

The resolution Directive ADR Working Party

Report

Executive summary: The working party was set up in mid 2006 to examine future opportunities for more directive alternative dispute resolution within family law, including looking at models in English civil litigation and global family law. We recommend a model of more directive mediation, the introduction of binding arbitration, the use of early neutral evaluation, powers of the courts to refer into ADR, and increased skills for lawyer negotiation. We re-emphasise the fundamental role of solicitors as specialist advisers and client representatives, acting in accordance with the spirit and letter of the resolution code of practice, using the very varied and now quite considerable number of models of ADR as appropriate for each case and each client.

Introduction and background

It was in 1984 that John Cornwall, even then a top London solicitor, wrote to a number of other leading London lawyers to express his concern about the conduct of many family law cases. From that famous epistle was born the Solicitors Family Law Association, as then known, and the code of practice. The code has transformed family law in England and Wales for a generation. It has dramatically influenced family law across the globe. Its primary concentration was on the conciliatory approach.

This conciliatory approach led naturally and inevitably to increased settlement rates. Most settlements were then between lawyers direct, itself a form of ADR, alternative dispute resolution, settlements other than by way of final court adjudication. But from the late 1980s onwards, focus has also been on various new, emerging models of ADR. Whilst the organisation has throughout maintained its raison d'être for the conciliatory, constructive and settlement orientated approach, increasing resources have been committed to the development of ADR.

The organisation was one of the leading bodies involved in the Family Law Act 1996, which had as one of its primary themes the development of ADR, specifically then mediation, to work alongside legal representation and court based adjudication. The organisation expressed anxieties on some aspects of the legislation but overall gave strong support and endorsement.

The organisation was strongly represented in the development of the present ancillary relief procedure with the stunning success of the FDR and the focus on the narrowing of issues.

The organisation wisely came late, as an institution, to the development of mediation although its members had been involved from its early days. Resolution is now one of the primary bodies of family mediation.

After it was imported from America by a few solicitors, the organisation has last year taken on the responsibility for running and developing collaborative law.

In other ways, the organisation has encouraged, supported, initiated and worked with other models of dispute resolution within family law. The ADR section of resolution is now very strong, committed, resourced and enthusiastic. It is doing an excellent job for the very many clients of its members, whether by acting as solicitors or as ADR professionals.

Moreover the organisation has worked with other disciplines within family law, including therapists, counsellors, specialist children workers etc. Each have their place in the better performance of a family

law resolution system.

Experience and research shows that families require a variety of different forms of assistance with resolution; dependent on the nature of the dispute, its complexity and intensity, the involvement of children, the funds available, the extent it has already progressed through the court system and a host of other factors. No one ADR resolution model is appropriate for all. Specifically some families require a resolution model which is strong on renewing and embracing communication skills, emphasising the paramountcy of the child's welfare, understanding the family dynamic and particular behaviours and helping the family members move forward again. A number of lawyers are skilled in this but equally there are a good number of family law professionals, not lawyers, who are very well placed to provide this service. It is highly empowering but invariably non directive as to an outcome.

Some families struggle to settle their differences through negotiation or ADR. Yet they do not want to go to court. Moreover on an objective analysis, their differences are such that they do not need to go to court. Nevertheless the past boundaries of some ADR models have not necessarily brought about a settlement. Experience over the past couple of years has increasingly highlighted that alongside traditional ADR models within family law, there is a need for a more directive style and content. Whilst the resolution remains that of the parties, they seek greater input, direction and assistance from the ADR professionals than some traditional ADR methods had been able to provide.

Some families do though require a form of adjudication yet they do not wish to go through the full court process. A number of variations of the adjudication model have arisen including arbitration and early neutral evaluation. English family law, perhaps distinctive across the world, has throughout refused to allow such forms of out-of-court adjudication to have any binding element. Yet the calls for the use of such models increase. Other family law jurisdictions exercising a discretionary element have had no difficulty in embracing binding adjudications outside of the court process.

Accordingly in early 2006, it became clear to Andrew Greensmith, the then new chair of resolution, that the time had come to expand the work of the Association into more directive styles and models of ADR. These ADR models would distinctly build upon a chief characteristic of the members, namely the representation and advice uniquely able to be given by specialist family lawyers, experienced in the likely outcome to cases through the court system. At the same time, David Hodson had written for Family Law Week online, subsequently reprinted in the resolution Journal and the Family Law magazine about the more directive style of mediation successfully used in parts of Australia and also reviving discussions about binding arbitration started in 2002. These articles were very well received by many mediators within the Association, who in reality were already adopting the more directive style.

Andrew therefore set up the Directive ADR working party. Its brief is attached to this report as Schedule 1. Its members are as follows:

David Hodson, solicitor and mediator, arbitrator, deputy district judge, Australian solicitor and mediator, chair of the working party

Andrew Greensmith, solicitor, mediator, arbitrator, deputy district judge

Suzanne Kingston, solicitor, mediator, collaborative lawyer

Sarah Lloyd, solicitor, mediator, director of ADR resolution

David McHardy, solicitor, mediator, deputy district judge

Caroline Willbourne, barrister, mediator, deputy district judge

Robert Worthing, solicitor, family mediator, civil mediator

Marcus Rutherford, civil litigation solicitor with experience of family law, arbitrator, representative of the Chartered Institute of Arbitrators

We were absolutely delighted at the membership. Everyone was a multi-skilled, multi qualified and wide visioned specialist family lawyer, Marcus joining us halfway through our deliberations and having himself undertaken some complex family cases as an arbitrator. We included seven solicitors, seven mediators,

four arbitrators, four deputy district judges and one barrister.

We met on three occasions.

At an early stage we informed Lord Justice Thorpe and Senior District Judge Philip Waller of our work. We were delighted to be able to meet Lord Justice Thorpe in January to discuss our work, especially in the context of arbitration. We were able to consider what could be learnt from civil mediation models. We were in contact with Reunite to consider what could be learnt from the child abduction mediation pilot.

