Family Court reforms:

One year on

By Sasha Borissenko

On 2 August 2012 the then Minister of Justice, Judith Collins, pledged a package of reforms to the Family Court to create a "modern, accessible family justice system that is more focused on the needs of children and vulnerable people."

The Family Court Proceedings Reform Bill was introduced to Parliament in 2012 and then considered by the Justice and Electoral Committee, which received 386 written submissions and 217 oral submissions. The Family Law Reforms took effect on 31 March 2014, and according to Ms Collins, they marked "the most significant changes to New Zealand's family justice system since the establishment of the Family Court".

Otago University Law Dean Mark Henaghan is one of three academics behind a two-year study, *Evaluation of the 2014 Family Law Reforms*, that will work with stakeholders in the Family Court community "to see how they're coping in response to some pretty drastic changes".

These changes, he says, while they were driven in an attempt to cut costs and increase efficiency across the board, have in fact "created great costs long term – financially, individually and socially".

"The changes were driven by a philosophy that because family law deals with private matters, people should therefore pay for the services themselves. Access is the biggest worry," Mr Henaghan says.

"It's still very early days and I don't want to speculate too much. That's why the research is so important. What's clear is that parties are all very confused at the moment – whether that be due to clumsy legislation or implementation, we'll see."

The legislative changes have been created in haste and "based on some naive principles". The new "processes are creating more hurdles so what might seem like a normal process is taking longer," he says.

"The only direction in law is to save costs. All research overseas says clients tend to suffer in these circumstances. People feel disempowered and want people to guide them through the legal process and what we're

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The Family Court reforms in a nutshell

New Zealand's family justice system had to change to meet the needs of 21st Century families, Justice Minister Amy Adams says. A Ministry of Justice review of family justice in 2011 found court processes were complex, uncertain and too slow. There was a lack of focus on children and vulnerable people, and not enough support to assist parties to resolve parenting and relationship issues out-of-court.

"Our reforms have worked to deliver a more modern, accessible family justice system that encourages parents to reach out-of-court agreements about arrangements for the care of their children," Ms Adams says.

ENTRY POINTS

With an "out-of-court" focus in mind, the ministry created a new website with more plain English information on family justice matters and introduced a new 0800 helpline (0800 2 AGREE, or 0800 224 733).

SELF-RESOLUTION PROCESS

The Parenting Through Separation Course (PTS), which is free and helps people understand children's needs throughout and after the separation

process, has been enhanced and expanded. The course is compulsory for those wanting to apply to the court who have failed to reach an agreement, unless an exemption exists. If risk factors are involved cases go through the "without notice" process.

FAMILY DISPUTE RESOLUTION (FDR)

FDR providers first assess the parties' readiness for mediation to determine whether it is appropriate. Exemptions may apply if participation wouldn't be appropriate. The FDR provider might suggest preparatory counselling before mediation. For those participants who are eligible for government funding (an estimated 60% of participants) their share of Family Dispute Resolution is fully funded by the government. Those participants who are not eligible for full funding can access the Family Dispute Resolution service for no more than $897 (GST inclusive) from government providers.

LEGAL SUPPORT IN OUT-OF-COURT SPACE

Those wanting independent advice outside of court are encouraged to see a lawyer, at their own cost. Some government-funded legal advice is provided by the Family Legal Advice Service to help families understand the legal aspects of settling a dispute about caring for children, and help fill out Family Court forms. This support can be provided before going to FDR.

