

**Characteristics associated with
the early identification of complex
Family Court custody cases**

Prepared for the Department for Courts

Helena Barwick

Alison Gray

Roger Macky

DISCLAIMER

This research was commissioned by the Department for Courts. The report has been prepared by the authors and the views expressed in it are those of the authors and do not necessarily represent the views of the Department for Courts.

First published September 2003

Department for Courts
PO Box 2750
Wellington
New Zealand

© Crown Copyright

ISBN 0-478-11122-3

The researchers would like to thank the staff at the Family Courts who facilitated this research and took part in interviews. We would also like to thank the Family Court Judges, lawyers, CYF lawyers, Counsel for the Child and specialist report writers who made time to speak with us. We appreciate their contribution.

Contents

| | |
|--|----|
| Executive summary | 4 |
| 1.0 Introduction | 7 |
| 2.0 Methodology | 8 |
| 3.0 Literature review | 10 |
| 4.0 Characteristics of complexity | 17 |
| 5.0 Perspectives of different groups | 28 |
| 6.0 Identifying characteristics of complex cases | 31 |
| 7.0 Issues relating to the potential for quantitative analysis or testing of characteristics | 35 |
| 8.0 Conclusion | 36 |
| Bibliography | 38 |
| Appendix 1 | 40 |
| Appendix 2 Suggestions for managing complex cases | 43 |

Executive summary

The Family Court deals with a proportion of complex custody cases which are of long duration and involve a lot of interaction with the Family Court. The Department for Courts has commissioned this research to investigate whether these complex Family Court custody cases can be identified early through particular characteristics or criteria.

The research, which was qualitative in design, gathered data through interviews and group discussions with individuals. It focused on characteristics or criteria that the Court can be expected to have or to obtain information about. Informants for this report include Family Court Judges, Court staff, CYF lawyers, family law practitioners, and specialist report writers. The research also included a brief literature review.

Literature review

The literature on the early identification of complex cases in the Family Court is limited in extent and dominated by comment or research by psychologists. Nevertheless, there is agreement that characteristics of complex cases can include: personal and demographic characteristics; behavioural characteristics including substantiated or alleged abuse between parties and against children; psychological characteristics including enmeshment in the relationship, entrenched attitudes and mental health issues; external factors including engagement with support or welfare agencies; and court-related indicators.

Characteristics most frequently associated with complexity in this research

Informants discussed a wide range of factors they associated with complex cases. Five stood out as being more frequently associated with complexity than the others. These are people with personality difficulties, self-represented litigants, untreated mental health problems, allegations of sexual abuse, and changes of counsel or poor quality representation.

- Virtually all informants said that Family Court custody cases were made more complex when one or both parties have personality problems. Personality problems are often not apparent at the outset, as the heightened emotions which follow the break-up of a relationship can mask their presence. However, as time goes on and it becomes apparent that one party is not emotionally progressing through the break-up, this may indicate pre-existing personality problems. Some of the indicators informants associated with personality problems were: difficulty in maintaining a line of reasoning, lacking insight, taking up a lot of court staff time, and having bouts of activity rather than applying themselves to the process consistently.
- Self-represented litigants were another frequently mentioned characteristic associated with complexity by those interviewed for this report. Self-represented litigants include people for whom the cost of counsel is out of reach, and those who hold strong views and wish to put those views to the

Court themselves. Both types of self-represented litigants can add complexity to a case by being unfamiliar with the Court processes and lacking the skills. Those who hold strong views are also often motivated by beliefs about the rights of parents that are at odds with the philosophy of the Family Court and this can make resolution of custody difficult.

- Unrecognised and untreated mental health problems, personality disorders, and people with brain injuries were characteristics that many informants associated with complexity.
- Many informants volunteered or agreed that cases where sexual abuse has been alleged are associated with complexity. The most complex cases are those where the other party denies the allegation, the police have not brought charges and there is no determination of fact. These cases contribute to case complexity through the difficulty in establishing the facts, the use of allegations to deny one parent access to the children, the increased likelihood of CYFS involvement, the possibility of criminal charges pending, the need for specialist reports and the extra demands caused by the standard of evidence having been raised.
- Almost all informants agreed that more than one change of counsel was a clear sign that the case was or would become a complex one. More than one change of counsel suggests that the party is unwilling to accept the advice given by counsel and is very determined on a course of action. The prevailing view was that the quality of counsel could either mitigate or exacerbate the impact of many of the factors associated with complexity. Counsel who work across jurisdictions were considered more likely than Family Court practitioners to promote an adversarial position that is unhelpful to the resolution of Family Court matters.

Other characteristics

Other characteristics available to the court at the time of application which are sometimes associated with complexity are: previous complex cases involving one or both of the same parties, multiple parties, *ex parte* (without notice) custody applications, cross applications, CYFS involvement and parties who are legally aided.

Other characteristics of complexity that are identified through reading affidavits include the volume and quantity of affidavits, allegations of violence or substance abuse, conflict over shared property and relocation.

Contact with one or more of the parties can reveal additional characteristics associated with complexity including high levels of conflict or distrust, new partners and wealth.

Additional characteristics that are revealed through the court processes include explicit refusal to attend counselling, multiple applications, the approach of the judge, the involvement of other agencies and litigious litigants.

The perspectives of different groups

As a group, judges saw psychological and interpersonal factors as the major characteristic of complex cases, which become prolonged because parties are unable or reluctant to compromise or negotiate, are hostile or have entrenched attitudes. Undiagnosed or untreated mental health issues also contribute to complexity.

Nearly all Family Court staff identified self-represented litigants as a characteristic of a case that will be complex or at least time-consuming. Interpersonal and psychological factors are also important, particularly where there are mental health issues for one or both parties.

Lawyers agreed that most complex cases are characterised by interpersonal and psychological factors – dysfunctional adults with entrenched attitudes who cannot or will not communicate. Mental health issues are also strongly associated with complexity. This group also considered allegations of sexual abuse, self-represented litigants, and inexperienced or adversarial counsel or frequent changes of counsel to be associated with complexity.

As with other groups, specialist report writers believed that complex cases are frequently characterised by psychological and interpersonal factors, including personality disorders and mental health issues.

Identifying characteristics of complex cases

During interviews, participants were invited to suggest ways in which the Family Court might identify applications that are likely to be complex. While most did make suggestions, a number were either opposed to or expressed caution about adopting a 'labelling' or 'flag' approach.

Participants agreed that if a 'flag' approach is adopted, that should not be seen as negative. Instead, a flag should affect the allocation of cases positively. Fast tracking need not be the automatic response.

A wide range of factors would need to be considered before any quantitative analysis or testing of the characteristics discussed in this report could be attempted.

1.0 Introduction

1.1 Background

The Family Court deals with a large number of applications for custody under the Guardianship Act 1968, most of which are straightforward and processed without a great deal of interaction between the parties and the Family Court.

However, some are complex cases which are of long duration and involve a lot of interaction with the Family Court. These make heavy demands on judicially ordered professional services, take up court time and incur legal costs for the parties.

As well as taking up time and resources, these cases are demanding for the parties involved, and in particular for the children of parents seeking resolution of their conflicts through the Court.

The Department for Courts commissioned this research to investigate whether complex Family Court custody cases can be identified early through particular characteristics or criteria.

1.2 The aim of the study

The main objective of this research was to determine characteristics or criteria that could lead to the early identification of complex Family Court custody cases.

The research sought to identify two sets of characteristics or criteria:

- characteristics that are readily available to the Court at around the time a custody application is made, and
- characteristics that may be apparent at the beginning of case, but are more likely to come to light as a case progresses.

The research focused on characteristics or criteria that the Court can be expected to have or to obtain information about.

1.3 The report

After describing the methodology of the study this report contains a brief literature review (section 3), discusses the characteristics informants associated with complex cases, and the mechanisms through which they contribute to complexity (section 4), reviews the perspectives of different groups of key informants (section 5), explores options for identifying complex cases (section 6), discusses issues relating to further quantitative investigation of characteristics (section 7) and draws conclusions (section 8)

2.0 Methodology

The study was qualitative in design, with data gathered through interviews and group discussions with individuals in selected court areas.

The research design also included a brief a literature review.

2.1 Literature review

The Department for Courts supplied some material for review. The researchers identified other references through Internet searches, and ProSearch, the professional search service of the Wellington City Library, undertook a search of relevant databases. The various searches identified only a small amount of relevant material additional to that supplied by the Department.

