Good lawyers are good advocates, but great lawyers excel at problem solving

by The Hon Chief Justice Will Alstergren and the Hon Justice Robert McClelland

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Introduction[1,2]

Like most common law courts in the western world, the simple volume of family law matters that the Family Court of Australia and Federal Circuit Court of Australia deal with has resulted in the courts being criticised for being too slow, too expensive, too complex and failing to keep pace with community needs.[3]

Because of similar pressures there is virtually no court in the western world, charged with the responsibility of adjudicating in respect to civil disputes, which has not embraced, as a fundamental aspect of case management, non-litigious means of resolving disputes.

As an example of the cultural shift that has occurred in the last two decades, in *Hryniak v Mauldin* [2014] CSC 7 at [1]-[2], the Canadian Supreme Court noted:

> *There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted.*
>
> ...
>
> *And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such* as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

However non-litigious resolution of civil disputes is not a novel idea. As far back as 1850, Abraham Lincoln wrote:[-1]

> *Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.*

Litigation is both financially and emotionally draining.[-1] The *Family Law Act 1975* (Cth) ('the Act') reflects the public policy objective of trying to avoid, or at least minimise, that impact. In that respect, the Court is required to encourage parties to consider mediation, arbitration or other family dispute resolution services.[-1]

The *Family Law Rules 2004* (Cth) ('the Rules') also impose, upon parties and practitioners, an ongoing obligation to continue to explore "options for settlement, identifying the issues as soon as possible, and seeking resolution of them".[-1] Further, the Court is required to apply

the Rules to actively manage each case by "encouraging and helping parties to consider and use a dispute resolution method rather than having the case resolved by trial".[-1]

Pre-action settlement services

Parenting

In 2006, the Act was amended to require parties, unless a relevant exception applies (including, most relevantly, situations of family violence or child abuse), to make a genuine effort to resolve their dispute by family dispute resolution before filing an application for a parenting order under Part VII of the Act.[-1] That requirement was phased in over a period of two years and coincided with the establishment of Family Relationship Centres around the country.

Originally, it was not intended that lawyers would play a role at Family Relationship Centres. However, in the years since Family Relationship Centres were established that restriction has been eased. Unsurprisingly, research shows that there are considerable benefits for parties if they are able to resolve parenting disputes, including with legal assistance, prior to commencing court proceedings.[-1]

In that context, the *Protocol for the Provision of Legal Assistance in Family Relationship Centres* (2017) permits, rather than mandates, the attendance of "private lawyers".[-1]

The participation of lawyers in Family Relationships Centres is currently still quite limited. However, it is something that is strongly encouraged as being likely to give clients more confidence to settle their matters and to ensure that settlements are in accordance with relevant legal principles and the best interests of the children involved.

A family dispute resolution practitioner may give a prospective party a section 60I certificate, and the Act requires a section 60I certificate to be filed with the initiating application. However a certificate can be issued when the other party simply failed or refused to attend family dispute resolution ("FDR"). This is notwithstanding that it may be a matter in which FDR would have been appropriate and beneficial.[-1]

It is important to remember that pre-filing family dispute resolution is a mandatory statutory requirement under the Act (unless an exception applies). Despite this, there remain instances where an application is filed in the Court without a certificate and where an exception has not been raised. A single judge of the Appeal Division of the Family Court of Australia recently considered the effect of section 60I of the Act, and confirmed that the filing of a certificate is a mandatory requirement, "and cannot be construed as giving rise to some discretion" as to whether family dispute resolution would have been effectual.[-1] His Honour held that the trial judge was in error in proceeding to hear an application when the mandatory requirement to file a certificate had not been complied with, and where the trial judge had not made a finding that any of the exceptions applied.[-1]

An analysis of 441 parenting cases in the Federal Circuit Court in 2016 found that the parties attended pre-filing FDR in only 17% of cases.[-1] In cases where no allegation of family violence was made, FDR was attempted in only 55% of cases, and actually occurred in only 40% of cases.[-1] This suggests that it may be timely to refocus on the purpose and intention of section 60I of the Act.

