

Family Mediation - the context:

Ongoing unresolved conflict challenges every aspect of children's healthy development.

Conflict is often the dominant element in both Public and Private Law matters, parties conflicted positions present a considerable challenge to the effective administration of Family Justice. The resolution of conflict and the restoration over time of beneficial parenting can only be achieved when level of consensus and cooperation is restored to fragmented relationships. Judicial adjudication can contribute little to children's "lived experience" where they remain the focus of adult's conflicted agenda.

I have been asked to present a paper by the FJC to aid understanding of the relationship between the work of the FJC and Family Mediation, I hope the following information and the issues I raise will not only serve to inform FJC Members, but will also highlight some of the challenges that require consideration and action. I will not detail the process of family mediation presuming that FJC Members have some knowledge of the subject and its key constituents of mediator impartiality and the participant's autonomy of decision making.

Mediation is distinctly different from "in court conciliation", it is not solely a solution seeking process, the restoration of functioning communication, shared responsibility for children, and ongoing effective parenting, are the outcomes that mediation can facilitate. Mediation should not be viewed as a quick or cheap fix; family breakdown is a process not an event many layers of hostility, disappointment and loss have to be shifted prior to the recovery that may lead to restored functioning.

Families in transition encounter the Family Justice System at a time when they have many complex needs that require a range of interventions that, if they are to be effective must be available when the parties and their children are able to make best use of them. Often what is offered by professionals is delivered at a time and in ways that does not maximize the potential for change. Professional rivalry, lack of coordination, and market competition often serve to hinder rather than help. The FJC should have a central leadership role in facilitating professional cooperation across the many disciplines that may assist any particular family or child at any given time. We have to work in ways and at a pace that our "users" can manage, in a hard pressed system this presents many challenges.

The mediation market place:

In England & Wales family mediation practice developed in 1970's in the voluntary sector and Family Court Welfare Units, usually being funded by the Probation Service and charitable bodies. Mediator training was until the 80's informal, practice developing from USA and Canadian models. Mediators practice was supervised and developed over time; practitioners were usually drawn from the social science and health profession and were unpaid.

Mediation with rare exceptions was not then the domain of the legal practitioner whose activity was then confined to advising and client representation. Family breakdown with its attendant disputes provided a rich litigation harvest in a fault

based system. Mediation remained at the fringe of the legal arena until the policy shift of the early 1990's notwithstanding, the findings of the 1983 Finer Report which highlighted the need for conciliatory and non adversarial approach.

The evolution of the Family Law Act 96 provided the opportunity for mediation practice to become recognized as a central tool in family dispute management, legislation made possible the public funding of mediation provision via the Legal Services Commission. In anticipation of the long awaited change, mediator training had become formalized, services had developed, and many legal practitioners became mediators. The UK College of Family Mediators came into being, in the main driven by the need for professional codes, policies and standards to regulate a range of provider's including legal practitioners, who unlike voluntary sector practitioners added mediation to the range of services they could offer on a "for profit" basis. The aim of the UKCFM was, and remains to regulate a growing and diverse market place and within that to protect the consumer. The challenge was, and to a great extent remains that consumers driven by the psychological processes that attend family breakdown, prefer to fight with the arms length assistance from lawyers rather than to seek their own resolution to the prevailing conflict. The "mediation option" for many at first sight has little appeal, repeated exploration, encouragement and the maintenance of a child focus does however bring clients to see the potential benefit. The most effective driver toward mediated outcomes is the support of professional advisers, and the Court.

The FJC has an important role in the development of education and Court practice throughout the jurisdiction.

I understand that some concern has been expressed with regard the contracting arrangements (including mediator remuneration) between the Legal Services Commission and suppliers of publicly funded mediation. I do not think that the matter of with whom and how such arrangements are arrived at should be a matter for the FJC.

An understanding of the different supplier types may assist FJC Members understanding of the environment.

Recent years have seen the decline in the availability of access to publicly funded family legal advice and representation, many practitioners operate only in the private client market, some of these offer mediation. Solicitors still providing services funded by the LSC also provide mediation or have in place arrangements for their clients to be mediated by another firm to who they refer such work. Solicitors offer mediation on a "for profit" basis as part of a range of services their overheads, are therefore spread across a range of services available in one or more locations. The LSC payment for mediation as with legal advice and representation is remunerated at an hourly rate, which is form time to time reviewed.

Mediators working in the "for profit" sector will either be legal practitioners or mediators drawn form other disciplines who mediate on a sectional basis for a fee on their behalf.