The literature review contributed to the development of a checklist of potential characteristics of complex cases that became part of the interview process. The literature review is included in the next section. The bibliography appears at the end of the report.

2.2 Research sites

The sample was based on the four court regions, using the clusters within those regions as the sampling base. The clusters chosen for the research were:

| | |
|-----------------|-----------------------------------|
| Northern Region | Manukau, Waitakere, Whangarei |
| Central Region | Wellington, Porirua, Masterton |
| Waikato Region | Tauranga and Whakatane |
| Southern Region | Christchurch, Invercargill, Gore. |

This selection of courts includes large and small courts, courts in rural, provincial and urban areas and courts in areas with a diverse population base.

2.3 Key informant interviews

Interviews or group discussions were held with a range of key informants who are involved with Family Court custody cases from a number of different perspectives.

Interviews were completed with 11 Family Court Judges, 33 Family Court staff, 9 CYF solicitors, 22 lawyers and 11 specialist report writers.

The 'interview' with one judge was completed through an exchange of emails because he was going on leave. All but one of the interviews with Family Court staff were completed as a group discussion. Three CYF solicitors took part in a group discussion, the remaining 6 were interviewed individually. One interview with a lawyer was completed by telephone, as he would not otherwise have been available to talk with the researchers. Three were interviewed as a group at one of their regular meetings. Five specialist report writers were interviewed as a group; the remainder were interviewed individually.

All informants were asked to:

- identify the main characteristics of complex custody cases
- comment on how those characteristics contribute to case complexity
- note any other characteristics that contribute in their experience
- rank the most important characteristics
- suggest ways in which the Courts might identify custody applications that are likely to be complex.

The interview questions that were sent in advance to all participants and the interviewer guide used by the interviewer are included in Appendix 1.

2.4 Data analysis

The interviews have been analysed as a whole to give an overview of the main themes and issues under each of the research questions. The report also identifies points of agreement and difference between groups who have different roles in the process e.g. judges, lawyers and Family Court staff. Information has also been analysed by type of court including region, size, homogeneity/heterogeneity of the population, urban/rural distinctions.

The focus of the research was on identifying potentially complex custody cases in the Family Court, rather than on how to manage those cases once they have been identified. Nevertheless, a number of participants did suggest ways in which the cases might be managed, as opposed to being identified, and these suggestions are included as Appendix 2.

3.0 Literature review

3.1 Introduction

The Department for Courts has commissioned research to determine characteristics or criteria that could lead to the early identification of complex Family Court custody cases. This brief literature review was undertaken as part of the research process and covers earlier work in New Zealand and other relevant jurisdictions on this topic.

3.2 Methodology

The literature was obtained through a search of the Internet, from previous reports and through a search of selected databases undertaken by ProSearch at the Wellington City Library. Key terms included: high conflict, early identification, complex cases, Family Court, characteristics of complex cases. Most of the literature is from Canada and Australia, with smaller amounts from the United States and New Zealand.

3.3 Definitions and scope

The literature suggests that while it is possible to establish a definition of a complex case in the Family Court in terms of duration or cost, it is much more difficult to establish a definition based on the characteristics of a case.

The Department for Courts Request for Proposals suggests that such cases are of long duration and involve a lot of interaction with the Family Court. An Australian paper (Australian Law Reform Commission 1997) notes that the complex case management track in the Family Court is reserved for:

Matters which involve complicated issues of fact, law or evidentiary material and in which the trial is estimated to take six days or more. ...The guidelines recognize that some cases not assigned to the complex track may nevertheless have characteristics warranting individual attention. These characteristics are the potential for multiple hearings, complicated psychological or emotional issues and complex social dynamics.

Other literature links complexity with 'difficult' families (Chisholm 2001) or 'high conflict' cases (Stewart 2001). Some authors refer to the increasing number of unrepresented litigants (Nicholson 2000) or to court processes (Bala cited in Stewart 2001:21).

The paper by Stewart (2001) was published by the Department of Justice in Canada and discusses the early identification of high conflict Family Court cases. It refers to both degree of conflict and the duration of cases. Its author notes that there is no generally accepted definition of what exactly constitutes a high conflict dissolution, or why certain families become engaged in lengthy disputes. He believes that the lack of any baseline measures of the 'normal' level of conflict

that one would expect in most separating families makes it impossible to accurately determine what constitutes 'high conflict'.

Psychologists have also expressed concern that establishing fixed criteria for high conflict dissolution could have a labelling effect that might limit alternatives for problem resolution. Bala (cited in Stewart 2001:21) argues that the definition of high conflict is not as critical as the process that tracks and steers the dissolution process through the court.

Researchers in Canada (Stewart 2001) estimate that approximately 10 to 15 per cent of all separating families fall into the high conflict category.

3.4 Characteristics associated with high conflict cases

The literature suggests that cases where there is a high level of conflict between the parties are likely to be both time-consuming and costly, and therefore complex.

In discussing high conflict cases in the Family Court, two points need to be borne in mind. The first is that people's perceptions of the characteristics of high conflict cases are influenced by the nature of their work or involvement - that is, by whether they are parties to the dispute, judges, lawyers, counsellors, social workers, psychologists or Family Court workers (Chisholm 2001). Secondly, much of the discussion in the literature is based on people's reports of their experience in practice, rather than on formal research. For example, Stewart (2001) obtained the views of a number of clinical psychologists, counsellors and social workers who work extensively with families as part of his work in preparing the background paper cited above. Wherever possible, the distinction between research-based and experience-based findings is noted in the text.

In the literature, high conflict cases are typically associated with particular behavioural and psychological or emotional characteristics

3.4.1 BEHAVIOURAL CHARACTERISTICS

Mental health practitioners and researchers agree that relationships characterised by a high level of physical, emotional and verbal abuse that extends over some time are more likely to remain highly conflictual (Hall and Lee 1994, Johnson et al 1989, Jones, Claridge in Stewart 2001, Pruett, Nangle and Bailey 2000). Violence can take the form of physical threats or intimidation, out of control behaviour or stalking by one parent (Jones in Stewart 2001). Other indicators are a high number of applications for non-molestation or non-violence orders (Martin in Stewart 2001) or constant use of police and restraining orders with no or minimal cause (Woolam in Stewart 2001).

Relationships where there are allegations of physical or sexual abuse of children also tend to be highly conflictual (Bleeker, Claridge, Freeman, Woolam in Stewart 2001, Pruett et al 2000, Sorenson et al 1997). In an Australian paper, Judge Linda Dessau (2002) concludes that while cases where child physical or sexual abuse is alleged constitute only a small percentage of children's cases in the court overall, they are often intractable and protracted and represent about 30%

of the children's cases ultimately heard by a judge. Parkinson (1998) notes that child sexual abuse cases where the evidence is contested or conflicting are likely to occupy the most time, and such cases often involve children under the age of five.

As a practitioner, Jones (in Stewart 2001) identified criminal behaviour as a predictor of high levels of conflict, while Freeman (in Stewart 2001) referred to substance abuse as a characteristic of complex cases.

In an Australian study, Brown (1998) found that parents in high conflict residence and contact disputes had high levels of criminal convictions. The men had convictions for property offences, alcohol and drug offences and assault, while women had been convicted of drug and social security offences. Rates of substance abuse were also high, as they were in an American study by Sorenson et al (1997). In another American study, families where there were allegations of substance abuse were less likely to settle their residential or custody arrangements during mediation (Pruett et al 2000).

3.4.2 PSYCHOLOGICAL CHARACTERISTICS

Both researchers and practitioners agree that parents who are enmeshed in their relationship are likely to experience high levels of conflict in disengaging from it. Enmeshment occurs where one partner does not or cannot accept that the relationship has ended or cannot separate their marital and parental roles. In some instances, one partner develops a distorted perspective and a revisionist history of the family and relationship. In other cases, one parent is enmeshed with the child or children, rather than with the relationship. Such couples are likely to become involved in conflict over issues of settlement, including support, custody and access (Mathis 1998, Kressel et al 1980 in Stewart 2001:49; Bleeker, Claridge, Freeman, Martin, Woolam in Stewart 2001).