Just as is the case in respect of parenting matters, in the absence of a relevant exemption, there is an obligation on parties and practitioners to make a genuine effort to resolve property matters prior to commencing litigation in the Family Court. Schedule 1 to the Rules specifically requires prospective litigants to make inquiries of dispute resolution services and invite the other parties to participate in dispute resolution.[-1]

The Rules also require parties to cooperate with a view to narrowing the issues in dispute.[-1] In that respect, research suggests that even if they do not result in settlement, mandatory pre-trial dispute resolution procedures, at the very least, perform an educative function that can subsequently result in the parties taking a more realistic approach to litigation.[-1]

Those who oppose the Family Court having the power of mandatory referral to alternative dispute resolution often refer to the potential for unsuccessful mediation to actually increase the costs incurred by the parties. There is no doubt that unsuccessful mediation can lead to an overall increase in the cost of the litigation.[-1] However, that needs to be balanced against the cost to the parties and the Court if they do become embroiled in protracted litigation.

In addressing that issue, we note that there have been some very encouraging developments in terms of access to ADR at a reasonable cost. This includes an increasing number of agencies providing mediation services.

For those unable to meet the cost of private mediation and dispute resolution services, it is encouraging to note that settlement services are being developed by Family Relationship Centres and Legal Aid.

The Australian Law Reform Commission recently noted, for example, that Relationships Australia offers property mediation on a self-funded basis, with an hourly rate determined according to income levels. That service handles 2,000 to 3,000 property matters each year (of which about 600 matters pertain exclusively to a property dispute).[-1]

Early resolution of property matters can be desirable for a number of reasons, including securing the economic independence of a person who has been the subject of family violence or is otherwise in a vulnerable situation.[-1]

An additional service that has been developed by Legal Aid Queensland is voluntary arbitration. The recent ALRC Report encouraged the Federal Government to provide funding to enable National Legal Aid to apply that model in other states.[-1] We support that recommendation.

The legal profession is also to be commended for developing family dispute resolution services. In New South Wales, for example, the Law Society of New South Wales administers the Family Law Settlement Service, through which, appropriately qualified barristers and solicitors provide mediation services in respect to both property and parenting matters. Many participating practitioners are both accredited mediators and FDR Practitioners. The cost of that service is fixed and relatively modest, with many participating practitioners significantly reducing their fees to make the service viable. Similar services are provided by the profession in the other States and Territories.

In combination, these are extremely positive developments and have the potential to assist separating couples to resolve their disputes, without the financial and emotional cost of what can be years of bitter litigation.

Dispute resolution as an integral part of case management

The Courts are committed to implementing a consistent approach to case management across both the Family Court and the Federal Circuit Court. A central aspect will continue to be implementing best practice in effective risk screening, risk assessment and triaging of cases according to issues and complexity.

As noted by the High Court in *Expense Reduction Analysts v Armstrong Strategic Management:*[-1]

> *It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.*

To that end, the Court, in consultation with the profession, is developing case management principles that will specifically require the Court and litigants to consistently and continually strive to narrow and resolve issues in dispute. The principles will refer to, where appropriate, the potential utilisation of both internal and external Alternative Dispute Resolution (ADR), including private mediation, family dispute resolution, conciliation conferences and arbitration in property disputes for as many cases as possible.

That is not to say, that there will be a uniform reliance on extra-judicial resources to achieve those objectives. Discretion is always required to ensure that, in the particular circumstances of the matter, referral to external services will not result in a denial of justice to one or both of the parties.[-1]

Nevertheless, research suggests that mediation can be successful, even where a party is initially reluctant to attend.[-1] In that respect speaking extra judicially Spigelman CJ noted that:

> *... some persons who do not agree to mediation, or who express a reluctance to do to, nevertheless participate in the process often leading to a successful resolution of the dispute.*[-1]

There is significant body of literature about the appropriateness of FDR or mediation in circumstances where there has been family violence between the parties.[-1] There can be obvious risks involved in conducting FDR or mediation in the context of past, or continuing, family violence, both in terms of the way the mediation or FDR is undertaken, and any interim or final resolution of the matters in dispute. For example, FDR or mediation may be inappropriate in the context of family violence because of physical safety concerns and the risk of re-traumatisation, power imbalances, a lack of candour or willingness to compromise on the part of the perpetrator, and fear on the part of the victim.[-1] For this reason the Court does not compel parties to attend ADR if the party's objection to attending is based on a safety concern.