This report has been seen by the resolution ADR committee. It has been sent to the FLBA.

Having reported, the working party has ceased to exist and responsibility passes to the ADR committee.

We commend this report and our recommendations to the National Committee of resolution, to our membership, to the family law profession in England and Wales including the judiciary and to our government.

Directive mediation

Orthodox mediation has worked well and is still fundamentally important. Experience across the country is that more mediation occurred in 2006 than previous years. Much of the mediation is being undertaken by relatively few mediators who are very able and specialised.

Yet in some mediations, an impasse is reached when a couple cannot settle for want of more direction of what may happen if a matter went to court, how arguments and claims would be considered and weight given to certain issues. Mediators can then go no further in indicating what is likely to happen if the matter went ahead at court. They can certainly say if any proposals being discussed are outside the very wide range of what a court may order, but that is all. They cannot comment on the respective merits of the claims and arguments. They cannot overtly suggest one party moves their position to produce an outcome. They cannot predict an outcome, as with an FDR judge, with all the benefits that FDRs bring. They cannot suggest what a sensible and fair settlement could be. Mediators are unable to give any strong steer or direct encouragement of any terms on which to settle. When all the best efforts of the couple in mediation have failed, the parties look in vain for more help from the mediator. As a consequence, the parties leave the mediation room without a settlement, often for want of a more directive approach by the mediator. For many lawyer-mediators, this is an immensely frustrating experience.

The working party looked at a model of mediation very successfully used by lawyers in Northern Queensland, Victoria and elsewhere in Australia. The full background is set out in an article by David Hodson in family law magazines in late 2005 and available from the chair. Based on orthodox mediation, it is mediation with a strong input from an experienced family lawyer acting as a neutral mediator to help the couple and their lawyers reach a settlement. The normal rules of mediation apply save if the couple struggle to settle, the mediator is able to indicate and predict what he considers might or would happen if the matter were to be litigated at court and/or to propose positive solutions and forms of settlement and/or to comment critically on proposals by either party because they are either unlikely to succeed if litigated at court or they are not likely to produce a settlement in the case in hand.

The mediator has training as a mediator but, in practice, is selected as much for skills, judgement, knowledge and abilities as a lawyer in negotiating and achieving a settlement.

This model of mediation often takes place after disclosure is concluded and the primary facts are known. The mediation is directed to negotiating and reaching a settlement. This needs prior disclosure. This model works well with lawyers participating in the mediation sessions. This is referred to separately below.

There is specifically no therapeutic element as the mediator does not hold out as having specialist therapy skills, although naturally the mediator is very experienced in family dynamics and negotiation dynamics for the purposes of reaching a settlement. If couples seek therapeutic elements of mediation, then the mediator or the lawyers recommend a more appropriate mediator or a therapist, or a life coach as recommended in collaborative law. This model is purely a dispute resolution process. No more. No less.

It is the experience across parts of England and Wales that many aspects of this Australian model of mediation including with lawyers present as referred to below are already being adopted by some more robust lawyer mediators, informally and probably contrary to the strict rules and terms of business of mediation. The working party resolved that it was keen for this particular model to be used openly within mediation in England and Wales, and create a structure and terms of business for this more directive style.

We have prepared terms of business separate to the existing resolution mediation terms of business and attached to this report as Schedule 2. It incorporates the opportunity for lawyers to be present as referred to below. It is approved by the ADR committee. Whilst we do not consider that any additional training is needed, it is our very strong recommendation that this form of mediation is not undertaken other than by lawyers who are very experienced and confident in the particular area of family law to which the mediation relates and therefore able to give the directive assistance on outcome and moreover by mediators who have had significant experience of a good number of sole mediation sessions. We do not feel it is right to be prescriptive of any minimum number. It is more the ability, through handling difficult mediations as well as round table meetings, judicial experience and similar, to handle and successfully manage the mediation sessions including sessions which have two or more opposing lawyers in attendance!

We direct that mediators should be clear at the outset about which form of mediation is being adopted, so that clients and clients' lawyers are aware in advance.

A leaflet of guidance on undertaking such directive mediations will be provided to resolution mediators along with the precedent terms of business.

Resolution welcomes feedback from members as they undertake this more directive form of mediation so that the model can be improved and better guidance given on the best ways of working within this model.

Participation of lawyers in mediation.

The directive mediation model referred to above is also more receptive to the involvement of lawyers in the mediation sessions themselves. Again this is a model which has worked well elsewhere in the world. One of the causes of unhappiness by some clients with the traditional mediation model is that the client is unaccompanied by their lawyer. However parties being on their own, unaccompanied by lawyers, has often been cited as one of the reasons for success in the traditional mediation model. But there are some cases and some mediations, and indeed some parties, where having the lawyer present is a significant advantage. This is acknowledged as one of the attractions of collaborative law.

Some lawyers have been keen to participate more in the mediation process but have felt at times

rebutted, even rejected, by the mediator, referring to the orthodox mediation model terms of business.

Some mediations undertaken by very experienced mediators have allowed one party to have their lawyer present to give that party more confidence in the negotiation process. This does however have a number of shortcomings and potential disadvantages.

There is no doubt that some mediations are much more likely to produce a satisfactory outcome if the lawyers are able to participate at the mediation sessions.

In the Australian model and as proposed by us for some directive mediations, lawyers are often present throughout and take a full part. They address the mediator about the issues and the positions of the parties. They engage in the ongoing negotiations as well as giving advice throughout to clients. Lawyers therefore feel much more comfortable with this mediation model as they are present and know that at all times they can safeguard their client's interests and advise their client as the mediation discussions continue. Clients say as much (or as little) as they want in the mediation round table discussions. It is good practice to make sure that they get a chance to say whatever they want, especially at the outset of the mediation. This will be the equivalent of their day in court to have their say, with the personal importance that lawyers appreciate clients feel to have such an opportunity to be heard. But everything then said is in the "safety" of the mediation room where the mediator can ensure what is said does not derail the settlement process.