Unresolved personal issues, extreme distrust between parents and strong feelings of threat from the other parent are also associated with high levels of conflict (Bleeker, Claridge, Freeman in Stewart 2001, Sorenson et al 1997). Feelings of fear, anger, powerlessness or intense bitterness can also lead to prolonged conflict (Hall and Lee 1994, Bleeker, Woolam in Stewart 2001).

Conflict also arises where one partner is unwilling to compromise and has a strong need to win, where positions are polarised, or where one parent makes unreasonable demands or seeks to exercise undue power and control (Bleeker, Claridge, Freeman in Stewart 2001, Hall and Lee 1994).

Where one or both partners have mental health issues, such as a psychiatric disturbance or personality disorder (Doogue 2001, Sturge and Glaser 2000, Bleeker, Freeman in Stewart 2001), this can lead to a continuation of the interpersonal battles that complicate and prolong legal proceedings and lead to frequent applications. Johnston et al (1985) believe that for some people, conflict is a way to salvage self-esteem, ward off loneliness, compensate for loss of control over the decision to separate and provide a defence against guilt.

Abduction of a child, either during or following a separation and dissolution, is an indicator of extreme conflict between parents. Johnston and Girdner (1998) have undertaken research into the early identification of parents at risk of custody violation. Their findings are in many ways congruent with the characteristics of high conflict dissolution cases described above. They identify three aspects of such cases:

- Psychological characteristics of parents – parents are likely to deny and dismiss the value of the other parent to the child. They believe that they, more than anyone else, know what is best for their child and they cannot see how, or even why, they should share parenting of their child with their ex-partner.
- Structure of the family – the children are likely to be very young, easier to transport and conceal, unlikely to verbally protest and unable to tell others of their history.
- The support of a social network – family, friends and cultural communities provide practical assistance and emotional and moral support.

Abductions are more likely to occur when a parent suspects or believes that abuse has occurred and has social support for those concerns, when a parent is delusional or sociopathic, or when one or both parents are citizens of another country and have strong ties to extended family in their country of origin. Parents who feel disenfranchised by the legal system and who have family or social support in another geographical community may also consider abduction.

3.5 Personal characteristics

The literature suggests that the personal characteristics of some families in difficult situations may contribute to cases becoming complex, although the evidence for this appears to be weaker than the arguments made for the relevance of behavioural and psychological characteristics.

Brown's (1998) Australian study found that some parents had serious social functioning difficulties. In his view, this indicated that they might need considerable assistance to master the challenge of separation and parenting in new circumstances. A higher proportion were unemployed or non-employed than in the general population.

The literature on complex cases rarely refers to the relevance of cultural affiliation in these cases. An exception is a brief United States paper by Buchanan et al (2000), which looks at perspectives of children and parents on the Family Court welfare service. In this study, 'black parents' were particularly dissatisfied with the outcome of the welfare reports prepared by the welfare service.

A study by Barwick and Gray (2002) looked at difficulties in meeting timeframes in the New Zealand Family Court and found that:

The ethnic diversity of the population served by a Family Court has a distinct impact on what comes before the court and on the way matters proceed. This impact is likely to be more obvious in

guardianship, custody and access matters than in domestic violence but when, as in many courts, these are dealt with together, the cultural make-up of the community has an impact on delay.

Delays in completing relevant reports also occurred in areas with a particularly high number of immigrant families and/or families/whanau that are large, dysfunctional, with low levels of skills and few financial resources.

Access to money, either from family or through legal aid, can prolong disputes. Researchers note that family members may provide money to maintain the legal fight, while lawyers may prolong disputes by engaging in “chatter over inconsequential matters” (Bleeker in Stewart 2001, Johnston et al 1985). Friends and professionals can also form alliances through which disputes can be solidified and stabilised.

3.6 External indicators

Other indicators that a case is likely to be complex and prolonged include frequent police contact for violence and access enforcement, a history of referral to professionals for problem-solving and the involvement of mental health, addictions or child welfare agencies with the family (Behr and Lafleur-Graham, Jones in Stewart 2001).

The more outside agencies are involved in a case, the more complex it is likely to be, if only because of the need to co-ordinate reports and information, and reconcile different perspectives (Bleeker in Stewart 2001). In both Australia and New Zealand, research has identified delays in the delivery of social work and psychological reports, which certainly prolong cases, even though the reports themselves may not add to complexity (Barwick and Gray 2002, Nicholson 1999).

3.7 Court-related indicators

A number of court-related factors may also signal that a case is likely to be complex. These include ex parte applications for custody, a high number of interim applications, the existence of affidavits with harmful content against the character of the other parent (Bleeker, Martin in Stewart 2001) and an explicit refusal to attend counselling (Hall and Lee 1994). Where parties engage in repeated litigation the court can reasonably expect that the case will be complex.

Some parties make several changes in legal counsel (Hall and Lee 1994, Bleeker, Hood in Stewart 2001). This may be due to dissatisfaction with service, but it may also indicate that a party wishes to pursue a case against the advice of counsel. In either situation, the case will become prolonged. Financial pressures or dissatisfaction with counsel may lead to self-representation, which has been identified in Australia, the United States and New Zealand (Barwick and Gray 2002, Nicholson 2000) as an indicator that a case that is likely to be prolonged. In an Australian paper discussing the growing workload of the Family Court in Australia, (Foster 2002) comments that:

Currently, over 40% of parties [in the Family Court] are self-represented at some stage of the litigation pathway. This is the highest proportion of any Court in Australia and has impacted on Judges and staff, requiring innovative solutions to how we provide services and information to these clients.

The involvement of inexperienced and unsupervised junior practitioners in a case, or the involvement of a senior practitioner who is similarly inexperienced and/or more adversarial in approach, will frequently prolong cases, result in unnecessary hearings and make settlement more difficult (Boshier *et al* 1993, Smith *et al* 1997).

Delays due to lack of case management and lack of resources, lack of court sitting time or judge time and requests for adjournments have a similar effect (Barwick and Gray, 2002, Hall and Lee 1994). In some cases, the judge's pattern of managing cases, or preferences for achieving a resolution may influence the length of time a case takes to resolve (Barwick and Gray 2002).

Gray and Merrick (1996) believe that men and women approach the legal process of separation and dissolution in different ways. They suggest that the process itself can affect psychological adjustment both during and after the dissolution. Their paper refers to the American court system, and argues that 'despite the fact that "no-fault" divorce is now the rule, the adversarial process is still built into the legal proceedings'. The authors suggest that therapeutic processes need to support parties, both male and female, through the legal as well as the emotional process to produce speedier and more satisfactory outcomes.

3.8 Strategies

A number of jurisdictions are exploring avenues to identify complex cases at an early stage in the court process. The State judiciary in New Jersey, for example, has set case management standards relating to reductions in court delays and suggests that it should be possible to identify complex cases from pleadings. According to the standards, the judge is expected to tailor a case management plan and to apply close and continuous supervision over each case's procedural progress and development. With high conflict cases there is a need to combine early and continuous judicial control with ongoing attempts to facilitate settlement.

In New Zealand, Judge Doogue (2001) has recommended developing an enhanced conciliation facility for early diagnosis and early intervention with complex cases. She suggests that assessment, education, counselling and therapy should dramatically reduce lawyer involvement and length of cases.

3.6 Conclusion

The literature on the early identification of complex cases in the Family Court is limited in extent and dominated by comment or research by psychologists. Nevertheless, there is agreement that consideration needs to be given to:

- personal characteristics such as employment status, ethnicity, and access to financial resources
- behavioural characteristics, including substantiated or alleged abuse between parties, as well as allegations of abuse against children, previous criminal convictions and alleged or documented substance and alcohol abuse
- psychological characteristics, including enmeshment in the relationship, feelings of threat or distrust, entrenched attitudes and mental health issues
- external factors, including previous involvement with the police, and a history of referrals to or engagement with support or welfare agencies
- court-related indicators, including repeated litigation, frequent changes of counsel, the use of ex parte applications, and affidavits containing detrimental allegations against the other parent. Self-representation is also a likely indicator as is a lack of court resources

4.0 Characteristics of complexity

4.1 Introduction

Complex cases are those that are of long duration and involve a lot of interaction with the Family Court. The characteristics of complexity described here are those listed in the Department for Courts Request for Proposals, those identified through the literature review, and any additional characteristics mentioned by informants.

Characteristics have been grouped as follows:

- characteristics available to the court at or around the time of applications being filed
- characteristics identified through reading affidavits
- characteristics identified through contact with one or more of the parties
- characteristics identified through court processes.

