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Family Mediation: Another Way?

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It has never made sense for a single model of mediation, entirely different from that used for civil and commercial disputes, to hold a monopoly grip on family mediation. This has apparently never happened in the US, where most mediation practice originated, and the logic of this anomaly needs to be analysed and tested.

Alternative Dispute Resolution (ADR) is well established in the worlds of both civil and matrimonial disputes. It is actively encouraged by the courts because it works, is cost effective and produces a high level of customer satisfaction. However, in England and Wales family mediation has developed in an entirely separate way to civil and commercial mediation. To many civil mediators who practise as family lawyers this has always seemed illogical and raises the question why it is that many other family lawyers are overlooking what is undoubtedly a well respected and highly successful form of ADR which they should be actively considering for the benefit of their clients.

Apart from the fairly recent arrival of collaborative law onto the family law scene, ever since the dawn of ADR in this country the world of family dispute resolution has been dominated by 'family mediator', which has become a somewhat isolated or even out on a limb process. As such it is conducted by trained family mediators who engage in a facilitative process, with

both parties being together for all or the greater part of it in the absence of lawyers, usually involving a series of different meetings often over many weeks and sometimes months. When heads of agreement are concluded, the parties then have to take them back to their lawyers for consideration and advice before and, if appropriate and agreed, they are incorporated within the minutes of a consent order. In contrast to this a civil/commercial mediation will actively encourage the parties lawyers to be in attendance on the mediation day and when a settlement is reached a *Tolmin* order is almost invariably drafted up and agreed then and there.

THE CIVIL MODEL

Also almost without exception, when the civil and commercial mediation model is adopted the parties attend the mediation with whoever they chose, including their solicitors, maybe counsel, and any experts they feel they require. Beforehand a core bundle of documents will have been agreed and position statements exchanged (if the civil model is used for a family mediation relating to financial provision, Protocol Form E's and any other necessary disclosure will have been exchanged well in advance). After facilitating as well as managing an initial joint meeting, the mediator will engage privately and confidentially with the parties and their lawyers. He or she will really test the parties' arguments as well as their respective proposals for settlement. Additionally, the mediator will act as a conduit for the making of offers and counter offers. The objective is to facilitate a process which produces a legally binding settlement agreement, usually within a single day.

THE FAMILY MODEL

Some practitioners say that the strength of the 'family mediator' model is that by working over a longer time scale, and not having lawyers directly involved, it brings a transformational approach to the parties dispute. They believe perhaps that it allows the parties to look beyond their immediate problems, to understand better the situation they and their partner face and to work gradually towards a fair and workable solution. However others say

with considerable force that the civil model provides a quicker and more focused approach to the task of helping estranged and warring husbands and wives (and now civil partners) construct their settlement within a much shorter timescale.

We suggest that family lawyers should weigh up the advantages and disadvantages of the two different models in individual cases before deciding which is the more likely to help the parties secure an early settlement. Both of us authors have long held the view that in many family disputes involving money or property, the civil model can often be the better choice. Experience gained through mediating a number of Inheritance Act and trust related disputes where there have been high emotions, antipathy, greed and distrust between relatives convinces us that the civil mediation model is eminently suitable for financial provision and property adjustment cases. Indeed mediations such as these have convinced us that it is by far and away the best model in so called 'big money cases' when often there are a wide ranging number of complex commercial or trust issues to be considered, understood and resolved before a settlement can be reached.

A particular mediation one of us dealt with supports this contention. It was far from a run of the mill case. It involved a wide range of issues including periodical payments, the matrimonial home and re-housing, grandparents and grandchildren, previous injunctive remedies having been sought, a substantial family trust, public funding, and underpinning all of these, a very deep seated and likely deal breaking degree of distrust and resentment among the parties. There was an extensive cast at the event, three parties (husbers, wife and husband), their respective solicitors and a matrimonial counsel. There were also two disconnected sets of proceedings (in the Chancery and Family Divisions) as well as much pessimism about the chances of the mediation actually bringing an end to the ever looming prospect of a ghostly and very costly trial. The civil mediation model had been expressly suggested by a chancery litigator and neither of two family lawyers present had previous experience of it.

To cut a very long story short the mediation succeeded, with heads of agreement and trust deeds being signed just before midnight. The dispute was at an end, the parties and their lawyers were happy with the outcome, significant legal costs on all sides had been avoided and the protagonists woke up the next morning in the certain knowledge that what had been a nightmare dispute was well and truly behind them. By using the civil mediation model they had resolved a massive and very expensive dispute in a single day and quite possibly put the family back on the rocky road to the rebuilding of relationships. The family lawyers involved were particularly impressed by both the process and the swiftness of the outcome. Why then is the civil/commercial model of mediation not used more often in family orientated mediations?

