

## Family Mediation - Under the Spotlight

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The Hon Margaret Wilson has announced that mediation may be used to cope with a surging caseload for the courts caused by the Property (Relationships) Act which came into force on 1 February 2002. This announcement is yet another illustration of the government's recognition of the value of mediation as a dispute resolution tool. This time in the context of its particular appropriateness for family disputes.

The spotlight is also being placed on mediation in the Law Commission's review on Family Court Dispute Resolution, where it is calling for submissions on a discussion paper considering possible systemic changes that would facilitate the early resolution of disputes. Mediation - an additional tool

A number of processes conducted by family lawyers, counsellors and judges within the current Family Court system include aspects of mediation - they move people towards solutions.

But purposive party-centred mediation offers something else and unless the process is explicitly stated with clear parameters outlined, the different aims of mediation and counselling (or similarly mediation and 'judicial mediation') can become mixed and blurred.

Mediation does not seek to displace available legal processes: it is informed by the law and litigation always remains an option. Likewise it is no substitute for counselling &ndash; there are times when mediation is not appropriate. While it can result in people seeing things differently which often creates a shift towards finding solutions, making constructive decisions and improved relationships, it does not aim to solve emotional issues. In step with the times

Whatever the outcome of the Family Court review, private mediation is being used more frequently in family disputes. For example, separating couples are using it as a constructive forum to make decisions and work out the practical arrangements following their separation. It is also being used as a forum to make 'contracting out' arrangements between de facto couples in the light of the new legislation. It is, in both instances, pragmatic and cost effective. Forest Mosten, an American lawyer and mediator, who has set up the first nationwide mediation business in the United States has said that mediation taps into the current trend for self reliance &ndash; it's in step with the times. While our cultural situation is different, his perspective resonates: all concerned have more control. Mediation is underpinned by the principle that it is ultimately self determinative - parties retain the option to end the process at any time and they only depart from their starting points (legal or other) by choice. Benefits for parties

The primary goals of mediation fit well with the needs and priorities in family dispute resolution &ndash; both in terms of new legislation and in the breakdown of relationships. Mediation provides a structured process for negotiation that maximises the parties' input into any outcome. It aims to:

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- Help parties find constructive solutions to problems (and/or make mutually acceptable plans). In family situations, where children may be involved, identifying appropriate, workable, sensible solutions to problems is fundamental.
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- Help the parties preserve and possibly improve (often ongoing) relationships. Mediation can focus on parties' relationships, in particular by facilitating better communication and fostering greater understanding between them by exploring their different perspectives.
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- Avoid litigation. In disputes involving children, avoidance of stressful protracted court battles is in their interests.
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- Provide an opportunity to resolve issues quickly before they escalate. This goal may be of special significance if the caseload of the Family Court does increase under the new legislation, as predicted.
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- Provide parties with a protected environment within which they can share their respective views of the dispute. Mediations can be conducted on a very confidential basis with only the parties, their lawyers and the mediator present. This can be valuable: the 'safe' environment makes it easier for intensely personal matters to be raised &ndash; and these are often at the heart of the dispute.
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- Allow parties active participation in the process. Recent discussion of the Family Court processes highlights the

need for participation in decision making processes involving personal relationships.

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- Emotion frequently blocks the ability to negotiate – mediation helps steer the parties through the process so they can make fully informed decisions.
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- Give parties control over their decisions, their outcomes in the light of all the circumstances. Benefits for lawyers

Family lawyers are seeing benefits too:

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- It is a useful tool: their task of negotiating with their counterparts can be made less time consuming if they work towards the mediation forum. Agreement to mediate can create a momentum towards resolution.
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- Some perceive a potential better bottom line as clients begin to select lawyers who support mediation and can guide them skilfully through the process – lawyers comfortable with a breadth of dispute resolution options. Satisfied clients are the best marketing tool available.
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- Better control: mediation gives skilled advisors the opportunity to improve their client's position throughout the process. For example, through generating options, recognising the other party's concerns and so on.
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- More satisfaction and less stress through increasing control, guiding parties to a process that concentrates on making plans and solving pragmatic problems, contributing to a process that frequently catalyses improved communication between bitter, hurt individuals and shifts them closer to a working relationship. Uncertainty of new legislation

Another reason why mediation may be the preferred method of dispute resolution now is the potential uncertainty of court decisions in "test cases" under the Property (Relationships) Act 2001. It has been suggested by one writer on the new legislation that "we are sailing on a sea with no compass and no landmarks". This means that the Family Court may be called upon to determine a number of questions of law causing a backlog of cases leading to delays.

In this context, parties may find mediation an attractive dispute resolution option. Although mediation takes place against the backdrop of the law, legal rights are not decisive (as they are in court). With factors such as the parties' needs, interests and relationships taking priority in mediation, they don't have to wait for the courts to formulate legal principles under the Act. Moreover, while the law remains unclear, mediation gives parties the opportunity to achieve results which they consider to be "fair".

The following scenarios illustrate these potential benefits:

#### Scenario 1

An elderly widow invites a male friend to live with her for mutual company. They socialise and holiday together and share a housekeeping bank account. They have no sexual relationship. The widow dies five years later and under her will her children inherit all her property stock. The man brings a claim under the Act saying "we were living in a de facto relationship and I want half of the estate". The law is unclear as to what "living in a de facto relationship" means.

Therefore to test it will require court intervention, time, considerable financial resources and an uncertain outcome. The parties in this scenario, namely the man and the widow's children, may prefer to avoid the publicity and stress of litigation and achieve a mutually beneficial outcome in mediation. Scenario 2

G & D, de facto partners for ten years, entered into a property sharing agreement in September 2001. In early 2002 they separate and D wishes to set aside the property sharing agreement on the grounds that she was pressured into it by G without understanding the implications of the new legislation.

The Property (Relationship) Act 2001 requires a "serious injustice" rather than simple "injustice" (the current test) before a contracting out agreement will be set aside. G & D have parted amicably and prefer to resolve their property sharing issues on an amicable basis without the delay and uncertainty inherent in litigation, especially as a test case. Gaining momentum

Nine years ago an earlier review of the Family Court (chaired by Peter Boshier) recommended the establishment of a

Family Conciliation Service - in which the functions of counselling and mediation be separated &ndash; as &lsquo;the appropriate environment for dispute resolution&rsquo;. In terms of the mediation component, it is positive to see it, once again, being seriously considered in a systemic way.

Nevertheless not everyone is waiting: lawyers are seeing benefits; parties are beginning to ask for it and there are increasing numbers of specialist mediators who can mediate in these disputes. Mediation is gaining momentum; it has a place. In the area of separation for instance, lawyers know they are not making the difficult process of separation worse and often, at times of chaotic emotion, realise it provides a pragmatic way through some of their clients&rsquo; issues. For parties themselves, not only can the speed of mediation be cost effective, but it also lets them get on with their future sooner.