4.2 Characteristics available to the court at or around the time of an application

4.2.1 SELF-REPRESENTED LITIGANTS

A high proportion of informants identified self-represented litigants as a factor linked to case complexity. Some of these people have been self-represented from the start, others have dispensed with the services of counsel part way through the process.

As a generalisation, some litigants choose self-representation because the cost of legal representation is out of their reach, and others because they have strongly held views and believe they will be able to put those before the court more effectively than will counsel.

While not all cases involving self-represented litigants become complex, there is a higher likelihood of self-represented litigants, compared to other litigants contributing to case complexity by:

- lacking understanding of court processes and failing to comply with directions
- preparing poor quality affidavits
- being less able to separate the emotions from the process
- having unrealistic expectations of the court
- lacking the skills required for cross-examination, especially of an expert witness
- achieving concessions from the system, which are granted to ensure they are not disadvantaged by self-representation
- requiring the appointment of Counsel to Assist.

In addition to these factors, the self-represented litigants with strongly held views often approach a dispute over custody or access in the belief that the Court should support equal parenting rights, rather than with an understanding that the Court is motivated by the best interests of the child.

Many of this latter group of self-represented litigants are supported by individuals or groups with shared views, and this can further add to case complexity by:

- fueling the hurt and anger of litigants, rather than working towards resolution
- taking action as a group, in some areas support groups harass and intimidate court staff, judges, and specialist report writers
- lobbying for the role of the McKenzie friend to go beyond the current mandate (eg to be included in mediation conferences)
- reinforcing litigants' need to keep control of the process.

4.2.2 PREVIOUS COMPLEX CASES INVOLVING ONE OR BOTH OF THE SAME PARTIES

All informants who expressed an opinion about previous complex cases involving one or both of the same parties agreed that, while uncommon, such cases were strongly associated with a new complex case.

4.2.3 MULTIPLE PARTIES

Multiple parties are involved in situations where people other than a child's birth parents make an application to the court for custody or access, or where the custody of a number of children who have different parents has to be decided. Multiple parties are more common in cases involving Maori whanau.

Informants believed that cases involving multiple parties were sometimes, but not always, associated with complexity. One judge said this:

Society is more complex, families are more complex, and the solutions to marriage and family breakdown need to be more complex and more sophisticated.

Multiple parties can lead to multiple applications and often to cross-applications. Multiple parties can contribute to complexity in the following ways:

- by generating more applications and cross-applications
- by requiring multiple representation
- by increasing the number of people the court has to contact, and the potential for delay if any of those people are hard to contact.

However, some informants were of the view that cases with multiple parties often resolved more readily as there were more options available for the custody of the child.

4.2.4 EX PARTE CUSTODY APPLICATIONS

It was agreed by informants that *ex parte* custody applications highlight poor communication and a lack of respect and trust for the other party. Such

applications can set the case off on a bad footing and while they are not legally complex, these cases often take time and effort to resolve. *Ex parte* custody applications may or may not involve allegations of domestic violence. One experienced judge considered *ex parte* custody applications to be a definitive characteristic of complex cases.

4.2.5 NOTICE OF DEFENCE OR CROSS APPLICATION

There was little support for a notice of defence alone being a feature of a complex case, however a cross-custody application was seen as a signal that a case could be headed down a complex path.

4.2.6 CYFS INVOLVEMENT

Informants agreed that cases with CYFS involvement were likely to be complex. This is because:

- the issues are often complex in CYFS cases
- CYFS has its own processes and objectives which do not always match those of the court
- there are often delays in completing required processes and reports in such cases
- CYFS cases often involve families who have little trust in the welfare and legal systems.

4.2.7 ETHNICITY

The literature review suggested that some demographic factors, including ethnicity, could be associated with complex cases. Overall, the informants interviewed for this research did not consider that ethnicity was strongly associated with complexity.

Views were divided over whether cases involving Maori families were any more or less complex than other cases. Those who believe they are saw the additional complexity resulting from the involvement of extended family and the increased likelihood that multiple parties would be involved in court proceedings. Other people saw the increased support offered by extended family as providing the court with options not always available to nuclear families. Informants in areas of high Maori population were inclined to the view that while Maori families may initiate proceedings the family often made decisions without the need for the Court to rule.

There are emerging issues in some areas with Maori who do not accept the jurisdiction of the court.

In areas with significant populations of recent immigrants many informants thought that these populations were over-represented amongst complex cases. The explanations offered for this included:

- culturally determined beliefs, values and attitudes different from those of the other party, or from those underpinning New Zealand's legislation and judicial system
- the difficulty for counsel and the court to identify key issues when dealing with people from other cultures
- some people from other ethnic groups do not understand or lack confidence in the legal system
- the lack of court staff, interpreters and specialists fluent in other languages can cause delays and hence be a complicating factor.

4.2.8 LEGAL AID

There was general agreement amongst informants that the cost of legal proceedings is a significant disincentive to people to continue action, and that those who feel the disincentive most sharply are those on low incomes, but above the threshold for legal aid. As one specialist report writer said:

People will settle for something workable rather than something satisfactory.

Informants who expressed an opinion on legal aid were divided between those who thought that it does allow people to continue when they otherwise wouldn't; and those who were of the view that legal aid is now quite tightly controlled and the system does not give people encouragement to continue.

Some people made the link between one party being legally aided and the other party, ineligible for legal aid, choosing to self-represent. In this way they argued legal aid does contribute to case complexity.

4.3 Characteristics identified through reading affidavits

4.3.1 VOLUME AND QUALITY OF AFFIDAVITS

Some informants thought that a large volume of affidavits was characteristic of complex cases, but others were inclined to the view that the quality and length of affidavits were more related to case complexity. This latter group thought that poor quality affidavits, which include a mass of irrelevant material, add to the complexity of a case by making it difficult to get to the heart of the matter. Several informants associated poor quality affidavits with self-represented litigants.

4.3.2 MENTAL HEALTH ISSUES

Several informants drew a distinction between parties with mental health problems that are diagnosed and acknowledged by all parties, and those with unrecognised mental health problems, personality disorders or brain injuries. Views were mixed on whether diagnosed and treated mental health problems were associated with complexity as there was often treatment and additional support built in for the party who had the problems. Unrecognised mental health problems, personality disorders, and people with brain injuries on the other hand,

were characteristics that many informants associated with complexity. One lawyer said this:

Bringing these people to the point of a sustainable resolution is not easy.

4.3.3 ALLEGATIONS OF SEXUAL ABUSE

Many informants volunteered or agreed that cases where sexual abuse has been alleged are associated with complexity. The most complex cases are those where the other party denies the allegation, the police have not brought charges and there is no determination of fact.

Ways in which allegations of sexual abuse contribute to case complexity are through:

- difficulty in establishing the facts
- one parent using allegations to deny the other parent access
- increased likelihood of CYFS involvement
- the possibility of criminal charges pending
- the standard of evidence being raised
- a need for specialist reports.

Several informants noted that allegations of sexual abuse in custody cases are less common than they used to be.

4.3.4 ALLEGATIONS OF VIOLENCE

Allegations of violence were seen by informants as having the potential to increase complexity, but did not always do so. As with sexual abuse, the complex cases are the ones where it is difficult to establish the truth of the allegations, and therefore make decisions about the safety of the child.

Some informants expressed the view that the resentment caused by an *ex parte* application for a protection order can make a very poor start to a custody dispute and impede resolution of issues. *Ex parte* applications for protection orders under the Domestic Violence Act contribute to the complexity of custody cases in two ways. Such applications can raise the level of antagonism between parties and hinder the communication necessary to reach agreements. They can also be interpreted by parties and their lawyers as a means of gaining tactical advantage in a custody dispute, and responded to accordingly.

The effect of these factors is exacerbated when the violence is denied and the application for a protection order is defended.

4.3.5 SUBSTANCE ABUSE

Informants working in and around some of the Courts involved in this research had much more to say about the incidence of substance abuse and its impact on case complexity than informants in other areas. According to those who saw it as feature, cases where one or both parents have serious substance abuse

problems are likely to be complicated and often involve concerns about the safety of the children. These cases may well involve CYFS, and are likely to require specialist reports.

Drug use can exacerbate mental health problems, affect people's insights and reduce their ability to work through processes. Severe drug problems can also raise issues of children's custody while parents receive treatment.