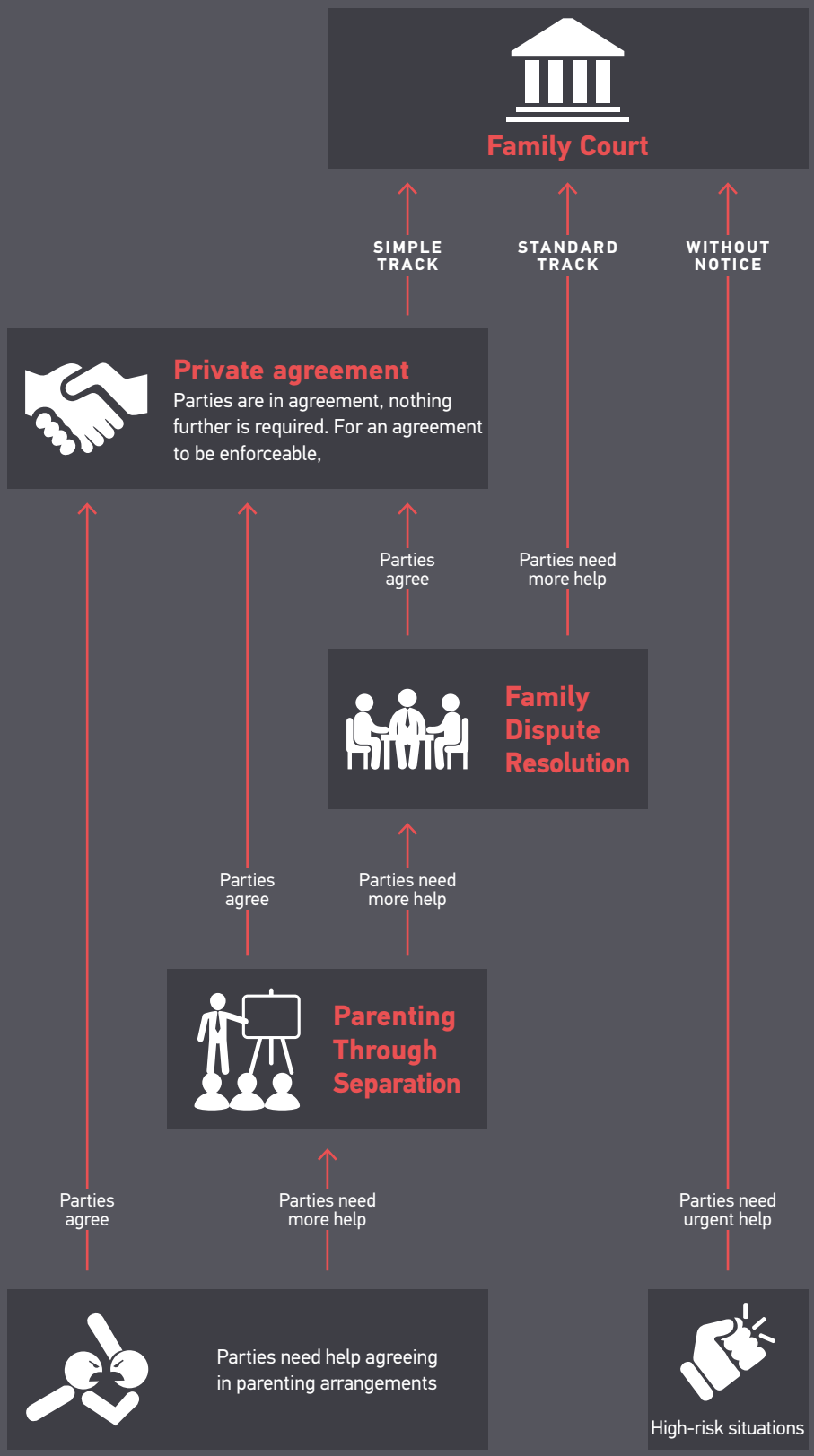
FDR FUNDING

Government funding is available for all out of court services such as FDR, preparatory counselling for FDR [WS7] and legal support. Funding can be applied for via FDR providers or a lawyer. Eligibility tests for funding with income thresholds apply.

FILING DOCUMENTATION

Those subject to urgent or high-risk situations automatically go through a "without notice" track where lawyers have the ability to file documents. The "simple" and "standard" tracks

THE NEW PROCESS



otherwise apply where parties have to file applications for themselves. Parties can access information via the Ministry of Justice website for assistance [WR9], they can call 0800 2 AGREE, or 0800 COURTS, or the FC counter or a FLAS provider.

SIMPLE TRACK

The "simple track" is reserved for self-represented people who have reached agreement and want a consent order made or where there are undefended proceedings. Cases are dealt on the papers by a judge with plain English questionnaire-style affidavits.