However, appropriately advised parties may non-the-less elect to participate in ADR even in those circumstances. Research and experience shows that, if the risks associated with family violence are appropriately managed, a tailored mode of FDR or mediation can be

violence are appropriately managed, a tailored mode of FDR or mediation can be empowering and effective.[-1] Measures such as thorough preparation, safety planning, minimising contact between the parties, using shuttle mediation, co-mediators, therapeutic support and scheduling follow-ups are some of the effective risk management measures that can be taken.[-1] The benefits of non-litigious dispute resolution for the parties include that it can be cheaper, more flexible, time-efficient, less-adversarial and provide a forum for the parties to have their voices heard.[-1] Significantly, mediation can achieve a more flexible outcome that can accommodate the interests of both sides. Litigation, on the other hand, tends to be more of a blunt instrument. A litigated outcome, more often than not, has a winner and a loser with associated ongoing resentment and strain on relationships which can be detrimental to the interests of any children involved.

A consistent case management model across both courts will include court based and/or external FDR for as many cases as are screened and assessed as being suitable for that pathway. This may take the form of mediation, conciliation, legally-assisted dispute resolution, co-mediation or the myriad of other responsive models that can be adapted to the requirements of the family law jurisdiction.

Role of practitioners

Lawyers have a fiduciary obligation to protect the interests of their client. That fiduciary relationship is particularly significant in the case of family law clients. In that respect, in *Weiss v Barker Gosling,*[-1] Fogarty J noted that "clients in the midst of emotive family law litigation are under considerable pressure which makes calm reflection upon the engagement of a particular lawyer and the terms of that engagement extremely difficult."

The fiduciary duty of lawyers to their clients is also entirely consistent with the main purpose of the Rules, as set out in rule 1.04, being – "to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case." Parties and their legal advisers have a responsibility to advance that purpose.

That obligation is very similar to the obligations on practitioners and litigants and, indeed, the Court, pursuant to Part VB of the *Federal Court of Australia Act*. Authorities of that Court are, therefore, relevant in considering the obligations set out in the Rules.

In *Modra v Victoria (Department of Education and Early Childhood Development and Department of Human Services)*[-1] , Gray J observed that "the impact of those sections on the obligations of legal practitioners practising in this Court is significant."

Further, in *Budby on behalf of the Barada Barna People v Queensland*[-1] the Full Court of the Federal Court, said that:

> *One of the procedural premises in the Act is that it is desirable for applications to be resolved by negotiation if possible...*

In *Mijac Investments Pty Ltd v Graham,*[-1] Tracey J observed that:

> *The achievement of the overarching purpose of the civil practice and procedure depends in part on a practitioner offering* **objective and considered advice** *to a client. .... Without such advice, the just resolution of disputes according to law and as quickly and inexpensively as possible may well be hampered, if not frustrated.*

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In *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCA 108, Greenwood J referred to the obligation to give proper consideration to any reasonable offer of compromise which he said "required the applicants to carefully assess all the material, including the discovered material, to determine and confront the strengths and weaknesses in their case."

The importance of flexibility

The case management principles to which we have referred will enable the Court to adopt a flexible approach depending on the issues in dispute, the complexity of those issues and, indeed the attitude of the parties. This later issue can be particularly significant in the area of family law where the emotional state of litigants may make it impractical or even undesirable to attempt to resolve matters until such time that they are in a better state of mind.

Judicial officers can be expected to take a common sense approach in considering whether and when a matter should be referred to mediation or FDR.

The need for a change in culture

The former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson AC once said:

> *The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are bought before them. Most legal disputes never come before the courts and most court cases are resolved by agreement between the parties rather than judicial decision.*[-1]

Litigation can be protracted, expensive and tremendously stressful for the parties involved.[-1] In the words of retired US Supreme Court Chief Justice Warren E Burger:

> *For some disputes trials will be the only means, but for many claims trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, and too inefficient for really civilized people.*[-1]

The fallout from family law litigation can significantly impact upon the ability of parties to interact, let alone cooperate, in the future. Children can be severely and irreparably impacted by that bitterness.