In some areas, some informants said that drug and alcohol use is so common that these would be unreliable indicators of complexity.

4.3.6 CONFLICT OVER SHARED PROPERTY

Unresolved property issues have the potential to complicate a case. Not surprisingly they tend to occur in cases involving families who have more assets.

One judge spoke of the concern that some people have about being unable to settle custody until they know how the property will be divided, and whether they may have to find new accommodation for themselves and their children.

4.3.7 RELOCATION

A factor that had not been flagged in the Department for Courts Request for Proposals, nor emerged from the literature review, but which was mentioned by several informants in each of the Courts visited was the impact of relocation of one or other of the parties to a custody dispute.

The chief reason informants said this contributes to complexity is that it '*raises the stakes*' for all parties as one parent is likely to be unable to maintain close contact with his or her children. It can lead to parents constructing a case against one another in order to 'win' custody. One lawyer said this:

To win a case like this you almost have to create a case that the other parent is a bad person even though you may not believe that to be true.

However, one judge had this analysis about cases involving relocation, which seemed to fit what other informants were saying:

These cases are not complex, they're just hard.

4.4. Characteristics identified through contact with one or more of the parties

4.4.1 PERSONALITY PROBLEMS

Virtually all informants said that Family Court custody cases were made more complex when one or both parties have personality problems.

Personality problems are often not apparent at the outset, as the heightened emotions that follow the break-up of a relationship can mask their presence. Informants agreed that the break-up of a relationship is an emotional time for many people, and it is common for one party to be further through the emotional process that follows the ending of a relationship than the other. Strong emotions

and parties at different stages in the process of emotional separation are not characteristics of complexity. However, as time goes on and it becomes apparent that one party is not emotionally progressing through the break-up, this may indicate pre-existing personality problems. Two judges made these comments:

Initially they look like appropriate emotions, but as you go on you realise they are not working through the emotions.

Some litigants pass through a period of irrational behaviour as part of normal adjustment process; others remain pathologically stuck in that mode, and the latter group are particularly difficult.

Some of the indicators informants associated with personality problems were: difficulty in maintaining a line of reasoning, lacking insight, taking up a lot of court staff time, and having bouts of activity rather than applying themselves to the process consistently.

4.4.2 STRONG BELIEFS OR INFLEXIBLE VIEWS

People who hold strong beliefs can see compromise as undermining those beliefs.

Examples of parties with strong beliefs are:

- parties who believe in the sanctity of marriage and will not accept that the relationship is at an end
- some men who view the Family Court as biased in favour of women and therefore unable to treat men fairly
- women whose experiences in their relationships have been so negative that they are completely unprepared to consider that the other party has any merits or rights as a parent.

Litigants who have strong beliefs or inflexible views, and are supported by participation in a group such as a church or a fathers' union, can become even more convinced of the rightness of their perspective, and less willing to accept the legitimate rights of the other party.

Several informants described some parties as having a sense of entitlement in relation to their children. One person described it as 'chattelisation' where a strong sense of the rights of parents to their children takes priority over the best interests or feelings of the child. One participant gave the example of mothers who strongly believe that every mother has the right to look after her own child, and another person described it this way:

When the party – usually the man – carries a sense of entitlement and talks about 'my wife, my children, my house'.

4.4.3 DISTRUST

Parents who have lost all trust in the other party because of things that have happened in the past find it extremely difficult to accept that that person could be a good parent to their child. People who are unable to distinguish between their

own relationship with the other parent and the child's relationship with the other parent, believe it is in the child's best interests for them to do all they can to limit contact between the child and the other parent. The inability to distinguish between the partnership and the parenting relationship is one characteristic of a complex case.

4.4.4 UNWILLINGNESS TO LET THE RELATIONSHIP GO

Many of those interviewed referred to the process of separation that people need to go through, and the necessity for Court processes to recognise that people may be at different stages in the process and moving through it at different speeds. However, some informants also expressed the view that by keeping the issues before the Court, people who are unwilling or unable to accept the end of the relationship use it as a way keeping in touch with the other party.

4.4.5 HIGH LEVELS OF CONFLICT AND HOSTILITY

Where the levels of conflict or hostility are so high the parties cannot communicate other than through a third party, the demands on the Court can be enormous. Some people are completely unwilling or unable to negotiate any aspect of their shared parenting without recourse to the Court to make a decision.

One member of Court staff cited a case on her desk with 13 live applications.

Parental alienation, or the deliberate attempt by one parent to influence the child against the other, was given as a feature of some cases with a high degree of conflict or hostility.

4.4.6 NEW PARTNERS

New partners emerged through the interviews as a characteristic some people associated with complexity. The explanations informants gave for this were that a new partner can:

- increase the pressure on the newly partnered party to settle matters promptly
- lead the other parent to raise questions about the safety of the children when in the care of the newly-partnered parent
- highlight unresolved grief and anger for the other parent who may not have fully accepted that the relationship is over
- have views about appropriate access arrangements that may differ from those previously agreed.

Sometimes a new partner can help resolve a complex case by enabling a previously stuck party to move on.

4.4.7 CHILD SUPPORT PAYMENT ISSUES

A minority of informants believed that child support payment issues and eligibility for state support made a significant contribution to the complexity of cases, particularly in negotiating access arrangements. In these cases parents will

endeavour to ensure that access is shared in a way that minimises their liability for, or maximises their entitlement to, child support.

4.4.8 WEALTH

In those areas with pockets of wealth, informants agreed that people with substantial financial resources were disproportionately represented amongst the complex Family Court cases. As one lawyer said:

Rich, white litigants are the ones most likely to continue on past the point of reason.

The association between wealth and complexity may not be as simple as having the resources to sustain Court action. A judge said this:

Wealth can give the time and resources to act, and often the wealthy have a history of control in their lives – they try to continue this in the Family Court.

4.4.9 ILLNESS OR DISABILITY

A few informants mentioned cases where one of the parties is ill or disabled as having the potential to be more complex than other cases.

4.5 Characteristics identified through court processes

4.5.1 CHANGE OF COUNSEL

Almost all informants agreed that more than one change of counsel was a clear sign that the case was or would become a complex one. More than one change of counsel suggests that the party is unwilling to accept the advice given by counsel and is very determined on a course of action.

4.5.2 MULTIPLE APPLICATIONS

Multiple applications, applications on a wide range of matters, are often a sign of parties who are unable to communicate at all even with the assistance of counsel. Many of the informants interviewed said multiple applications were often a feature of complex cases. Multiple applications contribute to complexity by:

- making it hard for the Court to identify and address the key issues
- stalling the process, some matters have to be delayed while others are addressed
- placing extra administrative demands on court staff
- indicating a high level of distrust between the parties
- creating problems for service of documents.

4.5.3 QUALITY OR APPROACH OF COUNSEL

Most informants offered some comments about the quality of counsel when asked about the characteristics they associated with complex cases.

The prevailing view was that the quality of counsel could either mitigate or exacerbate the impact of many of the factors associated with complexity. For example, a person with strong or inflexible views, if given good advice about the likely outcome of a course of action, may decide not to proceed; whereas someone with similar views represented by less skilled counsel could find encouragement to pursue matters that were unlikely to contribute to prompt and lasting resolutions.

Although informants disagreed about whether competence was aligned to seniority, there was a view that inexperienced counsel tend to favour the Court making a decision, whereas more experienced counsel, with a feel for what the Court is likely to decide, will discuss the most likely options with their clients. They will frequently settle the matter without going to Court. One informant said:

You won't find many complex cases with two experienced Family Court lawyers.

In smaller centres there was a distinct concern about the impact of a small bar on the work of the Family Court. When counsel are doing a combination of civil, criminal and family work it can be difficult for them to shift from an adversarial perspective to the Family Court philosophy of prioritising the best interests of the child. Those interviewed strongly associated counsel who promote or support an adversarial approach to Family Court matters with complex cases.

4.5.4 EXPLICIT REFUSAL TO ATTEND COUNSELLING

Referral to counselling is a common practice when seeking a resolution to custody and access disputes. Some people explicitly refuse to attend counselling. Informants were divided on whether explicit refusal to attend counselling was a characteristic of a complex case.