Often the mediation starts with both parties, their lawyers and the mediator in the same room. After the mediator has explained what mediation is, and what it is not, especially that it is a voluntary process and nothing can be imposed on the parties at the mediation or referred to openly, the lawyers often address the mediator on the issues, the offers already made and other proposals for settlement, with clients contributing as they wish. The mediator often wants to hear directly from the parties including what they want from the settlement in the wider sense rather than specific financial terms. The mediator will have been sent the relevant documents in advance and be aware of the issues between the parties, perhaps even the offers. He is likely to have his own questions to clarify the facts or positions.

Some mediations in this model takes place only with everyone together in one room throughout, with short break out sessions for clients to discuss with their lawyer. For other mediations, after this initial session together, the parties and their lawyers adjourn to separate rooms for discussions about further proposals to be made or received, with then either everyone returning to the primary mediation room for further combined discussions, or just the lawyers returning, or for the mediator to visit each of the separate rooms to talk to the parties and their lawyers to see how discussions are progressing and to make suitable interventions and proposals to take the discussions forward towards a settlement. How it operates depends on each individual case, the preference of the parties and their lawyers and of the mediator, and may vary during the session.

This model of lawyer inclusive mediation is invariably conducted at one session (perhaps two), not limited in duration to the orthodox 90 minutes although with a fixed conclusion time. It is quite usual for roundtable meetings and for the FDR process at court to last much longer than 90 minutes. As the parties with their lawyers may be in separate rooms for some periods, and as the clients will be primarily giving instructions rather than engaging in the intensity of the negotiations themselves as in orthodox mediation, there is no difficulty in this model of mediation having sessions lasting longer than 90 minutes. About 30 – 60 minutes before fixed conclusion, the mediator decides if the matter is likely to settle and indicates this to the parties and if necessary invites it to end if there is little prospect. This can produce renewed offers! Time is set aside for drawing up and signing final documentation although often the mediator draws up, and modifies, documentation about terms as the mediation progresses throughout the session. With lawyers present and able to deal with any issues of pressures on clients to conclude a deal and advice on the merits of terms as the negotiations proceed, the mediation documentation can be signed off openly at the session. The parties leave with, hopefully, signed heads of agreement,

perhaps even a draft consent order.

This model may often be appropriate for cases when there has been disclosure and often offers have already been made. As stated it is not then limited to 90 minutes. Indeed having lawyers in attendance is often on the basis of a much longer session to get all matters finally concluded with heads of agreement drawn up and signed by the parties and their lawyers at the session. Sometimes there is much sense in their attending on the last of several sessions, to finalise the detail and documentation. The privilege attaching in orthodox mediation to the mediation outcome document (we believe the phrase memorandum of understanding to be confusing and a term well past its sale by date) does not arise if the lawyers are present and advising during the session and on the drawing up of the agreed terms. Having both lawyers and the parties present in the mediation room makes it a much more difficult process and harder to control for the mediator, requiring considerable skills and abilities, but sometimes it may be the best, or only, way to get hard to settle cases to a resolution short of a final court hearing. It should be considered in suitable cases.

Early neutral evaluation

Early neutral evaluation is a process, both in court and out of court, in which an experienced lawyer gives an indication, as strong and as detailed as the disclosure and representation at that stage allows, of what would be the outcome if the matter were to be finally adjudicated in court.

Early neutral evaluation in court includes the FDR hearing at which the judge is required by the rules to predict what would happen if the matter were to go to a final hearing. It has its limitations for example because of time. Nevertheless there is a very high success rate. It is acknowledged as one of the primary achievements of the ancillary relief procedure. To a lesser extent, the process at the First Appointment is an early neutral evaluation as the judge is required to consider the points in dispute with a view to narrowing the issues.

Early neutral evaluation out of court is much less frequent and prevalent. Indeed, there is almost only apocryphal knowledge of what is going on. In this regard, it is also, perhaps confusingly, described sometimes as private judging.

The working party felt that it was now time to encourage early neutral evaluation yet to have better definition, boundaries and safeguards including within the professional context. Moreover the working party found a delightful coincidence of the collaborative law group of the ADR committee independently considering the same issue at the same time. Our recommendations do not conflict with any recommendations they make but it is hoped that the use of early neutral evaluation can build together, solicitors either as client representatives and as collaborative lawyers.

The anecdotal evidence is that over the past 15 years or more, from time to time opposing solicitors in a case have jointly consulted senior members of the profession, often senior barristers but also senior solicitors in other firms, on a complex issue causing a stumbling block towards a settlement. Sometimes this has been the whole of the case, for instance on quantum. Sometimes it has been discreet, perhaps interlocutory, issues or one single issue separating the parties. It is believed that often the opinion has been given in conference but sometimes in writing. It is believed that on occasions it has been given on a privileged basis so that issues do not arise about the status of the evaluation, the weight to be given in the court process and similar. It is not believed that any of these early neutral evaluations or private judgments have come before the courts for consideration of their status.

Specifically it is believed that when there was an incredible backlog of work due to the wardships being terminated under the Children Act by a specific date and many financial cases were taken out of the list and relisted for at least six months later, many cases in fact settled including a number through the

assistance of early neutral evaluation.

Private judging is sometimes used as an informal expression of early neutral evaluation. In some instances, it is identical. However early neutral evaluation is technically evaluation at an early stage in the case. Private judging has often occurred on a joint instruction to a senior professional towards the later stages of the case and as an alternative to a court adjudication. In this document we are referring to early neutral evaluation although private judging could also be incorporated in our recommendations.