The reality is, however, that, despite a changing culture, many cases will continue to require judicial determination. That process must be fair but it must also be efficient and proportionate. To that end the new Statement of Core Principles for Case Management that will apply in both the Family Court of Australia and the Federal Circuit Court of Australia will emphasise the need for parties and their lawyers to identify and narrow issues in dispute and make a genuine attempt to resolve matters including, where appropriate engaging in ADR.

Conclusion

We conclude by adapting and paraphrasing the recommendation of Judge Kevin S Burke of the District Court of Minnesota in *State of Minnesota, by its Attorney General Lori Swanson, its Commissioner of Pollution Control, John Line Stine, and its Commissioner of Natural Resources v 3M*

Commissioner of Pollution Control, John Linc Stine, and its Commissioner of Natural Resources v 3M Company:[-1]

Becoming intractable is not the sign of a good advocate.

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In the final analysis, this is not about the lawyers, it is about trying to achieve what is right.

The approach of all those involved in the family law system should first and foremost be upon problem solving. If that cannot be done, the process of litigation should be conducted in a manner that recognises the particular vulnerabilities of litigants and the need to avoid intergenerational trauma that can unfortunately be the end result of protracted litigation. The opportunity for parties to resolve their disputes through appropriate ADR is, and must, continue to be an important focus for parties, practitioners and judges involved in the family law system.

Since the article was written the Family Court and the Federal Circuit Court have issued the "Core Principles of Case Management" (Joint Practice Direction 1 of 2020). The Courts have also created dedicated Arbitration Lists to formalise support for private Arbitration of matters (Statement by the Chief Justice, 16 May 2020).

Endnotes

'Should I accept that offer – a practical and comprehensive methodology for settlement claim valuation', Published in Lexis Nexis, Australia, *Alternative Dispute Resolution Law Bulletin*, November 2019, pp27-33.

1, 2↑ The Hon Will Alstergren, Chief Justice of the Family Court of Australia and, Chief Judge of the Federal Circuit Court of Australia;
the Hon Robert McClelland, Deputy Chief Justice of the Family Court of Australia.

3↑ Shahla Ali, 'Civil Mediation Reform: Balancing the Scales of Procedural and Substantive Justice' (2019) 38(1) *Civil Justice Quarterly* 9, 9.

4↑ Abraham Lincoln, "Notes for a Law Lecture", 1 July 1850, in R Basler (Ed), *Collected Works of Abraham Lincoln Volume 2* (Rutgers University Press, New Brunswick, 1953) 81.

5↑ The Hon Kenneth Hayne AC QC, 'Restricting Litigiousness' (Speech, 13th Commonwealth Law Conference, Melbourne, 13 April 2003).

6↑ For instance, s 13A of the *Family Law Act 1975* (Cth) ('the Act') provides that the Court should encourage parties:

– to use dispute resolution mechanisms (other than judicial ones) to resolve matters in which a court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed; ↑ ; and

– to use, in appropriate circumstances, arbitration to resolve matters in which a court order might otherwise be made, and to provide ways of facilitating that use.

7↑ *Family Law Rules 2004* (Cth) ("the Rules"), clause (6)(e) of Part 2 of Schedule 1.

[8↑] Ibid, r 1.06(a).

[9↑] The Act, s 60I.

[10↑] Eunice Chua, 'Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-Led Approach' (2019) 38(1) Civil Justice Quarterly 97, 109 citing Lisa Parkinson, 'Keeping in contact: family relationship centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157 and Anne Barlow et al, *'Mapping Paths to Family Justice: a national picture of findings on out of court family dispute resolution'* [2014] *Family Law*.

[11↑] "... for the purpose of this Protocol, "private lawyers" are those who are retained by a client to appear for fee or reward, and also include private practitioners who are retained by an FRC, Community Legal Centre or Legal Aid Commission for the purpose of providing legal assistance under this Protocol. Private lawyers providing pro bono legal assistance services to an FRC are also included in this definition" (Attorney-General's Department, "Protocol for the provision of legal assistance in Family Relationship Centres (2017), 2).

[12↑] The Act s 60I(8)(a).

