

Facilitating the resolution of disputes in family law cases – an integrated approach

Brief background

The Board has been in existence for close to 35 years providing civil legal services. Throughout that time the great majority of persons who have sought services from it have done so in relation to family law matters. With the fall off in demand for asylum the percentage of new cases that relate to private family law matters has been increasing in the last few years rather than decreasing.

| Year | 2012 | 2011 | 2010 | 2009 | 2008 |
|---|------|------|------|------|------|
| Percentage of new cases relating to private family law issues | 81% | 78% | 75% | 68% | 65% |

During the course of the 35 years the Board has had a process for the consideration of legal aid applications i.e, applications to the Board for authority to institute or defend court proceedings on behalf of a person. In truth the process for most family law matters has been basic and, until relatively recently in any event, the simple fact that an application for a legal aid certificate was made by a law centre solicitor on behalf of their client to start a judicial separation or divorce case was enough to trigger an authorisation to institute court proceedings. This is in some contrast to a provision in the Family Law Act 1996 in England / Wales which provided that:

“(3F) A person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator—

(a) to determine—

(i) whether mediation appears suitable to the dispute and the parties and all the circumstances, and

(ii) in particular, whether mediation could take place without either party being influenced by fear of violence or other harm; and

(b) if mediation does appear suitable, to help the person applying for representation to decide whether instead to apply for mediation.

Legislative safeguards pre court

The State has court based legislative ‘safeguards’ that attempt to ensure that non court options have been discussed with the person – sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and section 6 and 7 of the Family Law (Divorce) Act 1996. Four or five years ago we conducted a competition for a panel of solicitors who would advise clients going through a mediation process. The competition involved interviewing about 50 private solicitors and one of the questions we asked them for a view on was the meaningfulness of sections 5/6 and 6/7. The almost

universal answer was that while they themselves respected the provisions, many other practitioners regarded them as formulaic rather than meaningful.

In the case of matters that come before the District Court we have similar provisions set out in sections 20 and 21 of the Guardianship of Infants Act 1964 (inserted by the Children Act 1997). The sections incorporate a requirement that if a solicitor is acting for an applicant (or indeed a respondent), the originating document shall be accompanied by a certificate signed by the solicitor to the effect that they have discussed with the applicant the possibility of engaging in counselling, mediation or negotiation to achieve a deed or agreement in writing. I checked with solicitors in the law centres what their experience of these certificates was. A number said they were not used at all in their particular area. One noted that he filed them on behalf of his clients but that he had never been served with one and that while a number of years ago the Judge had adjourned cases to allow a certificate to be filed, this was no longer done. It is also the case that applications to the District Court in Dublin and Cork, and possibly elsewhere, are more often issued without any solicitor involvement and the proceedings are in being by the time the matter comes to a solicitor. I understand that the Courts Service's experience of judicial insistence on the certificates is not dissimilar to the Board's. I am advised by one solicitor that the District Court President did recently inform practitioners in the local District Court area, that she would be activating the requirements.

Legal aid and court participation

It is difficult not to say that the default setting for the resolution of family problems is the court process. Arguably we in the Board have contributed to this mind-set. The Board operates a scheme for persons presenting with family problems that often involves handing them a certificate at the point of application, and without any further interaction with them, that enables the person to get a solicitor to represent them in the District Court. We do this because it is expedient from the Board's perspective. The majority of our clients resolve their issues using a court process. As per the Board's 2012 Annual Report, of the 17,500 cases that were live in law centres in that year there were court proceedings in existence in 55% of them. This percentage does not factor in the close to 5,100 legal aid certificates that were granted to clients to enable them to retain a private solicitor to go to court for them which would bring the percentage closer to 65%.