CONCLUSION

We contend that when advising upon complex and/or 'big money' cases, and particularly those which involve business assets, family law practitioners should be far more open to the idea of inviting their opponent to consider the use of the civil mediation model. Many long running family asset disputes have the self same characteristics of a commercial dispute and the more money there is in issue, or the greater the complexity, the more advisable this becomes. Those of us who are active in the mediation world know very well that one to one solicitor negotiations and round table meetings only go so far. Once these have failed, or become protracted in circumstances when the prospects of an early settlement are poor, often the next or last remaining option is going to court: why not though at that stage consider using the civil mediation model?

Finally we suggest that, with the advent and increasing use of collaborative law, there is another very persuasive reason for considering the use of the civil mediation model. Collaborative law is fine until in some, usually complex, cases it proves impossible to broker a deal. At that stage everyone faces a major hiatus while the parties instruct new lawyers and incur extra as well as duplicated legal costs, while they get themselves up to speed and start preparing for a final hearing. We

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suspect that on most of these occasions it would be very much in the best interests of all concerned for it to be agreed as soon as possible that there be a civil style mediation to resolve matters. In our view, if this

approach were to be adopted the collaborative law process would continue with extremely good prospects of a successful outcome.

ADJ NEWS

WHERE ARE WE NOW? PRIVATE CHILDREN WORK

A new regular item contributed by the Association of District Judges (ADJ).

Some observers continue to maintain that an adversarial process is an inappropriate way of resolving disputes between separated parents. It is expensive and protracted, exacerbating bitterness and damaging to children. The process should be more inquisitorial, conciliatory and educational, it is said. Many district judges sympathise with this view and over recent years have adapted their way of working where possible to accommodate it. However, more and more cases involve domestic violence, abuse, alcohol and drugs. Applicants with children often apply to court quite simply for protection, some having fled to refuges, others seeking to remain safe with their children in their home. How do we therefore balance these two conflicting strands? Training and conciliation work on the one hand against protection with sanctions on the other.

There is no easy fix. Each family is different. Where the safety of the child or parent is not an issue, family courts encourage mediation as a way of resolving cases. At First Appointments, district judges and family advisors often act not just as conciliators but as quasi mediators. However, many people who do apply are the vulnerable seeking protection. Moreover, not every case falls neatly into one of two categories. The complexity of human relationships and their dynamics mean that there is rarely an equality of arms or status between partners whose relationship is foundering. The First Appointment under the Revised Private Law Programme provides a professionally developed mechanism for distinguishing those cases where mediation (or other similar conciliatory approach) is suitable from those where serious allegations (sometimes denied) of domestic violence and abuse, often coupled with alcohol and

drugs, are involved, and where there is need for a contested hearing and/or protective measures.

Increased awareness of the impact of domestic violence and abuse within families, the revised Practice Direction on Domestic Violence and the inability of Cafass to provide a multi focussed s7 report within a reasonable period of time, often resulted in recommendations from Cafass and requests from advocates for long finding of fact preliminary hearings. Many judges began to question the need for an increasing number of such hearings. They engender more bitterness between the parties. They take up valuable court resources. The expense is considerable, financially crippling many. Even those who have legal aid suffer if the statutory charge applies. Some judges, therefore, came to the conclusion that, unless there was a high risk of violence or the principle of contact itself was in dispute, there may not need to be a separate finding of fact hearing. Other judges restricted the parties to five or six only of the most serious allegations. If it really was a case of gradually re-instating contact surely it would be better to commence contact initially in a supervised setting with perhaps Parenting Information Programmes being introduced with a subsequent review to ensure that it is safe to move gradually to unsupervised, then overnight, weekend and holiday staying contact. The Court of Appeal decision in *Re C (Domestic Violence: Fact-Finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728, therefore, was welcomed by many, upholding, as it did, the decision of HHJ Coppley to refuse to order a separate finding of fact hearing. Reasons must be given by the court when exercising its discretion to refuse a separate finding of fact hearing and at final hearings where there is a dispute in the evidence, findings of fact may still have to be made before a decision can be made. This approach has culminated with the new President of the Family Division issuing at the end of May 2010 welcome new Guidance in relation to Split Hearings suggesting that it will now be a rare case for the necessity of a separate hearing (see p 752 above).

It was also interesting that both the President, in his new Guidance, and Thorpe LJ in *Re C* referred to the scarce resources of the court. Indeed, in *Re A*