

# WHERE IS THE VOICE OF THE CHILD IN FDR?

**T**he way in which the Family Court in New Zealand operates now requires parties to have attempted Family Dispute Resolution (FDR) before being able to issue care of children proceedings. As part of the FDR process, the practitioner and parties are required to consider the children themselves. In particular, to ensure that the welfare and interests of the children are kept paramount and that the children's views are appropriately included. FDR Practitioners are required to:

**(a)** Facilitate a process that helps the parties reach agreements that "best promote the welfare of the children" (R7(c)).

This requires the FDR provider to:

- i. determine an appropriate mediation process for the parties;
- ii. ensure the welfare and best interests of the children are kept paramount during the FDR process;
- iii. conduct the mediation process to get the best outcome for all the parties, including the children; and
- iv. ensure the children's views are appropriately included in the mediation.

**(b)** Have adequate understanding and knowledge of child development and its relevant to day to day care and contact issues (R7(h)).

This requires the FDR provider to:

- i. use child focused and child inclusive

mediation as appropriate;

- ii. manage the mediation with sensitivity to the developmental and chronological ages of the child;
- iii. manage the mediation using age appropriate questioning and interaction;
- iv. comply with appropriate requirements of confidentiality in relation to children;
- v. recognise and take into account in the mediation child adjustment to parental separation; and
- vi. support care-givers in making decisions that are sensitive and appropriate to the developmental and chronological ages of the child.

**FDR Mediators are statutorily obliged to ensure child welfare is paramount and the child's views are appropriately included in mediation and agreements reached**

Up until the changes in legislation, the 'views of the children' were represented in mediation via Lawyer for the Child. The Lawyer for the Child was able to visit the children, their home and school, inquire as to the child's safety and general well-being and, when appropriate, recommend specialist reports.

At mediation, Lawyer for the Child would attend ostensibly 'in the shoes' of the children and would be able to comment on what was in their best interests. The Lawyer for the Child

# VOICE OF THE

- Carol Powell

could comment on care and contact arrangements that were age appropriate; share information about arrangements that other parents have used; ensure that the children were able to maintain healthy relationship with their parents/caregivers and extended family; ensure that care and contact arrangements were not overly disruptive or difficult for the children; and, importantly, stress the importance of the children's need to be in a conflict free home environment.

As FDR usually takes place prior to court proceedings being issued, in most cases there is no lawyer for the child appointed to take on this role. The way in which the children's views are appropriately included in the FDR process under the current regime is not defined and it is for the mediator and the parties to determine what will work best for the particular children concerned.

## Family Dispute Resolution Centre Model – Use of a Child Inclusive Specialist in FDR Mediation

One means of achieving both obligations would be to work with the parties to identify a suitable adult to speak on behalf of the children at mediation. It is important that this role is taken on by someone who has the skills to keep the children safe, emotionally and physically, throughout the process.

The Family Dispute Resolution Centre (**FDR Centre**) has developed a panel of child inclusive specialists (**CIS**) who are available to take on this role. Where parties are able to meet the cost, an appropriately trained and

skilled professional who could be a qualified lawyer for the child, a psychologist, therapist, or counsellor, will be appointed by the FDR Centre to meet with the children, build trust, agree what information can be shared, and identify the children's needs, without taking the side of either parent or party.

The CIS would then attend mediation to share the children's views with the parents, and would normally leave the session before decisions are made. If agreed upon during the children's initial meeting with the CIS, the CIS would also provide information and/or feedback to the children on the outcomes agreed by the parents to ensure that the children understand the agreements reached in mediation and to offer support to the children.

The benefit of a CIS is that the children are free from the guilt they often feel when speaking with one parent about what they want or need. Many children will tell their parents what they think the parent wants to hear and will endeavour to protect their parents from hurt. While parents are generally very motivated to make the best decisions for their children, the intensity of their emotional state often makes it difficult for them to understand how the situation is affecting their children. For these reasons, it is more likely that the child's views and interests will be represented in the way the child would like when there is another voice in the mediation room who is speaking solely for the children.

While there are other strategies that mediators can employ to meet their responsibilities under the legislation the use of an independent professional ensures that the

mediators role is not blurred and that the children genuinely feel heard in the process.

*Please contact us at [registrar@fdrc.co.nz](mailto:registrar@fdrc.co.nz) if you would like to discuss any of the FDR Centre's services, including our use of Child Inclusive Specialists.*

## AUTHOR PROFILE

Carol is a Mediator and Conflict & Communication Coach and a Panelist with the FDR Centre.

She has been mediating for the past 20 years and has mediated a wide range of disputes including: care of child, parenting issues, Hague Convention, guardianship, relationship property, sexual abuse, education, workplace, neighbourhood, health and medical, business, civil and commercial issues including aviation, construction and engineering, weathertight homes, partnership, franchising, intellectual property, trusts and estates, harassment and bullying relationships property, domain name ownership and corporate issues. I mediate regularly for the Family Court.

For more on Carol [CLICK HERE](#)



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# PROFESSIONAL NEGLIGENCE:

## PROFESSIONALS' CONTINUING DUTY OF CARE

- SIMON GARRET AND KATE MURPHY

**T**he Court of Appeal has held recently that the obtaining and receiving of advice after a mistake had been made by a professional did not mean that an obligation to correct the earlier mistake or negligence continued to accrue and give a fresh cause of action against the professional every day after the mistake had been made. Whilst *Capita (Banstead 2011) Ltd v RFIB Group Ltd* concerned negligent advice and pension services given to the trustees of a pension and assurance scheme and the principal employer under the scheme, the case is of wider interest to PI insurance practitioners and professionals because of the Court of Appeal's comments in relation to continuing duties owed to clients.