ADR models

We have in the past recognised that the system is imperfect. Many of you will recall the impetus that collaborative law had 9 or 10 years ago. One of the key aspects of the collaborative model is the commitment by the parties and their lawyers that they will not go to court or threaten to go to court unless it is to have an agreement ruled and that the lawyers will cease to act for the parties if contentious court proceedings are instituted. Another key aspect is the face to face meetings involving the parties and the lawyers. The Board was an active provider of training in the area. The International Association of Collaborative Lawyers hosted its annual conference in Cork in May 2008 and at which the then Minister for Justice, the late Brian Lenihan was one of the keynote speakers. While collaborative groups are still in existence, the collaborative model does not appear to have taken root as a commonly used dispute resolution model, though I do believe that the energy and reflection in relation to the collaborative process did and does contribute to the debate in relation to

non court based dispute resolution and it better equips solicitors to conduct family law cases in a more negotiation focused way.

Many of you will also be aware of the ideas put forward by Kevin Liston in his book *“Family Law Negotiations – An Alternative Approach”*. What Kevin proposed was a five phase negotiation process based on a series of 14 ground rules. This was effectively putting a framework in place for negotiating the terms of a separation or a divorce. Personally I thought the ideas were very sensible and logical but they may suffer from what a lacuna that Kevin described as “the curious absence of a procedural and regulatory framework for legal negotiations.”

Perhaps the most well known of the non court based dispute resolution options is mediation. I’m using the words ‘well known’ in the relative sense. In terms of the use of mediation some research work was done on behalf of the State funded Family Mediation Service, now under the Board’s umbrella, by a researcher, Trutz Haase, who carried out an analysis of aspects of the Service between 2003 and 2010. While I have heard reference to figures of 3% and 4% of couples who go through a separation process engaging in mediation, Mr Haase noted that in the period assessed, an average of about 800 couples went through mediation each year which was roughly 12% of couples separating. On the basis of his analysis, Mr Haase found that about 47.5% of couples reached some form of agreement by the end of mediation while just under 4% returned to their marriage / relationship. Mr Haase did however note that the system of data collection did not yield any information on the short-term or long-term impacts of mediation on the well-being of participants and their children and he expressed a more general view that better data collection would considerably enhance the research capacity.

The fact that mediation is referenced in the separation and divorce legislation and the 1964 Act does not necessarily mean that it is particularly well known or that it is fully understood. I made reference to an interview process we did for a panel of private solicitors who would advise persons, on a case by case basis, who were going through a mediation process. We also asked each solicitor what their understanding of mediation was. A good 20% of them didn’t know – they couldn’t offer any cogent view on whether the mediator was a decision maker or not. As I say these were solicitors who were applying to go on a panel aimed at promoting mediation. I mentioned that since November 2011 the State funded Family Mediation Service has come under the umbrella of the Board. At a staff meeting within the last two months at which over 80 people were present we had what I thought was a very good debate about better streamlining between the mediation offices and the law centres – I thought the debate was good until someone said to me afterwards that a large number of people in the room didn’t know what mediation was. The then Chief Justice Mr Justice John Murray noted in 2010 at the launch of the Dublin Solicitors Bar Association Family Mediation Group that *“For mediation as a process to take hold in the country there is a need to heighten public consciousness as well as that of legal practitioners and other professions of its usefulness, its value and its availability.”* I think more is needed. We need to understand what it is. As an example I, in common no doubt with many other solicitors, would have little insight into the difference between bargaining and therapeutic mediation. I have a strong sense however that its fundamental premise is the right one. Speaking at the Mediator’s Institute of Ireland Conference in 2007 the then President of Ireland, President McAleese noted that *“While happiness and misery are not always easy to measure there can be little doubt that the experience of being an active participant in a*

process that drives towards consensus has to be a considerable improvement on being a passive participant in a process where outcomes are imposed with all the potential for longitudinal resentment that can seriously blight many lives, but especially the lives of children.”

