benchtv
a benchmark production

Précis Paper

Models for Effective Dispute Resolution

A discussion of the models available to family law practitioners for effective dispute resolution outside of the court system.

Discussion Includes

- The court system in crisis
- Collaboration
- Mediation
- Arbitration
- Early Neutral Evaluation
- The elephant in the room – economy of the family law practice
- The way forward

Précis Paper

Models for Effective Dispute Resolution

1. In this edition of BenchTV, Elizabeth Bedford (Director – Watts McCray Lawyers, Sydney) and Professor Patrick Parkinson (Special Counsel – Watts McCray Lawyers, Sydney) discuss the alternative models of dispute resolution available to family law practitioners in the context of a court system in crisis.

<u>The court system in crisis</u>

2. Many judges, legal practitioners and clients agree that the delays and costs involved in using the family law court system have reached crisis point.

3. Professor Parkinson has been in the Australian family law system for over thirty years and, in his view, it has never been as bad as it is now.

Loss of a specialist trial bench

4. In the 1980s there were significant delays in the family court system but at least there was a specialist family court trial bench. We've now largely lost that. Today, whilst there are some family law specialists on the Federal Circuit Court, increasingly appointees have no background in family law.

Case overload leading to unsatisfactory monetary and time expenses

5. The current demand on the family court system is so great that parties are often waiting 3 or more years to get a final hearing and months to get an interim hearing.

6. Once the final hearing is over, the parties generally wait a long time for judgment. There is then the appeal process and if an appeal is upheld the case may be remitted for rehearing and the process starts all over again.

7. The costs and time involved for the parties participating in these matters can be phenomenal.

Contributory factors to the influx of cases

8. Demographics play a large role. In the early 1980s, 6.5% of babies were born to a single parent household and 25% would experience parental separation at a later stage. In 2013, these figures increased to 13% and 40% respectively.

9. If a child is born to a single mother, there is a child support issue from day one and there may also be a parenting dispute from day one. If the parents separate later a child support, and possibly a parenting dispute, arise at that stage.

10. Similarly, rates of immigration are increasing the burden on the courts. Australia accepts 190,000 new migrants each year, many of whom are of child-bearing age. Statistics show that migrants have higher breakup rates in comparison to persons born in Australia.

11. These demographic and immigration factors have a direct impact on the influx of cases into the court system.

Government not keeping up with demand

12. Whilst the Government has made efforts to meet the demand on the family law courts, for example by establishing 65 new Family Relationship Centres between 2006 and 2008 and more recently appointing more judges, the demand now far exceeds the supply.

Collaboration

13. Collaboration is a voluntary, confidential, agreement-based process that can allow parties to achieve settlement without the threat of litigation.

14. The agreement also involves disqualifying the parties' respective lawyers from representing them in litigation should the collaboration fail. This agreement incentivizes the parties to resolve the dispute in the collaboration process.

15. The process is led by a coach or facilitator and experts are brought in as needed.

16. The great strength of collaborative law is that it involves the parties sitting around the table and talking the matter through. It is an open and transparent forum which removes the possibility of strategizing.

17. This round-table approach is in stark contrast to what many practitioners do in legal practice, that is communicate with the other side by formal and sometimes discourteous letters.

18. What practitioners ordinarily do is not litigation. It is what Professor Marc Galanter called 'litigotiation', i.e. the pursuit of a settlement through mobilizing the court process.

19. The weakness is that if the collaboration does not work, the parties have lost their lawyers who cannot represent them in the litigation ahead.

20. Even though solicitors who undertake the collaborative law training often become converts of the process, there has been little uptake of collaborative law in the Sydney area.

Possible reasons for lack of uptake

21. Sometimes it is too late. The matter is already involved in litigation when the solicitor receives the instruction.

22. The unfamiliarity of collaborative law practice can deter solicitors.

23. Collaboration requires a perfect storm of factors i.e. the right client, agreement early on to resolve the dispute in that way, and solicitors on both sides who are willing and able to practice collaborative law. It is quite uncommon to have all these factors present.

24. Moving from the common adversarial legal practice style to a collaborative practice style can be difficult for solicitors.

25. Junior lawyers may not be aware of collaboration as an option.

26. It has not seemed to have taken off amongst clients.

Law reform in this area

27. There is no legislation associated with the *Family Law Act 1975* (Cth) that governs the collaborative law practice. The Family Law Council did however publish a report 'Collaborative Practice in Family Law' in 2006.

