2004 NATIONAL FAMILY LAW CONFERENCE

Monday, 27 September 2004, 8:30am
Gold Coast Convention and Exhibition Centre

Chief Justice Paul de Jersey AC

I am very pleased to have the opportunity to welcome you to the Conference, and especially to welcome those delegates from interstate and overseas.

Those present include Judges, family law practitioners and other professionals who fill important roles in the family law and Family Court processes. When I addressed a family law residential conference at Coolum last year, I was struck, as I am now, by both the immensity of the Conference, but at the same time, the discernible sense of cohesion and devotion to the goal of maintaining and enhancing a workable and responsive family law system in this country.

Ranking the significance of matters can be odious and unproductive. But when the rank is clear, it does not hurt sometimes to remind ourselves of the primacy of our mission. In terms of issues vitally affecting our people, the criminal justice system and the family law system undoubtedly predominate. The burden of responsibility you carry is therefore considerable. It is refreshing to see your preparedness, your determination, to investigate ways of better discharging that responsibility, and you are to be enthusiastically commended for that.

Another feature of these conferences which has impressed me in the ready interaction between Judges and practitioners. While this is not an unusual feature of contemporary legal communities, it seems to me to be pronounced here, and that again exemplifies your acceptance of the vital importance of your

joint mission. There is absolutely no doubt the capacity of courts to deliver justice according to law is maximized if they are supported by a cooperative and dedicated profession, and you are again to be commended for that.

This is not the occasion for a comprehensive "past, present and future" type presentation by me. But it is usually helpful to pause at least for a moment on occasions like this, to assess progress which has been made, and to identify, if generally, future challenges.

There is no doubt the family law system is accepted as an instrumentally important segment of the mechanism to assure public and private order in our society. Oddly, a very good illustration of that is the regular, enthusiastic public scrutiny applied to the workings of the Family Court. At the time the court was established, in the context of scepticism on the part of many people who considered it unnecessary, merely an example of the Commonwealth flexing its legislative muscle, many of the radical developments which characterized the ensuing three decades could not have been foreseen. A number of those have impacted markedly on the family law system. Its resilience in confronting them has been remarkable, and again illustrates the sophistication of the court's mechanisms and the strength of the beneficial relationship between court and profession.

The era in which the Family Court was established in 1975 was comparatively conservative. The community was used to the default based divorce system, and lurid adversarial contests which featured things like graphic photographs generated by private investigators and discretion statements as to a plaintiff's extra marital affairs, were accepted as legitimate features of that litigation landscape. It was an era where considerable disapprobation still attended a birth out of wedlock, and the child's unfortunate stigma as "illegitimate". Most people

still married in churches, and de facto relationships – much less common then – were considered distasteful. Because divorce was harder to secure, adverse spouses tended to stay together, "for the sake of the children" as it was often euphemistically put, and often I suppose to the children's detriment. Domestic violence and child abuse were phenomena even more hidden than they are now, and a touch of bullying in the schoolyard was considered by many as a maturing experience for the victim. And Judges justified months, sometimes years of delay in the delivery of reserved judgments, on the basis their judgment would benefit from a phase of gestation.

Glib cynicism aside, how times have really changed! Many people were chary about the "no fault" matrimonial regime introduced by the *Family Law Act* in 1975. It was felt to be trendy and unnecessary, an affront to appropriately conservative values, posing a substantial risk to the institution of marriage and the sanctity of the family. It was in that context the Family Court began its sensitive work, and family law practitioners re-learnt the jurisprudence which had so conveniently been catalogued in Toose, Watson and Benjafield.

The newly established Family Court comprised only five Judges, less than a tenth of its present complement. But its workload was then dramatically less than now. The divorce rate was about half the present rate, 1.4 per thousand of population compared with 2.8 per thousand in 2001 (Australian Bureau of Statistics, 2001). As to the significance to marriage of the commencement of cohabitation, in the 1970's about 23% of marrying couples had previously cohabited: now the percentage is 73% (ABS, 2002). And as to the retreat from religion, with the introduction in 1973 of the commissioning of civil celebrants, the rate of marriage outside churches was merely about 2%; now it is 55% (ABS, 2002).