Coincidentally with our consideration of the matter, the collaborative law section of the ADR committee of resolution were looking at a situation where it was proving difficult to reach a settlement because of unresolvable differences between the parties, perhaps on an issue of law or perhaps generally on outcome. Could two collaborative lawyers jointly instruct a senior professional to give a joint opinion to assist the parties?

In a similar fashion, could two lawyers representing their clients in conventional fashion yet working collaboratively to seek a settlement but being unable to do so for similar reasons, perhaps on an issue of law or perhaps generally on outcome, jointly instruct a senior professional to give a joint opinion to assist the parties?

The Family Law Bar Association was consulted and in turn they consulted the Bar Council. Their opinion was that provided there was no conflict between the instructing solicitors in the matter or areas on which the expert is being instructed, there is no reason why a member of the Bar cannot act in this way.

We have spoken with the Ethics Department of the Law Society. They have given a similar opinion to the Bar Council. Provided there was disclosure of all relevant information and joint instructions so that the expert solicitor was clear on what were the jointly agreed facts and information and boundaries of the request, then it was perfectly proper and an exercise of the professional function of a solicitor to provide this service as a jointly instructed expert in giving an opinion. The Law Society recommended that law firms should check their indemnity insurance on entering into new areas of work as technically this is, they said, contract rather than family law.

We therefore recommend highly that early neutral evaluation should be considered by opposing solicitors working towards a settlement but finding difficulty in concluding a settlement because of differences in circumstances in which the opinion of a senior professional might overcome those differences. This might be an issue of law applicable to the dispute. It might be a matter of the outcome on agreed facts. It is unlikely to be appropriate where the issue is credibility of witnesses.

It will be for the parties and their lawyers to discuss whether the early neutral evaluation is open or privileged. If open, it still cannot bind the family Court. Nevertheless, we believe it is likely to have some significant weight presuming the expert calibre of the expert appointed and the veracity and comprehensiveness of the joint instructions. Where the parties are nervous about subsidiary litigation on the status of the early neutral evaluation, there may be much sense in its being privileged. Its weight and status flows from the calibre and status of the jointly appointed expert rather than its open status.

There will be significant benefit that this is a confidential process and therefore will be attractive to some parties if the court process is opened up and becomes more transparent and public. We anticipate that in those circumstances a number of parties may seek private judging, to produce an outcome, and for this further reason we consider that it is valuable if early neutral evaluation is advanced now.

Naturally we do not say here about the respective qualities of the bar or a senior solicitor to give the early neutral evaluation. We record that on procedural issues and matters of family dynamics, solicitors are probably more aware and more familiar. We also acknowledge that most solicitors do not

appear frequently before the higher courts on final hearings and therefore barristers have inevitably an advantage in this regard. We anticipate that in time a number of senior members of both professions will undertake a number of early neutral evaluations, perhaps private judgments.

We consider that it is important that this form of assistance should not be confused with directive mediation. At this stage in the development of directive ADR, we recommend that someone appointed to give an early neutral evaluation should not previously have acted as a mediator. Equally at this stage in the development of this ADR, we consider a mediator should not subsequently give an early neutral evaluation, unless jointly requested and there is no risk of any confusion of roles and no issues of knowledge of privileged material.

As with any joint instructions, the request must be clear, with an agreed statement of facts and precise terms of request and agreed terms of acting.

We recommend this for the consideration of the profession in appropriate cases to overcome particular difficulties in reaching a settlement by the appointment of a jointly instructed expert to give an early neutral evaluation, perhaps undertake a private judgment of the whole case.

Arbitration

Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties. It is governed by both statute law and the common law. The Arbitration Acts 1950 – 1996 form the principal legislation governing arbitration in England and Wales. The fact that an arbitrator's award is enforceable summarily in the courts makes arbitration a unique alternative to litigation when compared to other means of dispute resolution. Almost any dispute which can be resolved in the courts can be settled by arbitration. Matters not suitable for arbitration are often those requiring certain powers of enforcement e.g. granting injunctions, imposition of a fine or prison sentence.

Unlike similar discretion based jurisdictions such as Canada and Australia, England and Wales does not have the possibility of binding family law arbitration. Specifically, nothing can bind the family courts, whether agreement of the parties or any out of court adjudication.

This topic was discussed in 2002 when there were discussions with the DCA, as it is now known, together with the FLBA and with the direct support of the Chartered Institute of Arbitrators. The DCA gave lukewarm support and have from time to time subsequently returned to consider it.

The working party has considered the matter in careful detail. It believes that in a number of cases arbitration has a number of distinctive advantages. Its only primary disadvantage is that the costs of the arbitrator are met by the parties themselves whereas, within the court process, the costs of the judge are free! It is therefore a matter for the parties whether the advantages outweigh the costs. Experience from abroad is that in a number of cases, and for some clients, they do. Binding arbitration should be available within the English family court system.

The benefits of family arbitration are as follows:

- **Identity of the arbitrator** – can be chosen as specific and appropriate for a case, the clients, funds available, for knowledge or experience of particular aspect of family law or background, i.e. more certainty than of any District Judge who is given the case the night before and “chosen” by the List Office.
- **Continuity of arbitrator** – will be involved throughout so less wasted costs, more detailed