28. Professor Parkinson believes legislation is not necessary to reform this area. What he does believe is necessary is for judges to recognise and prioritise those matters where the parties have tried to resolve the dispute collaboratively before going to court.

<u>Mediation</u>

29. Unlike collaborative practice, mediation can occur at any point in a litigation and can in fact run parallel to it in order to resolve or narrow the issues in dispute.

30. Solicitors should be open to mediation at different stages in the process because parties are not necessarily emotionally or mentally ready for it at the beginning. When the 'time is ripe for settlement', mediation is a good option.

31. The process involves a mediator sitting down with the parties, setting out the mediation process, giving each party an uninterrupted opportunity to be heard, then providing feedback to them, fleshing out what the interests are and generating options for them to consider to reach a settlement.

32. A major benefit of mediation is that the mediator can sit down privately, and in confidence, with one party, or both parties separately, to find options for the resolution of the dispute.

33. Mediators can be very creative in finding the types of solutions that courts are unable to order.

34. However, mediation is not appropriate in all cases. Where there are issues of fact that need to be resolved before a resolution can occur, mediation is not appropriate. For example, in disputes where the existence of domestic violence or child protection issues are asserted by one party and denied by the other. These types of cases are better suited to adjudication rather than mediation.

The mediation 'blitz' / 'call-overs'

35. Recently in Sydney we have had what is being referred to as 'the blitz' or 'call-overs' where judges have called matters before them and referred the parties to mediation in an attempt to resolve the disputes and get the cases out of the court.

36. Whilst the intention of resolving disputes outside of the court system is supported, this 'cookie-cutter' approach was not appropriate in all cases.

37. Mediators are bound by Sub Regulation 25(2) of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) to conduct an assessment of the parties to determine whether the dispute before them is suitable for mediation or not. In these 'blitz' cases, where a judge has ordered mediation, the mediator may determine that mediation is in fact not appropriate. Where would that leave the parties?

38. There have been cases ordered to mediation which have already been through mediation proceedings only six weeks prior and failed. Clearly, this is an attempt to get cases off the court lists and into mediation but without the necessary attention to the details of each case to determine suitability for mediation.

39. The danger here is that parties get denied access to justice due to the court sending cases away and parties incur additional expenses because of being turned away from mediation and having to go back to court.

Child-inclusive mediation

40. The family court's Child Responsive Program offers child-inclusive conferences, usually for school-age children, where children are given the chance to be heard and ask questions. These child-inclusive mediations can be powerful in that the parties hear from the mediator

what their children are saying which can make inroads into the parties' willingness to settle the dispute.

41. It is critical that the person who interviews the children is appropriately skilled to undertake the task. Apart from the court's mediators, the Independent Children's Lawyer can perform this function as well as Family Relationship Centres and not-for-profit services outside of the court system.

42. The early design of the child-inclusive mediation model was done by Professor Jenn McIntosh. Her own evaluation of the design demonstrated quite significant success with child-inclusive mediation. However, the clientele used in her evaluation were quite educated.

43. Professor Parkinson and Professor Cashmore have done a further study with less educated client groups and the outcomes were not as successful.

44. A caution for using child-inclusive mediation is that if one parent has an outcome fixed in their mind and they are not willing to hear what the child has to say, then it is of no use.

45. Child-inclusive mediation is less appropriate for parents with mental health issues or personality disorders.

Arbitration

46. Parties come to arbitration in one of two ways; party-initiated or court-referred.

47. The arbitrator is usually an ex-judge or senior practitioner. Their role is akin to that of a judge. They hear the dispute, make directions, make findings and make orders.

48. Arbitrations can be done on the papers or akin to a hearing.

49. Arbitration can deal with the dispute in its entirety or it can be used to settle one specific issue prior to returning to the court system or moving on to mediation of the other issues.

50. Even though arbitration can sometimes look very much like litigation (with solicitors and barristers on both sides) it is generally much cheaper because the dispute is usually resolved within 4 - 8 weeks.

51. Rule 26B.33 of the *Family Law Rules 2004* (Cth) allows for the registration of an arbitrator's orders with the court. If that is done, it is as if the arbitrator's orders are judge-made orders.

52. A limitation in arbitrations is that they deal with property matters only. Whilst there is a long-held view in Australia that children's cases are not arbitrable, England has been arbitrating children's cases for some time without any legislative background at all.