In some Courts the proportion of people who fail to attend counselling is very high. In these Courts where failure to attend is almost the norm, Court staff thought that explicit refusal to attend counselling would be of little value as an indicator by which to identify a complex case. In other Courts, where the attendance rate at counselling is much higher, staff were more inclined to the view that explicit refusal to attend, or even failure to attend, could be an indicator of potential complexity.

An associated indicator mentioned by some informants was when agreements were reached in counselling but one or other party reneges when the matter comes to the Court for ratification.

4.5.5 THE APPROACH OF THE JUDGE

The literature review revealed that the approach of the judge could be a factor associated with case complexity. Informants, particularly those in some courts, were inclined to agree that the judge's approach has significant impact in a case, but thought that even more important is the impact of several judges' approaches at different stages on a case that is potentially complex.

A related indicator some informants associated with complexity was the lack of early judicial attention.

4.5.6 LITIGIOUS LITIGANTS

Many informants agreed that some people are simply litigious. This statement was typical of many informants' views:

Some people just want to have their day in court.

It could be because of strong and inflexible views, or because the custody dispute is seen as a battle that must be won, or it could stem from the need of one party to stay in contact with the other at all costs. Litigious litigants will keep proceedings alive with apparently little regard for the interests of the child and little apparent motivation to reach a settlement. Multiple and cross-applications are the obvious manifestations of a litigious litigant.

4.5.7 INVOLVEMENT OF OTHER AGENCIES

Few participants thought that the involvement of other agencies was in itself a characteristic of complexity. At times it could be helpful in resolving complex issues if meant that issues and challenges for the family had been identified and were receiving attention.

5.0 Perspectives of different groups

This section summarises the perceptions of different groups as well as discussing matters relevant to location and size of courts. It identifies the *main* characteristics identified by each group. It does not include every characteristic mentioned.

5.1 Perceptions of judges

Several judges began by noting that they only see cases that the parties cannot resolve and which are, by definition, complex. One distinguished between the characteristics of complex cases and factors that are likely to or could trigger a complex case. Several noted that if participants can identify and deal with the problems people have, the case itself need not be intractable.

As a group, judges saw psychological and interpersonal factors as the major characteristic of complex cases, which become prolonged because parties are unable or reluctant to compromise or negotiate, are hostile or have entrenched attitudes. Undiagnosed or untreated mental health issues also contribute to complexity.

Court factors also characterise complex cases. Judges particularly mentioned cases where there are allegations of sexual abuse, although not every case where such allegations are made is complex.

Self-represented litigants prolong and often complicate cases because they do not understand the system or adhere to timetables.

'Difficult' counsel who are inexperienced, adversarial or legalistic can cause cases to be unnecessarily complex.

Most judges described relocation cases as inherently complex.

5.2 Family Court staff

Nearly all Family Court staff identified self-represented litigants as a characteristic of a case that will be complex or at least time-consuming. Some qualified their comments by noting that while self-representation makes far more work for the court, it does not necessarily mean that the case itself will be or become complex. People who elect to self-represent because they hold strong views and believe they can more effectively represent themselves and the issues they consider important are more likely to be associated with complex cases than those who self-represent because they are unable to afford counsel.

Interpersonal and psychological factors are also important, particularly where there are mental health issues for one or both parties.

Cases where there are multiple applications, multiple parties or cross-applications also make cases more complex for court staff.

New, inexperienced or adversarial lawyers who do not understand or support the mediation model can complicate a case.

Cases become prolonged where CYFS is currently involved and reports are required.

5.3 Counsel for the Child, CYFS lawyers and other lawyers

Lawyers and Counsel for the Child agreed that most complex cases are characterised by interpersonal and psychological factors – dysfunctional adults with entrenched attitudes who cannot or will not communicate. Mental health issues are also strongly associated with complexity.

This group also identified three court factors as characteristic of complex cases. These are cases where there are allegations of sexual abuse, self-represented litigants, and inexperienced or adversarial counsel or frequent changes of counsel.

Lawyers were more likely than other groups to mention financial factors, including both wealth and access to legal aid, as a contributor to complexity.

There were no differences in emphasis between CYFS lawyers, Counsel for the Child or lawyers who reflected on cases where they acted for one of the parties.

5.4 Specialist report writers

As with other groups, specialist report writers believed that complex cases are frequently characterised by psychological and interpersonal factors, including personality disorders and mental health issues.

In their experience, cases where there are allegations of sexual abuse tend to be complex, as are cases where there has been previous involvement with other agencies.

5.5 Main centre courts and satellite courts

Family Court staff in satellite courts commented on the lack of availability of specialist report writers and counselling services as complicating factors. A number of lawyers also identified a lack of court dates as a factor in prolonging but not necessarily complicating cases. In small towns where the bar is relatively small, the options for appointing Counsel for the Child are limited, and inexperienced counsel can add to the complexity or length of cases.

5.6 Courts with diverse populations

Participants' comments often reflected the diversity of the populations they served. Participants in areas with a high Maori population, for example, noted that Maori tend to work out custody issues for themselves. Where cases do come to court, they are often complicated because various family members may be caring for children, so there are different applications regarding different children. With the exception of the CYPF Act, the laws under which the Family Court works make no allowance for Maori families being different. The impact of this can be evident in cases where the parents reach an agreement in mediation that is subsequently changed by the whanau.

With people of different ethnicities and from different cultural backgrounds, there are often language barriers. Interpreters are needed at each stage, and culturally appropriate people are needed for cultural supervision and report writing. In one court, the judge has ruled that parties have to get an interpreter and come back for an appointment to make sure they understand what is being decided. Several lawyers noted that more cases involving Middle Eastern, African and Asian people are emerging and the court will need to develop the appropriate resources to deal with that.

Court staff referred to different cultural expectations of what should happen in the Family Court. Some other participants referred to the presence of groups with strong ideologies, including religious views, in their area.

In discussing applications from minority cultures, one judge commented that it is often difficult to tell whether a case is complex because court staff do not know about the culture, or because the case really is complex.

Family Court staff did not specifically associate socio-economic factors with complexity.

6.0 Identifying characteristics of complex cases

6.1 Characteristics associated with complex cases

As the literature suggested, the relative weight given to different characteristics varied according to the role participants played in a case. Despite this, a majority in each group agreed on the five main characteristics of complex cases. They also agreed that it is not always easy to identify some of these characteristics early in the court process. It is important to note that a sizeable minority of those interviewed for the research was unable or unwilling to say which characteristics they regarded as most strongly associated with complex cases.

The five characteristics ranked in order of the number of times they were mentioned overall are:

- personality problems
- self-represented litigants with strong beliefs or inflexible views
- untreated mental health issues
- allegations of sexual abuse where no determination has been made
- counsel-related issues, including the quality of counsel and changes of counsel.

6.2 Identifying complex cases at different stages in the court process

In this section, the characteristics identified by participants are grouped according to the point in the case at which they might emerge, and within that grouping, according to the weight given to them by participants. This section differs from the previous one in that (a) it focuses on the court process and (b) the ranking takes into account the strength of a particular indicator.

6.2.1 CHARACTERISTICS AVAILABLE TO THE COURT AT OR AROUND THE TIME OF APPLICATION

1. Previous substantive, complex applications to the Family Court. (Although not common these are a strong indicator).
2. Self-represented litigants.
3. Cross application, especially when this filed instantly.
4. Current involvement of CYFS.
5. Multiple parties involved, particularly where the family itself is complex, including, for example, a number of children with different fathers.
6. Multiple applications at the same time, for example, for protection orders and/or property as well as custody.
7. Numerous and/or poor quality affidavits – participants suggested that these be cross-referenced with a self-represented litigant or with a new and/or inexperienced or litigious counsel.

8. *Ex parte* application for custody – while some felt that this was a strong indicator, others disagreed, on the grounds that an *ex parte* application may be appropriate.

6.2.2 CHARACTERISTICS IDENTIFIED THROUGH READING AFFIDAVITS

9. Undiagnosed or unmanaged mental health issues for any of the parties – participants generally agreed that the presence of mental illness per se does not necessarily signal a complex case. It is only an issue where it is unmanaged or untreated or inhibits one party's ability to participate fully in the case.
10. Allegations of sexual abuse, particularly against children.
11. Allegations of violence – these were mentioned far less often than allegations of sexual abuse as a potential identifier. Some participants described allegations of violence as 'routine', and therefore an inappropriate identifier.
12. Allegations of drug use – only a few participants mentioned these as a useful identifier.