STANDARD TRACK

For those unable to reach agreement outside of court, the "standard track" process applies in court where, in most cases, those applying will have attended PTS and participated in FDR services. Judges have the ability to direct people to an issues conference where they self-litigate, or to a settlements conference where they can self-litigate or be legally represented if the judge allows. In the latter option, parties can apply for legal aid. A judge can order specialist reports or appoint a lawyer for child at this stage of the process. Once there's a formal hearing, both parties are entitled to legal representation and can apply for legal aid.

WITHOUT NOTICE

This track applies if there are risk factors, urgent situations, or if there's concern for the safety of children [WS10] or a parent. A judge can move the case from the "standard" to the "without notice" track. A lawyer, lawyer for child and legal aid are available. A judge also has the ability to refer people back to PTS or FDR.

COURT COSTS

A cost contribution order can be made by a judge. The judge must consider some of the cost of services including specialist reports, appointment of lawyer for child or lawyer to assist the court. Parties may be ordered to pay their share or a proportion of two-thirds of the cost. The crown will pay one third. ■

seeing is fewer lawyers and more confused individuals. Sure you've got people who want to buck the law and do it themselves but for those who don't, they now don't have any options.

"In practice I can understand how and why this is happening but we really have to see how these families are coping and where's the concern for the children throughout these changes. For example, fewer people are seeking dispute resolution services because they either can't or don't want to pay for it themselves."

From the Government

While the Ministry of Justice is still in a transition phase of systems, and cost saving figures are not available at this stage, the Family Justice Reforms are anticipated to save about $65 million over four years, Justice Minister Amy Adams says.

"Almost a year after they were introduced, the Government's family justice reforms are proving broadly successful," Ms Adams says.

"There have, of course, been some teething issues and learnings through the implementation but in my view the early indications are positive. Our reforms place out-of-court community-based resolution services at the heart of the system to resolve family disputes about the care of children.

"Benefits we're seeing include reduced stress on children and families by avoiding the conflict, delays and expense going to court can involve. This is largely because court is now a last resort when people can't agree on care of children matters, except in cases involving risk or harm.

"This gives way for the Family Court to now focus on the most difficult cases, especially those involving family violence, that require judicial expertise."

Almost seven out of 10 disputes are being resolved without having to go to court, Ms Adams says.

"We know that children do better when they see their parents working together to take care of them after a separation and it's great to see the reforms are working well to support families during what is often a difficult time."

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From a domestic violence perspective

Domestic violence advocate Maria Ashworth decided to end her relationship four years ago after suffering years of physical, psychological and emotional abuse. Her abuser knew all her whereabouts, monitored all of her technological devices and would constantly threaten to refer her to psychiatric services.

A detective took interest in her welfare after contacting her over an unrelated matter. Once she felt safe enough, she sought help from police and Women's Refuge. She went through the Family Court seeking a protection order and despite opposition, the Judge granted a protection order for life.

"Going to court is really really scary because your ex is in the room and you're trying to defend yourself when it has taken so much strength to get to that point. Why should I have to defend myself or

go through and try and prove details that I know have happened."

Although Ms Ashworth went through the Family Court before the reforms, the prospect of meeting with a mediator or to stand unrepresented seems "ridiculous", in cases of declared or undeclared domestic violence, she says.

"Who's to say a mediator could detect whether a woman is being abused? This is a huge question, especially for women who are emotionally abused."

In her circumstance, by the time Ms Ashworth got to the stage where she was ready to leave, she was absolutely exhausted, she says. "Once you've got that little ounce of courage, to have to sit there with a mediator or to be unrepresented and try and work everything out with potentially your [abuser] in the room is absurd.

"I wouldn't be able to represent myself at the time. It's hard to describe, inside. You feel like a child and you don't have the strength of an adult, to try and put my case across would be just crazy."

While the reforms allow procedures to fast-track applications in cases of domestic violence, the delays that have been happening could hugely jeapordise a victim's safety or their ability to come forward, she says.

"There's only a really short window of time to have the strength to get out. Any delay or bump in the road could change everything."

