ARTICLE SUMMARY

"Should Mediation b
All Family Law Act P

Since June 2006, Australian parties wanting to apply to court for parenting orders have had to attend, or attempt to attend, Family Dispute Resolution (FDR). Similarly, since 2014, the New Zealand Family Court has also had mandatory FDR. In both Australia and New Zealand, parties can seek exemption from attending FDR where there are allegations of family violence or abuse, a risk of family violence or abuse, incapacity to participate effectively, or in circumstances of urgency.
Judge Harman's paper provides a detailed, qualitative survey of his cases over a 3-month period in late 2014. In conducting his survey, the Judge looked at the pre-trial steps in 376 parenting and relationship property cases, examining the role of mediation or conciliation before those cases went to court.

A brief summary of Judge Harman's recent paper follows. A copy of the full paper can be accessed here

Key Findings

Judge Harman found that the parties had attended mediation before filing in only two of the 80 relationship property matters (participants were not asked whether one or both had wanted to attend mediation, but had for whatever reason not done so).

The rate of applications for exemption from attendance at FDR in parenting cases meant only 19% of parenting matters across this sample had actually attended FDR (and from the metropolitan sample only 13%).

1 The data sample suggested that, apart from exempt cases, when disclosure is provided settlement can be achieved in a significant number of cases (59%).

2 A large portion of the cases studied that were not resolved 6-8 months after filing (39% of "not settled" cases), involved parenting issues. These would already be compelled to attend FDR.

Summary Written by: Anet Kate, Mediator & FDR Provider

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Author - Judge J. Harman

Judge Harman was appointed to the Federal Circuit Court of Australia in June 2010. Prior to joining the Court Judge Harman worked in private practice as a lawyer and with a special interest in the Independent Representation of Children, Indigenous Issues and Family Violence. In addition Judge Harman worked extensively as a mediator/FDRP in both private and community practice including working at Blacktown and Bathurst FRCs and with Unifam Penrith. Judge Harman has also lectured at UWS in family law and mediation.

In 2005 Judge Harman received a Stop Domestic Violence award and in 2013 was nominated for an Australian Human Rights Commission award.

3 Another significant number of cases (14% of "not settled" cases) not resolved 6-8 months after filing were undefended and would likely have received exemptions.

Of the two cases that went to mediation, one case had settled, but a party had then moved before signing the agreed terms of settlement, and could not be found. Later (after filing proceedings in court) that party was found, and the matter resolved by consent without further intervention. This case was regarded as settled following mediation.

The second case did not resolve at mediation. In that case, there had not been complete disclosure, or agreement about the value of key assets. Accordingly, attendance at mediation might have been premature.

The adequacy of disclosure comes forward as a key input into the success or otherwise of any attempt at settlement. In less than a quarter of the cases, the parties reported that satisfactory disclosure had occurred; in slightly less than half of the case the parties had agreed about the pool of property for division; and in only 15% of cases the parties agree on the value of their assets.

Probably as a consequence of the above, in nearly two thirds of the cases the parties could not

define or identify the issues in dispute or properly develop and exchange settlement proposals. If pre-filing disclosure and mediation in financial proceedings was mandatory, this could encourage a culture of agreement making and avoidance of an adversarial court system. This was the intent of both Section 60I (Australia) and Section 12 and the new FDR Act 2013 (New Zealand) for parenting proceedings.

Judge Harman also considered the impact of legal representation on the process. The settlement rate for cases which went to mediation or conciliation was not much higher than the rate of settlement for cases using lawyer assisted negotiation without mediation. The number of cases settled without filing, or how those matters were resolved, is unknown, including whether mediation might have led to settlement.

As a whole, the data revealed two major pre-filing barriers to settlement (or attendance at mediation), which may impact upon the decision to file:

1 What Judge Harman calls "legal gate-keeping": disputants in family law cases tend to be both inexperienced and highly emotional. If the lawyers for the parties either don't suggest mediation, or advocate against mediation, mediation is unlikely.

2 Lawyers seldom consider mediation, let alone attend it, which suggests either a failure to seriously consider mediation as a viable alternative to litigation, or a preference for litigation.

The timing when mediation (or other third party evaluation or intervention) was engaged in, was also found to potentially affect settlement success .

Judge Harman's view is that the need for modern dispute resolution processes to develop, support and deliver a settlement culture would also obviate against traditional litigious modes of dispute resolution.

In both countries, if mediation has not been attended, or disclosure not completed, then the matter is case managed in the usual way, inevitably involving greater delay and cost.

When the new FDR regimes were introduced, both the Australian and New Zealand governments publicly predicted they would reduce both the costs of litigation to the taxpayers, and lower the financial and personal costs to parents. It was seen that going to FDR rather than Court to work out straightforward parenting disputes would achieve these desired outcomes.

The extent to which these aims have been achieved is still being studied. This survey shows that in Australia, as here, there is some way to go before pre-hearing steps and mediation are fully used by parties, lawyers, and the Courts.

End Notes:

1. These FDR provisions, apply only to parenting order applications.

2. The data pool was drawn from 80 property cases and 296 parenting cases. These included disputes about either parenting or property, or both.