Gateways to ADR

That leads me to another particular issue – the ‘gateways’ to dispute resolution in family disputes. The point I’ve made about knowing what mediation is, highlights for me the need to ensure that front office staff have a good understanding of legal process and mediation and what they involve and also of who the local service providers are. Too often we forget how important the first point of contact is for a person who is approaching a law centre or solicitor’s office about a family problem and what a key role front line staff have. The really critical gateway, to date anyway, has been the solicitor. The most recent edition of the solicitors booklet *A Guide to Good Professional Conduct for Solicitors*, published in October 2013, states as follows:

“The practice of family law requires a special approach and the development of skills which enable the practitioner to assist the parties reach a constructive settlement of their differences. The welfare of children should be a first priority. Solicitors should encourage a conciliatory approach.”

The Family Law Handbook published by the Law Society’s Family and Child Law Committee places emphasis on the importance of making your client aware of the various forms of dispute resolution in family law.

I have reviewed a significant number of family law files for quality assurance purposes mainly in the law centres but also those of private solicitors on the Board’s panels. In my observation the role / actions of the solicitor vary considerably in so far as the actions are documented. Some observations I’d make include the following:

1. The levels of documented compliance with the statutory provisions set out in sections 5/6 and 6/7 vary hugely. Some solicitors record significant efforts at encouraging marriage guidance, mediation etc while others record little or, in some cases, none;
2. Some solicitors are not particularly proactive about seeking to negotiate settlements on behalf of their clients and on the face of it see themselves more as information givers in terms of information about mediation etc and, in the event that the client doesn’t opt for marriage guidance / mediation etc, information processors in the context of court proceedings – the information often being processed for the benefit of a barrister who presents the case and carries out any negotiation. When the Board operated a Circuit Court Private Practitioner Scheme for divorce and separation cases it paid a flat fee to the private solicitor to conduct the case. The fee was somewhat reduced if the matter was concluded by way of a Separation Agreement but not to the extent that it was likely to be a financial disincentive to conclude by way of such an Agreement - quite the contrary. From the file reviews that I did, in almost all of the cases a barrister was briefed to draft an initiating court document with a view to starting a court process. I do want to stress that this approach is by no means universal and I have reviewed files where the solicitor has taken real

responsibility, on occasion for negotiating substantial settlements. I am also conscious that it is a considerable pressure for relatively inexperienced solicitors to negotiate a substantial settlement but it isn't just inexperienced solicitors who on occasion appear reluctant to be proactive about negotiation. There are times when very experienced solicitors are led by relatively inexperienced barristers when it comes to negotiation. Whether this is a training issue or a cultural issue that might require reappraisal of the solicitor's role is open to debate.

I recognise that one of the challenges, when one is required to discuss mediation and give names and addresses of mediation providers, is that mediation may not be readily available and there is clearly much work to be done in terms of regulation of mediators and on the quality assurance side. On the availability side the Family Mediation Service has 16 offices of which seven are full time and nine are part-time. Clearly accessibility to the State funded service is going to be an issue when the service is so limited. The point was made at another recent staff meeting that it was very difficult to meaningfully promote mediation when the nearest FMS office that was available by public transport was 75 miles away. On the regulation and quality assurance side the FMS has fairly thorough requirements in terms of becoming an FMS mediator but there is effectively no regulation. The Draft General Scheme of Mediation Bill 2012 does enable the Minister to prepare and publish a code of practice or to approve a code of practice drawn up by another body for the purpose of setting and maintain standards for the provision and operation of mediation services.

Family Mediation Service

I mentioned already that the FMS is now under the umbrella of the Board. It transferred to the Board with a budget of €2.8m which now forms part of a single budget for the Board. The Board's grant-in-aid is just under €33m for 2014. It is a matter for the Board how much it wishes to spend on mediation relatively to the provision of legal services. In other words it can spend more in its mediation services and less on its legal services if it so chooses (or vice versa). In 2013 the amount spent on the mediation side was over €3m and this was with not insignificant costs savings on the property side. That figure is going to have to increase if we're to make mediation more meaningfully available.