Women's Refuge New Zealand official spokesperson Kiri Hannifin says the service raised concerns over much of the Family Court reform proposals before they were implemented.

> **"I wouldn't be able to represent myself at the time. It's hard to describe, inside. You feel like a child and you don't have the strength of an adult, to try and put my case across would be just crazy**

"We have seen these concerns play out post implementation, which is frustrating and disappointing. Victims of domestic violence deserve a safe and effective justice system. We do not consider the reforms to have led to better outcomes for many of the women and children we work with."

The greatest issue for those subject to domestic violence is out-of-court dispute resolution services, the lack of representation and the court costs, Wellington manager Philippa McAtee says.

The problems for domestic violence victims going through the court process haven't changed since the family reforms came into force, despite assurances to the contrary, she says.

"The Family Court is one of the systems that doesn't work well for our clients. It tends to drag them through long, stressful, confusing and costly court processes that doesn't necessarily keep victims safe, especially when children are involved.

"[Since the changes] victims have to jump through more [procedural] hoops and mediation out of court can be the worst case scenario for a lot of women in desperate situations.

"Mediation might be great for families sorting custody issues, but for families who are facing domestic violence, either declared or not, I don't think it is a good solution because it's really about pressuring people to agree to an arrangement and sit in a room with their abuser. It seems strange where there is already an unequal bargaining power among the parties."

With regard to costs – many victims don't realise a protection order can cost up to $3,000 and that doesn't include day-to-day care, the ongoing court costs and legal bills. For those who are poverty stricken, they can qualify for legal aid but someone who has an average income and is trying to break free from the domestic violent home, money is a huge issue, she says.

Practical things are missing, she says, where railroad agreements or physical arrangements with regard to childcare are huge obstacles, for example.

"I've worked with women who have plucked the courage to get out of toxic environments. They've sought help and tried to get protection orders, which have been rebutted in the courts.

"I've seen women going through the system where their partners haven't ever changed a nappy and their only concern is to use the court as a tool to get back into the abusive relationship."

Of course this isn't the case for traditional relationships, but domestic violence cases have to be treated differently. The new system does not prioritise victims of domestic abuse and children, she says.

From the ground: the legal profession

Based in Palmerston North, Andrews Family & Property Lawyers principal Bruce Andrews says there are no successes as far as he is concerned. The new system is far more difficult to access and procedurally cumbersome, he says.

Anecdotally speaking, the main issues for Mr Andrews include:

- access to justice;
- the non-availability of counsel to act for the parties in the course of the proceedings until close to a hearing (unless the proceedings are without notice);
- the resulting huge rise in "without notice" applications that should never have been made without notice;
- the "without notice" procedure being used to avoid the need to attend the Parenting Through Separation course and mediation; and
- because counsel aren't involved until later in the proceedings, judges are having to deal with litigants in person who cannot be expected to understand the increasingly difficult procedural provisions.

"There are significant delays in being able to file applications on notice because of a need to attend a Parenting Through Separation course and mediation.

Counsel and the judges have resorted to the ruse of dealing *Continued on page 12...*

(From left): Emma Parsons, Judge John Adams, Ophir Cassidy and Rosaline Fuatai following Judge Adams' final sitting at the Manukau District Court on 13 February 2015

From a retired judge

After more than 40 years working in the Family Courts in the Auckland area Judge John Adams had his final sitting in Manukau on Friday 13 February.

He retired not because he was "grumpy with the court" but to pursue a career in creative writing. But that's not to say Judge Adams doesn't have his issues with the Family Court changes, he says.

He deplores the reduction of legal representation in the process, for example.

"Depriving people of legal representation at an early stage of a case is misguided because that is the very time where you need a professional to shape yourself before going to court. In my experience when people have been represented by lawyers, their appearance in court is more business-like, productive and shorter.

"The vast majority of people don't know the law. They're like sheep, running around and when they hear a dog bark they bang into a fence.

"Now, judges are obliged to deal with the raw material with the breakdown of the relationship, and there are misconceptions by people before the court about their rights. It's now a shop-front kind of situation.