knowledge, consistency of approach and orders

- Arbitrator will normally be able to attend the hearing at a location (and time?!) to suit the convenience of the parties.
- Parties may appear in person or be represented by legal practitioner.
- Parties choose their own timetable so parties can control speed of process by agreement or arbitrator decides as best for the case and issues and parties, and it is not regimented with uniform standard court timetable procedure as for all cases in accordance with court rules
- Privacy and confidentiality – this is likely to become an issue if court hearings or judgments become public. The whole arbitration process would be considered private and confidential
- The arbitrator can deal with discrete issues or all of the case - the advantage of the former is that there can be specific arbitrator for specifically complex or sensitive or detailed or specialists element of the case. Arbitration and court resolution can be inter changeable.
- The parties may control the manner of the proceedings having regard to the nature of the dispute and to their precise needs. So could be less formality of hearing. The parties indicate the degree of formality or informality of the procedure. (However, it should be borne in mind that in some instances the mandatory provisions of the 1996 Arbitration Act may preclude any agreement of the parties to the contrary.)
- Final arbitration outcome can be on written submissions or oral evidence and oral submissions, as parties chose
- The arbitrator is not bound by all rules of evidence but may inform himself or herself on any matter in any way that he or she considers appropriate.
- The arbitrator may require a person to attend to give evidence and/or produce documents, in accordance with court rules and based on powers in the Arbitration Act.
- It is not adversarial which the court based system still is at heart; the arbitrator is an inquisitor with power to order disclosure etc of what is particularly needed in a specific case
- Parties can decide if costs follow event and if so what is the event, including fact of if the arbitrator is aware of offers, alternatively costs shared equally or each pays their own
- Arbitrations would not affect status of individuals e.g. no attempt to pronounce decrees of divorce.
- Unlike mediation and collaborative law, arbitration imposes an outcome.
- It is a more formal version of private judging
- It is at a cost, unlike the court based system but arguably may save overall due to beneficial factors of arbitration. The costs of an arbitration are primarily time-related and will depend upon the matters in dispute, the procedure chosen by the parties and their choice of representative.

- It will reduce burden on Court hearings.
- At the end of the arbitration the arbitrator makes an award and provides concise reasons and findings of fact. There are limited appeals into the court system.

We have had very helpful discussions with the Chartered Institute of Arbitrators, considered the leading organisation of arbitrators across the world and based in London. They are keen for arbitration to be extended to family law. We are in an advanced stage of drawing up terms and rules of arbitration applicable just to family law cases. We have been clear that arbitrators must first and foremost be experienced family lawyers but who have had arbitration training. The Chartered Institute are prepared to undertake the work necessary to set up this scheme to be run in conjunction with resolution.

The precise nature and structure of the arbitration would be very much governed by the arbitration agreement. This includes where and when it is to be conducted; the issues to be dealt with; the estimated time required for the arbitration; how it will be conducted (for example exchange of documents and witness statements, scheduling and receiving of expert evidence); the circumstances in which the arbitration may be suspended or terminated; the powers of the arbitrator (e.g. to award costs); whether or not there will be sworn evidence, cross examination, discovery, affidavits, rules of evidence; whether the arbitration will be conducted on the papers, by telephone, by video link or in person etc.

Some of the perceived primary advantages of family arbitration are:

- * The selection of decision maker.
- * The direct, continuous involvement of decision maker.
- * Flexibility and individual choice of adjudication process.
- * Privacy and confidentiality.
- * Avoidance of court delays and standardisation.
- * Use for discrete issues of case
- * Speed.
- * Saving of court resources.

Equally there are disadvantages such as the private cost of the arbitrator.

A article with further details on family arbitration is available from the chair.

Obviously not all cases will be suited to arbitration (and the informed consent of both parties to go into arbitration is required). Equally, like all new ADR options, it will take time for family arbitration to merge with the legal culture and for practitioners to see it as a viable (and even preferred) option for their clients. Unlike mediation which started in family law, arbitration is well established and growing in other areas of litigation and often the resolution process of choice of experienced litigation lawyers.

We urge the government to reconsider this matter and bring forth primary legislation to introduce binding family arbitration within England and Wales.

In the meantime and pending such primary legislation, we urge the judiciary to consider that a very good reason indeed would have to be demonstrated for a family court not to make an order in the terms of an arbitration award where

- 1 the award is on the basis set out in the Arbitration Act 1996, as if it applied to family law
- 2 the award is by an arbitrator suitably qualified with the Chartered Institute of Arbitrators in its family law model set up with resolution, and who is also an experienced family lawyer
- 3 the award follows the procedural rules of arbitration agreed between the Chartered Institute and resolution
- 4 the award is given with a fully reasoned judgment

5 both parties have received independent legal advice before entering into an agreement to arbitrate.

We hope the senior judiciary encourage the use of arbitration as a method of resolution appropriate and beneficial in a number of cases.

Collaborative law

We were sternly informed that it is no part of our brief to look at any issues regarding collaborative law. This worried some of us as although it is still the very early days of collaborative law, it should not have the preciousness and sanctity from external debate which marred the development of family law mediation in England and Wales.

We have nevertheless respected our brief. We make no recommendations concerning collaborative law.

However we have undertaken some global survey of family ADR as part of our work. We therefore merely observe and record here that although Australia is only just starting with collaborative law it is already experimenting in ways to improve it as a resolution tool in their local culture. Australia distrusts self disclosure and relies on third party disclosure so it is quite normal to agree in collaborative law for subpoenas to be issued and for letters of authority to be sent to third parties to produce information about the parties' finances. It is actively looking at how to overcome what some perceive as the fundamental flaw of collaborative law, and others perceive as its fundamental strength, namely its termination on the non consensual issue of proceedings. Perhaps because parts of Australia are quite litigious, this is being openly discussed. They are considering that if proceedings are then issued, the collaborative process is not automatically terminated but at the next session a mediator runs the meeting to see if the process can be brought back on track, to understand on both sides the reasons behind the issue of proceedings and how the case can otherwise proceed, alternatively the matter is referred to arbitration. In this way, various strands of ADR are brought together to make sure the matter stays in "out of court" settlement mode rather than crashing into the court adjudication system.