6.2.3 CHARACTERISTICS IDENTIFIED THROUGH CONTACT WITH ONE OR MORE OF THE PARTIES

13. Personality disorders, which may be characterised by: participants making a lot of contact with the Court over a short time; obsessive behaviour, difficulty in maintaining a line of reasoning.
14. Entrenched attitudes.
15. High levels of animosity between the parties.

6.2.4 CHARACTERISTICS IDENTIFIED THROUGH COURT PROCESSES

16. Numerous applications by the same party or parties.
17. Changes of counsel.
18. Counsel-related issues, including counsel who are unfamiliar with the philosophy and/or processes of the Family Court, or who are unwilling to seek resolution.
19. Failure to attend counselling, although in some courts, a high proportion of parties failed to attend counselling, making this a less useful identifier.
20. Involvement of multiple agencies – only a few participants mentioned this as a potential identifier.

6.3 Characteristics in combination

Many informants mentioned the fact that the characteristics associated with complexity are often found in combination. In fact, some characteristics lead to an increased likelihood of others. For example, self-represented litigants are

more likely to put numerous or poor quality affidavits before the court than are litigants represented by counsel; people with personality disorders or those with entrenched views may have more changes of counsel than other litigants; and, the likelihood of multiple applications and cross applications is increased when more parties are involved.

6.4 Process for identifying characteristics

Some participants chose to focus on the process of identifying complex cases rather than on the characteristics associated with them. While a few thought that such identification should be the judge's responsibility, most agreed that both Family Court staff and counsel had a part to play. A comment from a judge summed up this point of view:

There is no substitute for intelligent observers (case managers, co-ordinators, counsel and judges) watching the track of a case develop and making the diagnosis. This cannot be done by rote.

A number of participants believed that 'responsible' counsel and Counsel for the Child do and should identify complex cases to the judge or Family Court Co-ordinator. Identification might also happen through full and frank discussion at the judicial conference.

[There should be] some form of early independent assessment focused on that issue. Briefs for Counsel for the Child don't ask them to identify the key issue that needs to be addressed to help prevent the case becoming more complex. It's the same for psychologist referrals.

6.5 Cautions

During interviews, participants were invited to suggest ways in which the Family Court might identify applications that are likely to be complex. While most did make suggestions, a number were either opposed to or expressed caution about adopting a 'labelling' or 'flag' approach.

As a group, judges were particularly cautious. One made the following comment, which was echoed by others:

It's unfair to label files with a flag using fixed characteristics, things ebb and flow. Knowing when to force a case to a hearing and imposed outcome as opposed to letting things sort out is a difficult judgment call, a recurring dilemma. Sometimes forcing too early will create a complex case. We need to balance informality with the need to protect judicial independence.

Another was concerned that categorising a file could predetermine the way it is treated. Family Court staff had similar concerns. They noted that there are many cases where the characteristics associated with complex cases are evident but the case itself is not complex. In other cases, complexity can be avoided with a high degree of effort over a few weeks.

A judge also identified the need to distinguish between cases that are validly complex, and those where the system is being manipulated, intentionally or not, to apply inappropriate resources or to further an inappropriate agenda. Examples of validly complex cases include those with allegations of sexual abuse with a very young child where there is indeterminate physical evidence, cases where there is significant conflict of evidence, and relocation cases.

Participants agreed that if a 'flag' approach is adopted, that should not be seen as negative. Instead, a flag should affect the allocation of cases positively. Fast tracking need not be the automatic response.

7.0 Issues relating to the potential for quantitative analysis or testing of characteristics

A number of different factors have been identified which may be associated with the complexity of a case. The Department for Courts may wish to test the significance of these factors. It might consider using statistical techniques which would attempt to assess the overall risk of a case becoming complex based on a number of contributing factors. If such an approach were successful it might result in the identification of those factors which do have a significant influence on case complexity and the relative weight that should be placed on each factor or combination of factors.

This section discusses any issues, identified during the interviews, which relate to the feasibility of such an approach. As such, the issues raised here are only some of the issues that would need to be considered when assessing the feasibility. Furthermore, the information obtained from the interviews is not sufficient to make any judgement about whether such an approach is likely to be feasible or not.

When developing the type of statistical models discussed above, analysts are usually careful to consider that potential explanatory variables could be correlated. The feedback from informants suggests that there may be correlations between a number of different characteristics identified in this report. For example, in the interviews there were suggestions that difficult personalities can manifest themselves in a number of ways such as: previous complex applications, self-representation, cross applications, changes of counsel and litigious behaviour. Given that correlations are likely, the Department should take the necessary steps to allow for any correlations if undertaking statistical modelling work of this nature.

8.0 Conclusion

Custody disputes which reach the Family Court are those in which the parties involved cannot reach agreement among themselves, or with the assistance of counsel. They are, almost by virtue of having come to the attention of the Court, a subset of the most difficult custody cases.

A proportion of custody applications brought before the Court are settled without the Court having to make a determination, and where a determination is required most often that decision is reached in a timely manner, without heavy demands on judicially ordered professional services, and without a disproportionate claim on the resources of the parties or of the Court. The cases that meet this report's definition of complex case – those that are of long duration and involve a lot of interaction with the Family Court – are a small proportion of the custody disputes that result from the separation of parents.

There will always be a proportion of cases that are the most complex, the most intractable and the most resource intensive. Identifying these cases early and responding to them appropriately may prevent some of them from becoming as complex as they would otherwise have been, but it is likely that some cases will always be complex.

A number of the characteristics the participants in this research associated with complex cases are not things it would be easy for the Court to identify early. Characteristics such as personality difficulties, entrenched views, extreme levels of distrust and hostility between parties, and repeated changes of counsel often do not reveal themselves until a case unfolds. Furthermore, with the exception of changes of counsel there are no clear indicators associated with these characteristics and identification would depend to a large extent on subjective assessment.

There are however, some characteristics that informants strongly associated with complex cases which the Court could identify early. Self-represented litigants, previous substantive applications, the involvement of CYFS, *ex parte* custody applications and multiple or cross applications are objective indicators which are available to the Court at an early stage of a custody dispute. However, one of the challenges for early identification is that not all of the cases which have one or some of these characteristics develop into complex cases, and there may be cases which have many of these characteristics which are resolved in a timely and straightforward way. Furthermore, the quality of counsel, the parties' financial resources, and the approach of the Judge can all influence whether a case becomes complex.

People interviewed for this report found it relatively easy to identify the characteristics associated with complex cases and to describe the mechanisms at work. They found it very much harder to rank the relative contribution of the characteristics to complexity and to identify those which contributed the most. It is also clear that while there is some enthusiasm among judges, Court staff and lawyers for identifying complex cases there are also reservations about what that

might mean for cases identified as complex, and the implications for the progress of those not so identified.

Bibliography

Australian Law Reform Commission (1997) Case management in the Family Court of Australia in *Review of the Adversarial System of Litigation*. ALRC Issues Paper 22. Retrieved from the World Wide Web on 24 February 2003 from www.austlii.edu.au/au/other/alrc/publications/issues/22/08.html

Barwick, H. & Gray, A. (2002) *Research on the Domestic Violence Act 42 day and the Children, Young Persons and their Families Act 60 day "rules"*. Department for Courts: Wellington.

Boshier, P., Beatson, L., Clarke, K., Henshall, M., Priestley, J. & Seymour, F. (1993) *A review of the Family Court* Auckland.

Brown, T. (1998) '*Focusing on the child*'. Paper presented to the 3rd National Family Court Conference. Melbourne: October.

Buchanan, A., Hunt, J., Bretherton, H. & Bream, V. (2001) 'Families in conflict – perspectives of children and parents on the Family Court welfare service' in *Family Law* December.

Dessau, L. (2002) '*Judicial management of complex child abuse cases*'. Paper presented to the International Association of Youth and Family Judges and Magistrates, XVI World Congress, Melbourne: 26 – 31 October.