Law Reform Commission Recommendations

I want to mention recommendations that have been made by the Law Reform Commission. In its Report published in 1996 on Family Courts the Commission recommended, inter alia, that a Family Court Information Centre be established at various regional courts, with responsibility for providing objectively presented information relating to available alternatives to litigation, the implications of separation, the court processes and case management information and information on available support services. The Commission recommended that where proceedings for judicial separation had issued, the parties should be required within two weeks to attend the Information Centre to receive information, inter alia, about the availability and purpose of mediation. The information should be supported by a full information pack and also by an appropriate video.

Clearly the Family Court Information Centre has not become a reality yet, nor has a Family Division of the courts. I know that there is information available on the Courts Service website that is aimed at those contemplating using the family courts. The Courts Service has also recently jointly produced with the Office of the Ombudsman for Children, two short films the first of which is aimed at persons contemplating going to the family court and the second is aimed at children aged 13 – 15 of separating couples. The films are available for viewing through their websites or indeed a link on our own.

In its 2010 Report “Alternative Dispute Resolution: Mediation and Conciliation”. The Commission recommended that attendance at an information session on family dispute resolution processes, including mediation, conciliation and collaborative practice should, in general, be a statutory mandatory requirement in family law cases (some exceptions). The Commission considered that the information sessions could be provided by an accredited mediator, an accredited conciliator, a solicitor trained in the collaborative practice model or mediation or by a member of staff at appropriate organisations such as the Family Mediation Service, the Legal Aid Board, Family Resource Centres or the Courts Service. This requirement did not make it to the Draft General Scheme of Mediation Bill 2012 though it is understood that consideration may be given to including a proviso along these lines where the welfare of a child is concerned when a Mediation Bill is published.

Dr Carol Coulter’s work

I also want to briefly mention some of the recommendations made by Dr Carol Coulter in her Family Law Reporting Pilot Project Report to the Board of the Courts Service published in October 2007. She recommended regional family courts co-locating with information offices, mediation facilities, an office of the Legal Aid Board and family support and child assessment services. She recommended that before a case can go forward for litigation, each applicant should undergo a minimum number of mediation sessions, where arrangements concerning the welfare of children are a priority. She also recommended that the President of the Circuit Court should consider drawing up a practice direction requiring parties to undertake a number of mediation sessions before a case is listed for hearing and that mediators should inform clients who do not resolve all their differences in mediation of the collaborative model as an alternative to litigation.

Other jurisdictions

I made reference earlier to a requirement in England / Wales to get information about mediation prior to getting legal aid for certain family law proceedings however that jurisdiction has now taken matters considerably further with the recently enacted Children and Families Act 2014. Section 10(1) of the Act provides that “*Before making a relevant family application, a person must attend a family mediation information and assessment meeting.*” They are already colloquially known as MIAMs. As a government spokesman noted “*we have changed the law to ensure that separating couples always consider mediation as an alternative to a courtroom battle*”. During the course of the House of Commons debates on the Legal Aid, Sentencing and Punishment of Offenders Bill that was passed in 2012 the then Secretary of State for Justice, Kenneth Clarke noted that the government was to increase spending on mediation and legal advice in support of mediation by two thirds. He was doing

so in the context of that Bill largely removing private family law disputes from the scope of civil legal aid and having noted that courts should be accessible and efficient but generally turned to as a place of last resort, not as a first choice “But we have a litigious society and too many cases go down the court route unnecessarily.”