The court did plainly good work from the outset, weathering its own share of tremendous difficulties over the years, a lot of them borne of the intense emotional pressure which builds up and occasionally erupts in this jurisdiction. What I find especially interesting has been the capacity of the court and its supporting professionals to deliver just outcomes against the background of a community changing, not only in the respects just mentioned by reference to statistics, but radically in terms of social and cultural attitudes.

Notable over the last three decades of the court's existence has been the rise of the women's movement, with the increasing willingness of women to assert rights, and their participation in the workforce, with children in day care facilities. Then there has been a retreat from the institution of marriage as such, with the growth in the community of an acceptance of de facto relationships, together with later partnering and child-bearing. The stigma associated with birth out of wedlock has substantially diminished if not disappeared. Unhappy married partners have shown a greater preparedness to part, notwithstanding the presence of children. There is increased incidence of sole parenting, and young people living longer at the family home. Then there are the confronting demands, more in recent times, for recognition of same sex relationships, with the prospect of those couples adopting children, or producing children through in vitro fertilisation. Modern technology facilitates the birth of children other than the result of the physical union of man and wife, and this has itself been an extraordinary – and of course beneficial – development, beyond any realistic contemplation in the early 1970's.

The Family Court, and the family law profession, have endured these dramatic changes, embracing them so far as necessary, and dealing with their ramifications for a system collegially supported. This is not an arena for so-called "black letter" lawyers. I surmise there is prime need for lateral application, for a

capacity to synthesize a mass of social considerations to the point where the emerging solution is seen as supportable – albeit sometimes not entirely clear.

From the pioneering days of the mid-1970's, the court has passed through many procedural developments, including some introduced by statute, many of those developments being the court's own initiatives. A large objective has been to increase access through simplification, and decrease adversarialism through a focus on mediation. Most visible recently was the establishment in 1999 of the Federal Magistrates Service. The court and the profession are doing their best to accommodate a raft of current problems, especially the substantial incidence of litigants in person. From the view of an outsider, the work of the Family Law Pathways Advisory Group and the Family Law Council appears supportive, beneficial and progressive.

In summary, ladies and gentlemen, the family law profession of this nation has progressively weathered substantial change over the three decades of the court's life. The court's mission has not changed, but the means by which it effects that mission have developed as necessary, sometimes subtly. In all of this, you will have been moved by the momentous significance of that mission. May I seek to express briefly my own perception of that significance to contemporary society?

The stability of that society rests on the capacity of its members to recognize and embrace certain non-elastic values. Starting with the cardinal virtues of justice, prudence, temperance and fortitude, we may engraft truth and integrity, fairness and compassion. Families have traditionally schooled their members in these values, with the wider community the beneficiary. With the more frequent disintegration of families – the drug culture often the culprit – that educative role within the family unit seems to be diminishing, with the wider community a loser. When people say, sometimes unduly sentimentally, that the future of our society

depends on its children, they generally contemplate children who are members of functional family units, whether or not the parents are united, save that if they are apart, they can nevertheless interact amicably in the interests of those children. We are talking of core structural elements of society.

As legal practitioners and the family law profession, your responsibility in guiding spouses, parents and children through these traumatic situations is immense, not only with respect to the immediate parties, but also in relation to the healthy functioning and development of society itself.

As Judges, it falls to you, exhibiting the wisdom of Solomon, to resolve, for the parties and the children, what will usually be the most emotionally demanding problems they will ever encounter.

Whether practitioners or Judges, your responsibility, in short, is of profound significance. To discharge it, compassion and human understanding accepted, your knowledge and experience must transcend the mechanics of divorce and the fundamentals of child custody, and extend as well to the intricacies of the law of trusts, superannuation, income tax and many other aspects of property and commercial law.

The burden you bear is inadequately appreciated outside the sphere of your own daily endeavours. For what it is worth, I make my own acknowledgement of these matters, and offer you my respect and encouragement as you go forward.

I conclude with an analogy. In this vast, largely arid continent, water is the most precious natural resource. Rivers must be saved: desalination, de-contamination are current topics. Success seems uncertain, possibly, and ironically, because of the federal nature of our system.

Our must precious human resource is the family, the biological family, and its offshoots, the local community, and the State and national families. The root, which is the biological family, needs continuous nurture, and more than occasionally, repair. Australian society is fortunate that those tasks ultimately fall, as necessary, to a specialist entity of national purview, the Family Court of Australia, and the specialist profession which supports it.

I am very pleased now to declare open the eleventh biennial National Family Law Conference, 2004.