The "not for profit" sector provides mediation as its core activity. Many services also provide specialist children's support and information services, adult counseling and child contact facilities, all of which are funded by a mix of small grants from charities

and local service commissioners. Such funding is generally annual and much time and effort has to be expended in fund raising. In 2003/4 Cafcass who were formally core funders of such services, reduced its funding by 40%+vat, an actual income loss of 57.50%. The advent of LSC funding for mediation has also served in the last 5 years to reduce or extinguish charitable support. LSC requirement that all providers put in place systems to ensure compliance with its Quality Mark and audit procedures, legislative requirements relating to human resource management, health and safety etc has greatly increased cost in a sector that provides vital core services within the Family Justice System often in locations where no other services exist, to largely excluded population's. These providers do not sell their services and are funded by the LSC on a "case cost" basis determined by volume, overheads and the direct cost of employing mediators. The case payment funded by LSC does not favor "not for profit" providers, nor does it make up such services funding deficit indeed, the continued existence of such services despite growing need in the present funding climate is doubtful.

If in coming years the mediation provider base is further reduced, public access to mediation will as has been seen with the provision of legal services will only be available to those who can finance such services, in consequence litigation fueled by conflict and the consequent damage to children and adults will grow.

Research findings, the experience of other jurisdictions and Government policy in the last 10 years highlight the centrality of conflict management in the administration of family law, Cafcass is expected (among other things) to deliver much needed "support" services, such services in 2005 are in diminishing supply the provider base is at best stagnant and in great need of realistic and reliable investment.

This is an issue that the FJC should address at local, nation and Government level.

Legal practice has changed much in the last 20 years with the shift to non-adversarial practice and the growth in mediation, we have however a long road to travel still if client behavior is to be changed rather than simply contained. The Court at all levels has a central role in the "change process", if we are to achieve consistency of practice throughout the jurisdiction. Research reports "user" dissatisfaction; people seek justice - to win the day, and exoneration from any blame. There must be a winner and a loser, the notion of "win/win" with a focus on children's needs rather than the "wants" of adults, is hard to shift. Were the practice of Courts to be informed by active interdisciplinary working led by local judiciary much could be changed.

The FJC should be pro-active in this regard and encourage local groups to include mediation providers from both the "for profit" and "not for profit" sectors to be actively involved in Family Justice in each area.

Child Protection - Domestic Abuse.

It is not generally understood that a primary function of mediation practice is the protection of children from harm and abuse.

Prior to mediation, mediators are required to screen by use of direct and indirect questions the suitability of any matter for mediation. As general principal cases presenting features of abuse are not mediable, however there are exceptions which I will not expand upon in this paper. The level at which such screening is carried out will much depend upon the professional background of the practitioner and the setting in which the service is delivered. It can not be assumed that all mediators will pay the close level of attention required, for many it is yet another requirement in a time constrained preliminary process.

Children at risk of harm are often to be found in Private Law matters, the identification, management and referral of such children is complex when located in the conflicted family in a society where the statutory agencies are overburdened and under resourced. It is not unusual to identify such issues in cases presenting for mediation that have been before the court and where Cafcass are involved. Mediation providers do not get paid for the time required to deal with these issues. In my role as specialist adviser to NCH I collected data over several years from 10 services across England & Wales. The annual number of cases referred mediation presenting child protection issues that were not previously known to local authorities represented 8% of the case load, and involved several hundred hours of unpaid work each year.

Research long ago established the close link between domestic and child abuse. Professional's knowledge and practice in this area should be consistent at all levels of the Family Justice System, not only to aid identification, but also to ensure that practitioners have an informed understanding of the impact of their decisions where matters are adjudicated. In cases that are mediated it is the duty of the practitioner to ensure that the agreement reached does not put a child at risk of harm.

I would be happy to expand information on this subject when required; likewise the issue of children's participation requires attention I hope time will in due course be found for consideration of the issue.

The FJC at local and national level should develop interdisciplinary links to promote awareness of child protection in all its presentations, and knowledge on this subject.

Mediation Practice - Public Law.

The potential for the use of mediation in Public Law cases in this jurisdiction has not yet been developed. In recent years "not for profit" providers usually at the request of Judges or Guardians ad Litem have successfully mediated in such matters as post Care Order or Adoption contact arrangements. Family Group Conferencing is now widely used as it often provides a more flexible and beneficial way of ensuring the protection and wellbeing of children. Mediation in such situations provides flexible positive outcomes for children, particularly where siblings are placed in separate households. There is of course considerable benefit in time/cost saving in the Justice System. The potential to maximize use of mediation in this area is dependant upon knowledge of its availability and the re-direction of funding.

I will if required expand upon this subject.

The FJC may wish to consider how the issue can be advanced at local and national level.

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