Without wanting to get into too much detail, family mediation has become an integral feature of family justice systems in many different jurisdictions. In a significant number of jurisdictions the mediation available is linked to the family courts. Court related mediation services were first established in California as long ago as 1939 and mediation itself is generally mandatory in certain US States including California and Florida. In West Virginia parents who are not able to agree on shared parenting responsibilities must attempt to mediate their dispute and every family court office provides pre-mediation screening to determine if there are factors that might prevent parents from meaningfully participating in mediation. My understanding is that in Australia a court exercising most forms of family jurisdiction may, at any stage in the proceedings compel one or more of the parties to the proceedings to attend family counselling, family dispute resolution, or to participate in an appropriate course, program or other service. New Zealand has recently introduced an element of compulsory information about mediation. With the New Zealand model, again in common with some other models, the information session, though compulsory, is not necessarily free.

Mediation and the Legal Aid Board

In terms of what I was asked to speak about – ‘an integrated approach’ – changes are happening. Since 2010 the Board has worked with the Courts Service (and previously the Family Support Agency) in order to provide a co-located mediation service with the District Family Court in Dublin. The objective is that the front-line staff of the Courts Service will seek to direct persons presenting for a family law remedy through the District Court, to the mediation office located on the 4th floor. We had originally envisaged that many persons presenting with problems would require legal advice while in a mediation process but on the face of it relatively few do. In a 12 month period in 2011 – 2012 803 persons presented to the Board’s legal office in Dolphin House of which just under half were referred to the mediation office on the 4th floor after expressing an interest in mediation. Only 7 of those sought legal advice in connection with an ongoing mediation. This may be because many of the problems presenting in Dolphin House relate to access which has little legal complexity attaching to it. In the two years 2012 and 2013 over 2,200 first contact information sessions and over 1,300 second contact sessions were attended in the mediation office in Dolphin House. 782 mediated agreements were concluded. This would suggest a reasonably strong success rate in terms of cases where both parties present at the mediation office. The interesting comparative figure, and I only have the nationwide figure as opposed to the figure for the Dublin District Family Court in Dolphin House, is that 5,640 orders were made in relation to custody and access matters in 2012 alone¹. The number of completed mediated agreements in Dolphin House in that year was 374. A review of the initiative found that there were costs savings for the State when one factored in the savings on court time that were generated by the greater availability and take up of mediation (over €213,000 in 2013). The Board has similar, though not identical initiatives in Cork, Naas, Co Tipperary and Limerick some of which have developed locally and some of which have been more successful

¹ Courts Service Annual Report 2012

than others. Most of the initiatives involve an element of on site mediation presence at the local family court.

The Board's most recent initiative

The Board has just launched as a pilot what is potentially its most ground breaking initiative to date – it is a pilot operative in Cork since last Monday, making information sessions about mediation mandatory in order to get a legal aid certificate. I should first note that the pilot does not apply to cases on foot of the Child Care Act and it only applies to private family disputes. The fundamental is that a legal aid certificate will not be granted to a person with a dependent child to seek or defend a remedy in the family law courts in the absence of that person having a certificate from the Family Mediation Office confirming that they have attended an information session with them. What is mandatory is the information session. Mediation itself is not mandatory. The Board remains conscious of the Law Reform Commission Report's recommendation in its 1996 Report on the Family Courts that mediation services are not intended to replace the court system but rather to divert appropriate cases from it. I've referenced mandatory mediation in certain other jurisdictions but that is not what this pilot is about. What we will want to do is to persuade persons presenting for information sessions, that mediation is a good option for them. This may not be easy. Research undertaken to test the implementation of mandatory information meetings under the Family Law Act (England and Wales) 1996 found that of 1,838 persons who had received information about mediation, just 7% had used a mediation service in the following months and some of these had dropped out of the process or found that mediation did not work for them. I am hopeful that with good availability and the right message delivered in the right way, the take up will be much higher on this initiative.

The statutory basis for operating the pilot is an interpretation, and I believe the proper interpretation, of section 28(2)(d) of the Civil Legal Aid Act 1995. That provision states that in order to grant a legal aid certificate the Board must be satisfied that the proceedings the subject matter of the application are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant or a more satisfactory one, may be achieved. The Board cannot be so satisfied in the absence of the applicant being properly informed about what the options are, particularly where those options are real and meaningful.