Solicitor negotiated settlements

With many models of ADR, various ways in which cases can be settled without a final court adjudication, it is imperative that the profession does not lose sight of what has always been, and what remains today, the primary means of settling cases namely through solicitor negotiated settlements. Many solicitors through training and experience in ADR techniques or generally through negotiation skills training are excellent client lawyers in negotiations to settle cases. SFLA and now resolution members have been working collaboratively to settle their clients' cases on mutually satisfactory terms for decades before collaborative law was ever thought of. It is important for the profession and for our organisation not to lose sight of the crucial importance of solicitor negotiated settlements. Whilst other forms of ADR may from time to time require a concentration of effort and resources to start the process and to publicise, solicitor negotiated settlement will always remain.

We believe that the English family law solicitors profession is probably the most skilled across the world in negotiation of family law settlements in a conciliatory and constructive fashion outside the court process.

However such is the continuing importance of solicitor negotiated settlements, which inevitably have a strongly directive element as the solicitors advise their clients in the traditional representative mode, that we continue to urge all family law solicitors, from newly-qualified to those practising for decades, to

carry on with training, retraining and refreshing in negotiation tactics, skills, techniques and processes.

It is very easy for continuing education budgets to provide for training on hard, black letter law. This is important. However whatever the law, the vast majority of cases settle and they require sophisticated, developed and skilful negotiation abilities of solicitors. This in turn requires ongoing training. We urge this for the profession.

Court referral to ADR

Although the SFLA, as it then was known, had some reservations about the powers set out in the Family Law Act 1996 for the referral of cases into mediation, we generally supported the explicit opportunities for courts to direct that cases should be adjourned for mediation. Since 1996, other forms of ADR have sat alongside mediation. The particular part of the 1996 Act fell with non fault divorce.

From time to time since 1996 and from place to place across the country, family courts have had initiatives to encourage parties into ADR, which term we use here although often it is explicitly mediation. In the past couple of years, a specific week has been committed by government to various projects and initiatives at a local level to encourage ADR. We support all of these, with a caveat that it is a fundamental importance, especially given the unhappy history of mediation in this country, that there should be evenhandedness and openness between the various mediation professions, specifically lawyer-mediators and those from the not-for-profit sector.

Nevertheless these various ad hoc initiatives and enterprises should not take away from the continuing need for the explicit powers and opportunities of the family courts to refer into mediation, along the lines of sections 13 and 14 of the Family Law Act 1996. Whilst it is probably not now appropriate for those sections as drafted to be automatically implemented, we strongly urge government to introduce similar provisions at a very early stage to give the courts power to direct cases into ADR, of whichever form may then be appropriate for the particular case, including the more traditional and passive forms of ADR and the more directive and interventionist forms as referred to in this report, perhaps also including out of court adjudication such as arbitration and early neutral evaluation. We do not consider that there are any adverse public costs implications. We believe it would have the support of the judges and has the support of lawyers including lawyer ADR professionals.

Learning from other mediation models.

We were keen to learn from other mediation and ADR models. We looked carefully at the civil litigation mediation model, which ironically arrived later in England than family mediation but which has developed much faster. It works alone or in parallel with the court based process, but crucially interlinks within the court process. This is where directive family mediation and ADR has a future role. We were keen to learn from the 'Reunite' mediation pilot project in child abduction cases, which gave its own report just as this report was being published. Mediation is relatively easy when there are several possible outcomes with varying levels of satisfaction by the parties. But when there are only two outcomes and each party starts very unhappy with one of those outcomes, mediation requires very considerable mediation skills, specialisation in the area of law and a directive approach. General family law mediation and ADR must continually learn from these other areas and adapt accordingly.

Conclusion

ADR can no longer be considered the alternative form of dispute resolution. We are witnessing a culture change which recognises that it is now the primary form of resolution in family law matters. The court based adjudication must be recognised as the secondary form, the final resort, the fall back situation if all else fails.

In any event, the court based final adjudication process is financially unavailable to a large majority of the population; other than those on legal aid, those with particularly high levels of wealth or those who have little choice because of the attitude and approach of the other party insisting on going to court.

The court process is still often needed in getting to the necessary facts or disclosure for settlement, but not for final resolution.

With non court based resolution as the primary form of settlement there is now the need for more directive forms of resolution short of court adjudication. Resolution by means of orthodox mediation and other passive, non directive resolution still has an important role. But dispute resolution short of court adjudication will not realistically reach the hard to settle cases and hard to settle parties without much more direction and input from those professionals engaged in assisting the resolution. Some present forms of dispute resolution have flaws which can hijack the prospects of settling.

What is fundamental is that we are open to all ways and methods of resolving our cases. This is the only criteria, subject to issues of safety and interests of children. If a method or ADR model can help a family settle without a final court hearing, it should be actively examined and developed. Precious and/or historic allegiances with ways of working can only be allowed to survive if they have a place in an ADR culture. No doubt new ADR directions will arise. No particular style or method is right in all cases, for all clients, for all lawyers and in all sorts of circumstances. Lawyers need to know the strengths and weaknesses of each and when they are appropriate.

Adjudication at final court hearings is only appropriate and needed in a small minority of cases and parties. It must be very much the fall back resolution method. Primary resolution is ADR – of many and various and diverse methods and means and processes. Future work in family law will be working with these different methods. The SFLA was founded on a conciliatory approach. That remains a core *raison d'être* of Resolution. But in the past 20 years, the development of means and models of resolution have come equally to the fore of the organisation. The boldness and innovation which characterised the first decades of the organisation must now be the emblem as we develop new and exciting means to resolve our cases in the best interests of our clients, the children, the wider family and our community.

David Hodson
12 February 2007
Chair of the resolution directive ADR working party
dh@davidhodson.com

Schedules

Schedule 1

Brief of the working party

The Arbitration and Directive ADR Working Party

Memorandum of creation

Summary

To consider and expand family law ADR into more interventionist and directive opportunities.

