from the perpetrator. This is based on an array on concerns such as the safety of the victim, the possibility of the perpetrator using a power imbalance to sway the outcome, and a fear that bringing the parties together again can be a form of abuse in itself through the emotional harm caused by a forced confrontation.\textsuperscript{46}

However it is often a victim’s family who keeps them safe. The process needs to take this into account, and possibly the best way to do that is to involve those people who have a significant connection with the victim when deciding the best way to provide protection. Those with a significant attachment to the perpetrator may also be able to help them from reoffending.

\textsuperscript{44} s5(b)  
\textsuperscript{45} s5(d)  
The DV Act and CYPF Act take completely different approaches to situations which can give rise to similar issues. The CYPF Act takes a family group perspective, while the DV Act is focused on individuals and State intervention. The concerns involved in family violence proceedings under the DV Act are often similar to those in proceedings under the CYPF Act. Both can involve for example physical or sexual abuse. A parent who has abused their child attends an FGC with that child but an abusive partner is kept completely separate in DV proceedings because of the concerns outlined above. Children are arguably more vulnerable than an abused adult partner, so what is so different to staging such a conference in the context of DV Act proceedings as opposed to CYPF Act proceedings?

We could look at a model where a conference is convened according to a certain timeline if a person applies for a protection order, just as in CYPF Act proceedings. Family Violence is currently the subject of considerable Government attention, including the establishment of a Ministerial Taskforce for Action on Violence within Families which is looking at possible solutions across every sector involved in dealing with this scourge. The Taskforce released its first report in July this year, and recommends that all family members be involved in preventing violence within their family relationships, and that people must take responsibility for their own families’ behaviour.

Having a conference would bring together a greater range of people to support the victim. Currently there is little in the way of support during the Court process, unless the victim is proactive and seeks this out themselves through other agencies such as the Women’s Refuges. A conference would mean greater support for the victim, and allow for protection in a hands-on way to be established with the wider family. A conference would also have a similar role to a youth justice conference in that it would require the abuser to be accountable for their actions.

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48 above, p17
One obvious difference to a care and protection FGC is that an abused partner may want to simply cut themselves off completely from their partner, whereas in care and protection proceedings the aim is always to keep the family together as much as possible. In these circumstances a family violence conference may be unnecessary and unhelpful. It is also possible that if a victim wanted to keep their problems private, that they would be discouraged in applying for a protection order if they knew their family would find out and be involved in the resolution.

Clearly this would need to be considered in much more depth before being implemented but there may be considerable benefits to including an FGC type conference in family violence proceedings.

**Conclusion**

Judges place significant weight on FGCs and generally follow their recommendations. Even where the plan cannot be adopted in whole, the ideals and foundations of the FGC plan can be used to guide the Court in its decision, as in _CYFS v H Children_.

However the ultimate decision rests with the Court and in some situations the Judge will decide that the FGC has to be overridden. The examples of where this has happened provide some guidance on what Judges have taken notice of when deciding an FGC cannot be followed. It is important that a plan covers the areas that Judges see as significant to ensure that the family group remain as in control of their own direction as possible and that State and judicial involvement is kept to a minimum. In this way FGCs will provide the best possible outcomes for the children and young people involved, and will retain their intended position as the primary mechanism for upholding the principles of the Act.

With the success that FGCs have had in the areas of care and protection and youth justice, it seems logical to look at the possibility of using this model in other areas where families need the Court’s assistance. I hope that the
suggestions here of utilising the FGC as a means of involving children and wider family in conciliation based childcare proceedings, and as a way of achieving additional support and protection for victims of family violence, can provide the basis of solutions in both of these areas.

[Speech Ends]