"Imagine a scheme to streamline a brain surgery unit where brain surgeons were posted to reception duties for a part of each week. That wouldn't be a good use of their skills and likewise the current Family Court system isn't a good use of judges' skills."

Although he does favour judicial triaging of cases, in his view that process would be much more effective if parties had lawyers. If so, the process of triage would be informed by generally better material than is the current position.

The administrative problems around managing high volumes of urgent cases have meant courts are overloaded and where once his own Waitakare Court ran like a dream, the new centralised system is now "ineffective and grubby", he says.

> **"The vast majority of people don't know the law. They're like sheep, running around and when they hear a dog bark they bang into a fence**

In his experience the new forms are cumbersome and difficult for the judge to follow, he says.

They are designed to ensure a lay litigant gives all relevant information but little attention has been accorded to the end-user, the judge.

"What used to be set out in three to five pages sprawls in scraps across a very long document. This makes it hard in court but where a judge is dealing with applications without notice, generally on the computer, readability is highly significant. It takes a lot of effort to mentally repackage the material so the relevant narrative is understood. And lawyers, who are well able to write logical material, are obliged to chop their cases into the particles required by the form. The tail (of documentation) is wagging the dog uncomfortably."

But Judge Adams is an advocate of the urgent classification system, he says.

"Why would you take a route that takes five or six months to get to court, which could be financially and emotionally burdensome and ultimately at the expense of the children? In my view what the Family Court does in urgent cases is more important socially than carefully reasoned solemn cases over two-year periods.

"The situation is fairly dire. If one parent takes control of the kids it's uncivilised for the other to go wading into their partner's house and drag them up the road. But in the real world one person will take the lead. There's nothing fair and balanced about it.

"What we need is for litigants to come to court in a meaningful way and this is not happening." ■

with applications on a "without notice" basis and then leaving them on a "without notice" basis, thereby avoiding the more onerous provisions of the new regime. The paperwork is barely penetrable and is relatively uninformative.

"I hear from litigants constantly how difficult it is to navigate the new system. They are also concerned at the fact that they usually have to contribute a third of the fees and disbursements of counsel for the child and/or any psychologists engaged by the court."

As for the future, Mr Andrews says there needs to either be many more judges in the system to deal with the onslaught of litigants without the help of counsel or the need to change the system "back to pretty much what it was before the reforms".

"The pressures on the system now are immense.

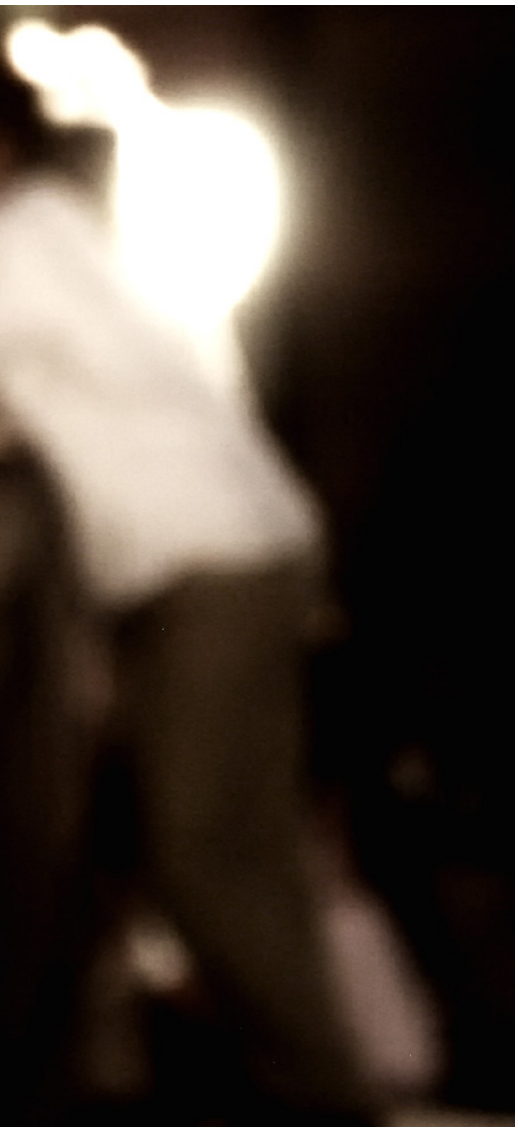
"Judges are doing what they can to mitigate the problem by allowing parties to file 'without notice' applications (that should never have been made without notice) and then allowing them to continue on the 'without notice' track which means that lawyers can be involved and the parties don't have to attend Parenting Through Separation or mediation. This of course is 'cheating' the system but is the only way to keep the work flowing through."