Brief

To consider existing ADR, its strengths and particularly its weaknesses and identify gaps and opportunities, especially where patterns of clients and cases are not going into ADR. To learn at an early stage of the working party from those involved in different models.

To consider the merits of binding arbitration, its use abroad, the potential use in England and Wales, its weaknesses and its attractions, and if endorsed, make direct recommendations for reform and garner support. To work with the Chartered Institute of Arbitrators and meet with them. To renew contact with the DCA and meet with them. To consider what primary legislation would be needed. To consider in context of other proposals for reform from resolution which would restrict the unfettered discretion of the family courts.

To consider more directive mediation, ascertain how much in reality it is already taking place, the sorts of mediation where it is and is not beneficial and if endorsed, consider how it can be promoted and any changes needed to existing practice such as terms of business and similar.

To consider early neutral evaluation including, if different, private judging, to ascertain how much is taking place, probably by contacting the leading family law chambers as the likely objects, consider its benefits and uses, consider where it could fit in to more directive ADR in the context of the recommendations of the working party, and garner support.

To contact the Court of Appeal family law mediation scheme, to learn what sorts of cases are referred, specifically whether these cases benefit more from the therapeutic, holistic aspects of ADR or the more directive, interventionist aspects, to ascertain the progress of the scheme and how Resolution can help, if at all, and to bring in the lessons learned to the final report of the working party.

To contact the Reunite child abduction mediation scheme, whose 20 pilot mediations have now finished and a report is expected imminently, to learn what lessons they have gathered for the use of ADR in this particular litigation based context and to bring in the lessons learned in the final report of the working party.

To learn from civil mediation and civil ADR, which has no or minimal therapeutic element, including having a family lawyer experienced in civil mediation on the working party and meeting with a representative of the civil ADR organisations, consider what lessons and benefits can be gathered for family law in the context of the working party and to bring in to the final report of the working party. To learn explicitly from the experience of mediation piloted in the Commercial Court in London.

To consider what areas of family law presently underused in ADR, especially mediation, might benefit from greater use, perhaps borrowing lessons learned from the Court of Appeal mediation scheme and the child abduction mediation scheme, and report with recommendations.

To consider why so many lawyers are seemingly so reluctant to recommend into mediation, whether this is purely (as anecdotally) loss of income, or whether it is also, at times, a lack of confidence in the ADR professional and ADR process and whether this may change if the ADR professional were more senior and/or had additional qualifications and/or took a more directive, even compulsive, approach.

To endeavour to avoid taking cases away from existing ADR, on the basis of the perception that previously new ADR has tended to take more from existing ADR than from the litigious, court based cases although also recognising that some cases and clients presently in ADR may be more suited to a more directive approach.

To consider a resolution for the fundamental flaw of collaborative law namely its termination on the commencement of proceedings with the perception that this immediately excludes many clients and excludes many solicitors from recommending it because of practice management issues, including a variation whereby commencement of proceedings would be possible if a third party ADR professional was present at meetings, and make proposals

To consider the merits of med-arb whereby if a mediation is not “successful”, a suitably qualified mediator can transform it into an arbitration, including to consider the previously perceived (by some) disadvantages of confusion of role

To work closely with the FLBA, some of whose members are likely to feel more comfortable, and will be particularly skilled and experienced, in the more directive forms of ADR, with the Chartered Institute of Arbitrators, the Academy of Experts, with civil mediators and other relevant organisations

To consider implications for legal aid cases, including the positive encouragement already given by Angela Lake Carol

To consider in the overall context of the direction of ADR in family law, especially by Sarah Lloyd and Emma Harte being on the working party

To report to the national committee from time to time via Andrew Greenslade as instigator of the working party

To report finally by autumn at the latest and then cease to exist!

David Hodson
dh@davidhodson.com
26.2.06

XXXXXXX

Mediator

AGREEMENT TO MEDIATE
BASIC PRINCIPLES AND TERMS OF MEDIATION

The following terms are the basis for mediation conducted by XXXXXXXX. Please read each point carefully, noting any questions you may have to bring to the first meeting or raise in advance. Each party to the mediation will be asked to sign this document before the mediation commences as an indication of your commitment to the process and agreement to the terms. Thank you.

Mediation Organisation and Code of Practice

1. I undertake this mediation as a member of resolution, formerly known as the Solicitors Family Law Association (SFLA). In doing so I am guided and bound by the Code of Practice approved by the Law Society of England and Wales.

Mediator's professional capacity and functions

2. I am a family mediator and a solicitor and I undertake this mediation as part of my practice at ZZZZZ. My role is to assist you to resolve any issues that you may have or in making future arrangements for yourselves and any children. I will help you to explore the options available to you, with a view to your reaching a resolution that you consider appropriate to your circumstances. The choices and decisions are yours. I require you to give your commitment to the mediation process and to co-operate as fully as possible in seeking workable solutions and a settlement.

3. When working as a mediator, I do not represent the parties but instead I act in an impartial way to help you arrive at your own decisions. I will not assert or protect any legal rights of either party. I may provide legal or other information on an even-handed basis to assist you, for example in understanding the applicable principles of law and the way those principles are generally applied. 4. I may make positive suggestions, observations and proposals that I consider, in my judgment and experience, may help you in reaching a fair and just outcome. I will tell you if I consider that your proposed terms are likely to fall outside of the parameters that a court might approve.

4. If I consider necessary to help produce an outcome, I may provide a legal opinion or analysis on the merits of respective arguments and claims, on what may be the outcome if the matter were litigated at court or other directive legal views and opinions to encourage resolution.

5. It is always very helpful for you to have advice from your solicitor before the first mediation session and between sessions to discuss progress, developments and take advice on the next stage.