[13↑] *Ellwood & Ravenhill* (2019) FLC 93-915 at [21].

[14↑] Ibid [28].

[15↑] Judge Joe Harman, 'The intersection of family violence and family dispute resolution: implications for evidence fathering and mediation confidentially' (2019) 33 *Australian Journal of Family Law* 1, 10.

[16↑] Ibid 11.

[17↑] Clause 3 of Part 1 of Schedule 1 sets out the following:

(1) A person who is considering filing an application to start a case must, before filing the application:

(a) give a copy of these pre-action procedures to the other prospective parties to the case;

(b) make inquiries about the dispute resolution services available; and

(c) invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed. ...

(2) Each prospective party must:

(a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; and

(b) make a genuine effort to resolve the dispute by participating in dispute resolution.

[18↑] Clause 3(4) of Part 1 of Schedule 1, provides that, where the parties are unable to resolve a matter by dispute resolution, "the proposed applicant must give to the other party written notice of his or her intention to start a case". That notice must set out:

(a) the issues in dispute;

(b) the orders to be sought if a case is started;

(c) a genuine offer to resolve the issues; and

(d) a time within which the proposed respondent is required to reply to the notice.

The respondent has an obligation to reciprocate by providing his or her response within the specified time or fourteen days, whichever is the less.

[19↑] Shahla (n 3) 26 citing Carrie Menkel-Meadow, 'When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals' (1997) 46(6) *UCLA Law Review* 1871, 1893).

[20↑] Ibid citing H. Jay Folberg and Joshua D. Rosenberg, 'Alternative Dispute Resolution: An Empirical Analysis' (1994) 46 *Stanford Law Review* 1487).

[21↑] Australian Law Reform Commission, *Family Law for the future – An Inquiry into the Family Law System* (Report No 135, March 2019) 8.37.

[22↑] Ibid 10.76.

[23↑] Ibid 9.56.

[24↑] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46.

[25↑] See Amy J. Cohen, "Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values" (2009) 78 *Fordham Law Review* 101.

[26↑] Shahla (n 3) 13 citing Heather Anderson and Ron Pi, *Evaluation of the Early Mediation Pilot Programs* (Judicial Council of CA Administrative Office of the Courts, 2004).

[27↑] Chief Justice James Spigelman 'Address to the LEADR Dinner' (Speech, University and Schools' Club Sydney, 9 November 2000).

[28↑] Sarah Dobinson and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: Identifying best practice and research objectives for the next 10 years' (2016) 30 *Australian Journal of Family Law*180.

[29↑] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (Final Report, ALRC Report 114 and NSWLRC Report 128, October 2010), 21.31.

[30↑] See Sian Green, 'Effectively Managing the Impact of Family Violence on Mediation in the Family Law Context' (2017)28 *Australian Dispute Resolution Journal* 155; Rachael Field and Angela Lynch, 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' (2014) 36(4) J*ournal of Social Welfare & Family Law* 392, 392.

[31↑] Australian Law Reform Commission and New South Wales Law Reform Commission (n 29) 21.36.

[32↑] Dobinson and Gray (n 28) 184.

[33↑] (1993) FLC 92-399 [at 80,090].

[34↑] [2012] FCA 240; (2012) 205 FCR 445 at 455.; at 455.

[35↑] [2013] FCAFC 149 at [42].

[36↑] [2013] FCA 296 at [45]-[49] at [49].

[37↑] Murray Gleeson, 'The State of the Judicature' (Speech, Australian Legal Convention, Sydney, 25 March 2007).

[38↑] See *Studer v Boettcher* (2000) NSWSCA 263 at [63] and *Village/Nine Network v Mercantile Mutual* [2001) 1 Qd R 276.

[39↑] United States Supreme Court Justice Warren E Burger, "The State of Justice" (Speech delivered at the American Bar

Association Meeting, Las Vegas, 12 February 1984) cited in Judge Joe Harman, 'Should Mediation be the First Step in All Family Law Act Proceedings?' (2016) 27 *Australasian Dispute Resolution Journal* 17.

[40↑] District Court, Fourth Judicial District, Court File No 27-CV-10-288862 Judge Kevin S. Burke

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