Clearly an initiative of this nature is not resource neutral and we have put in place the capacity to increase our mediation services, hopefully to the extent that we can ensure that the information sessions are delivered promptly (within a couple of weeks) and, just as importantly, that any mediations that flow from the sessions will also be delivered quickly. As part of the pilot, the Board will prioritise the giving of legal advice to persons who are in a mediation process. We would hope that there would be some element of saving in the time spent on cases in law centres and also in the number of referrals to private solicitors for District Court disputes however I want to stress that this is not a costs saving exercise. The initiative will not be successful if we build up significant waiting lists. We will therefore increase the mediation capacity. This initiative is being piloted because the Board believes it is the right thing to do.

One critical aspect of this or indeed any initiative, is a shared understanding of what it is about and getting buy-in from the key stakeholders. It is for this reason I very much welcome the opportunity to speak here today. We have sought to develop a blueprint of how the pilot operates from the moment of first contact to the conclusion of the case. It is likely that this blueprint will evolve as issues arise and are required to be dealt with. We have communicated with the Presidents of the District and Circuit Courts and the Courts Service. We have also communicated with the private solicitors on our panel in the area and with other key stakeholders. It will be just as important to engage with them on an ongoing basis.

Related to the shared understanding is the level of commitment. An initiative of this nature will involve change and on occasion it may involve taking the harder rather than the easier option. The process is not set in stone. It is a pilot and we want to learn and improve the process as we go along. To date I have specifically mentioned the commencement of the initiative in Cork. We will be looking at rolling it out in Mayo and Westmeath shortly also.

Another key aspect will be the evaluation of the initiative. There is very little research work done in terms of tracking persons through a mediation process and beyond. I've mentioned before, the file reviews that I have done and more than once I've seen mediated agreements that have unravelled at the legal advice stage. I'm not suggesting that this was because a lawyer got his or her hands on it – on some occasions it appeared that the agreement had effectively unravelled before the person got anywhere near a lawyer. What we want to do with this pilot in the longer term is to evaluate the outcome for the person, rather than simply evaluating the outcome of the mediation. This was very much in the mind of Trutz Haase but it's a clear gap in any event. The fact that the Board is now responsible for both legal and mediation services should be of assistance in this regard.

I have expressed that this is being piloted because the Board believes it is the right thing to do. It would be naïve to think that cost won't be a factor in the evaluation. Of course it will. The Board has a budget and must live within it. The costs of piloting an initiative of this nature are unlikely to be a huge challenge when it is limited to a number of geographic areas but if the evaluation finds that the initiative is worthwhile, there will need to be considerable reflection on how it can be rolled out elsewhere.

This initiative is, initially anyway, about promoting mediation. I'm conscious that the Law Reform Commission's report recommends that the information should be broader and not confined to mediation. I'm also conscious of the range of persons that the Commission identified as being potentially suitable to give information. We will be keeping the content of the information sessions under review.

I want to finish with a word of caution. What we really want to avoid is a pre-supposition that persons who present at the Board's law centres are intent on ending their relationship with their partner / spouse. The first responsibility set out in the legislative provisions that I referenced earlier in relation to the judicial separation and divorce legislation and the Guardianship of Infants Act is to give information about marriage guidance / relationship counselling and we always need to bear this in mind. There are many people who present to the Board or their solicitor who simply want legal advice about where they would stand if they made certain decisions. Legal advice will continue to be

available without any requirement to attend an information session. The mandatory aspect is about getting information about mediation before a legal aid certificate is granted for the purpose of court representation.

What I've spoken about today does involve change and change isn't always easy. I certainly don't have all the answers nor do I believe does the Board or other stakeholders. A lot of the answers should be from the ground up. Virtually everyone in the room here today is a stakeholder and I hope can contribute to improving our system of family justice.

Thank you