Meanwhile, Tauranga lawyer Fiona Mackenzie of Mackenzie Elvin says she is not convinced the changes are for the better, for families or for the legal profession.

Ms Mackenzie has observed a rise in self-represented litigants and although this facet of the reforms was intended to re-empower people through individual decision-making, people are instead confused by the system.

"There is real value in having a good capable lawyer who can represent people who are dealing with often highly emotionally-charged situations in a professional and competent way. Lawyers in this case save a lot of time but courts don't have that available now."

There is concern that family lawyers might have to turn to other work if they are not utilised and getting the same



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work, she says.

"Good family lawyers are still very busy. There's no substitute for good family lawyers as a profession. But for the future, I worry fewer people will get into this line of work, which will mean we have fewer experienced and efficient practitioners."

Palmerston North lawyer Rachel Lohrey says the lack of court time is at the top of her list. The cases that were being dealt with by way of mediation under the former system are now being set down for Settlement Conference. Hearing time is now extremely scarce even for matters which are urgent, she says.

"The legal system operates better if people have good legal advice and are well represented. Procedurally everything appears to take longer and be more difficult."

Furthermore, dealing with more cases where both parties are self-represented is challenging for lawyers for child who are required to be neutral, she says.

"The long delays in getting court time places more demands on lawyers acting for children, I think, to get agreements between the parties in relation to interim arrangements and to ensure that matters that are urgent are brought to the Court's or Child Youth and Family's attention and are dealt with as promptly as possible."

On the plus side, Ms Lohrey has been surprised at people's willingness to contribute to the costs of court-appointed counsel and specialist report writers without complaint. Similarly, according to her colleagues who have legal aid contracts, they are earning more under the system – which is positive, she says.

"Family Court practitioners and Judges are likely to keep working together to implement whatever system as best we can. In my experience, the people who work in this area care deeply about children and people who are vulnerable and will deliver the best service they are able to."

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From FDR service providers

Presbyterian Support Northern development general manager Wendy Hoskin says Family Works Resolution Services supports parents to come up with a solution that is in the best interests of their children.

When parents are supported to come up with a plan for care and contact arrangements themselves, it's more likely to be sustainable in the long term.

"We provide a service which is a far quicker process than what existed previously. We think it is good for family issues to be resolved in an out-of-court environment that's more family-friendly and less adversarial than a court. The out-of-court mediation process reduces stress on families at what is already a difficult time."

The numbers accessing our Family Works Resolution Services have been fewer than expected, possibly because more people are resolving issues between themselves or due to a lack of understanding among the community about the changes, Ms Hoskin says.

"Family Works has been very active in getting the message out. We have identified places where people are likely to go to ask for information such as Citizens Advice Bureaux and libraries. We have conducted open days throughout the upper North Island, including the East Coast, and we've encouraged our mediators to display resources and get the information out within their own communities."

FairWay Resolution Limited FDR Scheme director Denise Evans says the benefits of private dispute resolution is that timely early resolution of conflict is beneficial for children. It is also cost effective, involves less stress, is responsive to cultural and other needs and encourages the capacity of the parties to work together and reach durable agreements, which are reviewable to take account of changing family circumstances.

Ms Evans says the FDR service is very competent, where there is a nationwide pool of FDR mediators who are very responsive and keen to provide mediation services.

"We are able to set up mediations referred from the Court within a couple of weeks. There are no substantial wait times for parties attending mediation ... The recent changes made by the Ministry of Justice to pay for all assessments has improved parties' access because previously there was reluctance to pay for an assessment to see whether or not a person was suitable for FDR." ■