Doogue, J. (2001) '*Psychological abuse: the Family Court response 2001 and beyond – a personal view of a Family Court Judge*'. Paper presented to the Triennial New Zealand Law Conference and 4th New Zealand Family Law Conference. Christchurch: 6 October

Foster, R. (2002) '*Triage in Family Court services: doing more with less*'. Paper presented to AFCC 39th Annual Conference, The Big Island of Hawaii, 5-8 June. Retrieved from the World Wide Web 28.02.03 from www.familycourt.gov.au/papers/html

Gray, C. & Merrick, S. (1996) 'Voice alterations: why women have more difficulty than men with the legal process of divorce' in *Family and Conciliation Courts Review*, Vol.34 No. 2 April: 240-251

Hall, G. & Lee, A. (1994) *Family Court custody and access research: Report 8 – Discussion Paper*. Department of Justice, Wellington.

Johnston, J., Campbell, L. & Tall, M. (1985) 'Impasses to the resolution of custody and visitation disputes' in *American Journal of Orthopsychiatry*, Vol.55: 112-159

Johnston, J., Kline, M. & Tschann, J. (1989) 'Ongoing postdivorce conflict: effects on children of joint custody and frequent access' in *American Journal of Orthopsychiatry*. Vol.59: 576-592

Nicholson, A. (1999) '*Court management of cases involving child abuse allegations*'. Paper presented to the 7th Australasian Conference on Child Abuse

and Neglect, Perth, 19 October. Retrieved from the World Wide Web 24.02.03 from www.familycourt.gov.au/papers/html

Nicholson, A. (2000) '*Future directions in family law*'. Paper presented to the 10th World Conference of the International Society of Family Law. 10 July. Retrieved from the World Wide Web 28.02.03 from www.familycourt.gov.au/papers/html

Parkinson, P. (1998) '*Family law and parent-child contact: assessing the risk of sexual abuse*'. Paper presented to the Third National Conference of the Family Court of Australia, Melbourne, 20 - 24 October.

Pruett, M., Nangle, B. & Bailey, C. (2000) 'Divorcing families with young children in the Court's Family Service Unit' in *Family and Conciliation Courts review* Vol.38 No. 4 October:478-500

Smith, A., Taylor, N, Gollop, M., Godfrey, M., Gold, M. & Henaghan, M. Access and other post separation issues: a qualitative study *Children's Issues Centre: Dunedin*

Sorenson, E., Goldman, J., Sheeber, L., Albanese, I., Ward, M., Williamson, L. & McDanal, C. (1997) 'Judges' reliance on psychological, sociological and legal variables in contested custody decisions' in *Journal of Divorce and Remarriage*, Vol. 27 (1/2).

Stewart, R. (2001) *The early identification and streaming of cases of high conflict separation and divorce: a review*. Department of Justice Canada: Ottawa

Sturge, C. & Glaser, D. (2000) 'Contact and domestic violence – the experts count report' in *Family Law* September

Appendix 1

Interview guide

We are carrying out research for the Department for Courts in relation to characteristics or criteria that could lead to the early identification of complex Family Court custody cases.

These are cases that are of long duration and involve a lot of interaction with the Family Court. They make heavy demands on judicially ordered professional services, take up court time and incur legal costs for the parties.

We are talking to Family Court Judges, Family Court staff, lawyers and specialist report writers and would like to talk to you about your experience with complex custody cases.

The focus of this research is on identifying potentially complex Family Court custody cases, rather than on how to manage those cases once they have been identified.

1. What in your view are the main characteristics of complex custody cases?
2. Can you comment on **how** those characteristics contribute to case complexity?
3. Are there any **other** characteristics that contribute in your experience?
4. Could you rank the most important characteristics for me?
5. Finally, can you suggest ways in which the Courts might identify custody applications that are likely to be complex?
6. Is there anything else you would like to add?

Thank you for your time.

Interviewer guide

We are carrying out research for the Department for Courts in relation to characteristics or criteria that could lead to the early identification of complex Family Court custody cases.

These are cases that are of long duration and involve a lot of interaction with the Family Court. They make heavy demands on judicially ordered professional services, take up court time and incur legal costs for the parties.

We are talking to Family Court Judges, Family Court staff, lawyers and specialist report writers and would like to talk to you about your experience with complex custody cases.

The focus of this research is on identifying potentially complex Family Court custody cases, rather than on how to manage those cases once they have been identified.

1. What in your view are the **main** characteristics of complex custody cases?

Can you comment on **how** those characteristics contribute to case complexity?

Other prompts: When or in what circumstances does that become a factor; what other things influence that?

2. Are there any **other** characteristics that contribute in your experience?

Then say: Some people have also identified these characteristics as relevant. Have you any comments on how significant they are? (Go through checklist, mentioning any that have not already been covered):

A. **Personal characteristics**

- ethnicity
- unemployment
- criminal convictions
- substance abuse

B. **Financial factors**

- wealth, legal aid

C. **Psychological factors**

- entrenched attitudes
- unwillingness to compromise
- mental health issues

D. **Interpersonal factors**

- high levels of conflict with other party
- distrust
- child support payment issues

- conflict over shared property

E. Court factors

- large volume of affidavits
- previous complex case involving either or both of same parties
- previous substantive affidavits
- allegations of violence or abuse
- *ex parte* custody order applied for
- notice of defence or cross application
- self represented litigants
- explicit refusal or failure to attend counselling
- multiple parties, extended family etc
- changes of counsel
- nature of counsel, junior or senior
- the approach of the judge

F. External factors

- police involvement
- CYFS involvement
- other agency involvement

6. Now that we have identified the whole range of characteristics, could you rank the most important ones for me?

7. Can you suggest any ways in which the Courts might identify custody applications that are likely to be complex?

8. Is there anything else you would like to add about complex cases?

Thank you for your time.

Appendix 2 Suggestions for managing complex cases

The focus of this research was on identifying characteristics of complex or potentially complex cases in the Family Court. During the course of the interviews, a number of participants made suggestions for managing complex cases once they have been identified. These are presented below without an assessment of their merit or relevance.

Managing court processes

1. Educating parties about the process

The Courts could be doing more in way of education about the process – all court staff should be involved but they need training. The training should cover things like the separation process, stages, what to expect, how to manage.

Early education of people within the Court system is essential. They used to have videos in Court. They could reinstate that, or say that parties have to talk to the Family Court Coordinator about what happens in the Court, the stages it goes through, why and when.

2. Case management within the Court

Appoint a resource panel for the Family Court to support the Family Court Coordinator. The panel could help identify complex cases to put on case management, fast track etc.

Judges need to manage cases where there are litigants in person. They could maybe not give them a 3-day hearing; they could have a half-day hearing on submissions as would happen with lawyers.

Case management of difficult cases is essential – more and more judges have a directive approach, going for early intervention, e.g. Rolls Royce counselling early on. Judges need to clarify issues for the counsellor and give them clear directions as to what is to be covered in counselling.

Good case management could be judicial management. They could employ lawyers in the Court to assist judges. We need a Court registrar who can deal with interlocutory cases e.g. access, discharge of order. This would take pressure off judges. They could even employ a Court psychologist.

Maybe if had a hearing with the issues identified and that was child-focused early on could reduce no of complex cases. Some cases linger too long before getting before a judge.

Some participants believed that identification of potentially complex cases could lead to selective allocation, particularly where there were allegations of sexual abuse or mental health issues. Participants suggested:

Training all or some case managers in mental health issues.

Use selected case managers where there are sexual abuse issues.

3. Other Court-related issues

Need for interpreters, cost – should staff who speak other languages be expected to be interpreters on top of their other roles?

Involvement of counsel or Counsel for the Child

Pick experienced and appropriate Counsel for the Child.

Extend Counsel for the Child brief so that they can make early submission in complex cases

Early appointment of Counsel for the Child, going to a mediation conference to sideline counsel who don't advise their clients appropriately, or who use the court to fight with each other, firing off affidavits and arguing in court or going for a hearing are all good strategies.

With entrenched parties with counsel who are not experienced at moving things along can appoint Counsel to Assist.

Counsel need training in how to recognise complex cases and manage them. The people who need to come to training of course never come – should they be on the list?

Courts can only act on data provided. Counsel could fill out checklist e.g. how long since separation; any psychological needs; mutual separation or not; any allegations made. Would focus counsel as well.

Other issues

Train judges in mediation. Some judges are very good at mediation, others don't like it or are not good. Only those who have received training should do it. When assigning judges to cases, perhaps their preferences could be considered.

It would be useful if the Guardianship Act explicitly allowed report writers to cover parental issues as they can under CYFS.

S.9 and S10 referrals have no information on what the counsellor should be looking at e.g. grief, what the children need. Should have much clearer instructions.