Argument for children's cases being excluded from arbitration

53. Whilst Professor Parkinson really cannot argue against children's cases being arbitrated given the state of the court system, there is one argument against it that can be made. Arbitration is fundamentally a commercial arrangement with each party contributing to the arbitrator's fees. It is questionable whether this commercial arrangement creates an incentive for the arbitrator not to make findings wholly against one party, even if such findings would be in the best interests of the child. The neutrality and independence of the court are beneficial in this regard.

A new model including arbitration for children's cases

54. Professor Parkinson has worked on a model where the parties contractually agree to the following:
    - a family report will be obtained from a family psychologist, after which
    - they will attempt to resolve the matter through mediation; should that fail
    - they will move on to an arbitrator or an early neutral evaluator who will give them recommendations for interim orders; and
    - those recommendations will then be turned into interim orders;
    - if one party refuses to turn the recommendations into interim orders they will be liable for the costs of the whole process to this point.

55. This model allows parties to agree to resolve the dispute outside of the court system and incentives the parties to accept the recommendations provided for interim orders or face a contractual cost consequence.

Legislative protections for arbitrators if they get it wrong?

56. Section 10P of the *Family Law Act 1975* (Cth) provides arbitrators with the same immunity provided to judges.

<u>Early Neutral Evaluation</u>

57. Often a case will get to a certain point and a barrister will be briefed to provide an opinion, but that opinion is never shared with the other side.

58. Early neutral evaluation involves the disputing parties jointly briefing an independent barrister who considers each side's position and provides a neutral view of the merits of each side and an overall evaluation of the case.

59. There are other areas of law having success with early neutral evaluation and it could be a valuable model for family law as well.

The elephant in the room - the economy of the family law practice

60. Traditionally the economy of the family law practice has been built upon litigation and letters. In a court system that is broken, these are not good products to be selling to clients.

61. We need to be thinking about ways, not only to help our client, but how to restructure our family law practices so that we are not so dependent upon litigation.

62. The elephant in the room is that there is potentially a conflict of interest for solicitors in moving away from the court system. We want to help our clients, but once we settle a matter that is one less client that we have. And there are many family law practitioners out there fighting for the same business.

63. There are therefore real challenges for practitioners in running ethical and successful family law practices. However, those who are willing to develop different models will, in the end, reap the rewards.

The way forward

64. Education of law students and junior lawyers is important to enable practitioners to use these models.

65. Out of necessity we may see these models being used more. A critical mass needs to be reached for these models to become part of the normal referral process.

66. Out of crisis comes opportunity and now is a great time for family law practitioners to think about we they do, how we do it, how we charge for it and how we make a living out of it in ways that can be helpful to the clients and give us job satisfaction as well.

BIOGRAPHY

Professor Patrick Parkinson

Special Counsel – Watts McCray Lawyers, Sydney

Professor Patrick Parkinson is a decorated expert in family law. He was appointed as a member of the Order of Australia for his service to the law and is a former President of the International Society of Family Law. Patrick is a frequent speaker at national and international events and has published several legal textbooks and numerous journal articles. He was also the Chairperson of the Family Law Council, chaired the Ministerial Taskforce on Child Support, a member of the NSW Child Protection Council, Chairperson of the review of NSW Child Protection Laws and Editor of the Australian Journal of Family Law.

Elizabeth Bedford

Director – Watts McCray Lawyers, Sydney

Elizabeth was admitted as a lawyer in 2005 and is an accredited specialist in family law. She appears in Court regularly as a Solicitor advocate, including as an Independent Children's Lawyer. During 2007 and 2008, Elizabeth worked for the United Nations Children's Fund (UNICEF) in the Republic of Kiribati as a Child Justice specialist. Upon her return to Sydney, she was appointed to the Independent Children Lawyer's Panel. Elizabeth was appointed a Partner of Watts McCray in 2016.

BIBLIOGRAPHY

Legislation

Family Law Act 1975 (Cth)
Family Law Amendment (Arbitration and Other Measures) Rules 2015 (Cth)
Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)
Family Law Rules 2004 (Cth)

Other

Cashmore, J. & Parkinson, P. (2009). Children's participation in family law disputes: The views of children, parents, lawyers and counsellors. Family Matters, 82, 15-21.

Family Law Council, 'Collaborative Practice in Family Law' (2006)

McIntosh, J.E., Long, C.M., & Moloney, L. (2004). Child-focused and child-inclusive mediation: A comparative study of outcomes. Journal of Family Studies, 10(1), 87-96.