6. Mediation is commonly conducted without lawyers present. However sometimes it can be helpful for parties to have their lawyers present with them in the mediation room. I am happy to proceed on this basis if agreed by all parties. If your lawyers are present at the mediation meetings, you will have the opportunity of seeking legal advice from them before turning any decisions arrived at in the

mediation (including any settlement proposals) into an open agreement.

No conflict of interests

7. Mediation cannot take place if I have prior knowledge of the situation through a previous involvement including as a solicitor, judge or in any other professional role. If any other conflict subsequently arises or emerges, I will not continue to act as mediator (except with your specific informed permission).

Confidentiality and privilege

8. I will treat all matters in the mediation as confidential except as otherwise agreed, and subject to Paragraph 12. I ask you to agree that for training and quality assessment purposes that the mediation and any mediation documents may be reviewed on a strictly confidential basis by my Professional Practice Consultant and/or any other appointee of my mediation organisation.

9. At the mediation sessions I will meet with the parties together. Mediation is a transparent process. All information or correspondence from you or your lawyers will be shared openly with other parties. An exception to this is an address or telephone number which any party wishes to keep confidential. As the mediation progresses, I may exceptionally meet with the parties separately when at my discretion I feel that private meetings are appropriate and helpful towards a settlement. Any information disclosed to me in private meetings will remain confidential and will not be disclosed by me without the prior consent of the party who provided the information.

10. All financial or other factual information or evidence is provided on an “open” basis, which means that it can be used in court. This may be in support of a consent application made by you or in contested proceedings. Such disclosure will assist your legal adviser and will avoid information having to be provided twice over. (This reinforces the importance of full and accurate disclosure, as your legal adviser will need to check with you about the completeness and accuracy of all information received before advising you on any settlement terms.)

11. However, communications about possible options, proposals and terms of financial settlement are conducted on a “without prejudice” basis. This means, for instance, it cannot be referred to in court. They will not be turned into an open agreement until you have each had the opportunity to seek advice on them from your legal advisers. Also, an evidential privilege will ordinarily be claimed for all attempts to resolve issues in mediation including those relating to children. Where an evidential privilege exists, it can only be waived by agreement. (An exception to this is when the parties lawyers are present and advise each party on the proposed terms and a settlement outcome document is then signed. This cannot bind a family court but is treated as open and from which it is difficult to resile.)

12. These provisions for confidentiality and privilege may not apply if it appears that any child or other person is suffering or likely to suffer significant harm or a child is likely to be abducted. In this event, I would, as far as practicable and appropriate, seek to discuss the action to be taken with you before taking any action to contact the appropriate authorities in line with the Mediation Code of Practice under which I work and the Guide to the Professional Conduct of Solicitors and the Law Society Family Law Protocol. These provisions are also subject to any overriding obligations of disclosure imposed by law.

13. You agree not to call me to give evidence in court nor will you seek to have any of my notes brought into evidence.

Financial and other disclosure information

14. You undertake and commit to provide complete and accurate information of all your financial and/or other relevant circumstances, with supporting, corroborative documents where necessary. This is called disclosure. If disclosure has already been given via court proceedings or voluntarily between lawyers, I may ask that each of you provide in advance of the first mediation session the Financial Statement (Form E), any chronology, the statement of issues, any balance sheets and any other relevant disclosure prepared already on your behalf, together with any written offers made.

15. Exceptionally if a dispute is well advanced, I may request in advance of the mediation meeting that your lawyers each provide to me (and simultaneously exchange) a written summary of your views on the case (a 'Position Statement'), together with all of the documents to which that Position Statement refers, together with any written offers that have been made. I will read in advance and may ask questions or seek clarification. This can have the result of helping better progress to be made at the mediation sessions themselves and be more time and cost efficient.

16. It is not my task as a mediator to verify the completeness and accuracy of the information you provide. But if required, I can help you to consider the ways in which you may make such enquiries or obtain verification and help you to identify what information and documents would help the resolution of any issues, and to consider how best these may be obtained. I may point out where any disclosure may be unacceptable to a court or may seem incomplete or require more verification by you or your lawyers.

17. I may also help you to consider the desirability of seeking assistance from other professional advisers such as accountants, expert valuers or others, or from counsellors or therapists.

18. I will ask you to sign and date a statement confirming that you have made full disclosure. If it should emerge that full disclosure has not been made, any agreements or court orders flowing from the proposals reached in mediation based on materially incomplete or inaccurate information could in some cases be set aside and the issues re-opened and costs orders made.

Disclosure Summaries and recording of agreements

19. At the end of the mediation (or earlier if appropriate and required), I will ordinarily draw up:

- **A disclosure summary** of your financial and/or other relevant circumstances and facts which will be "on the record" and could be used in evidence in court if need be. This is the factual basis on which the mediation outcome is reached.
- **A mediation outcome** (sometimes called a memorandum of understanding) of your mutually acceptable proposals for the settlement of matters discussed in the mediation. This is a without prejudice document.

20. These documents enable you to obtain separate and independent legal and/or other advice before entering into an open agreement. You will need independent advice to assess how the proposed settlement terms may affect your own individual position.

21. I may also draw up as required:

- **An interim privileged mediation outcome.** This is a record of mutually acceptable proposals about interim or short-term arrangements. It is also without prejudice.
- **A privileged statement of the final offers of settlement** made by each of you.

This is only in the event that a mediation outcome is not achieved. It might also include the areas of agreement and the areas where you are apart. It can be valuable for your legal advisers. It is simple privilege and cannot be referred to openly nor has any efficacy in “new costs rules” cases.

- **Heads of agreement.** This will only arise if your lawyers are present, have advised on the mediation outcome and everyone is content to proceed to sign a comprehensive document. It is open and may be referred to subsequently in court proceedings. Often your lawyers and I will draft (and you will sign) heads of agreement before you leave the mediation meeting. Your signing of heads of agreement will make the mediation outcome open and as close to binding as possible in family law matters.
- **Draft consent order.** This will only arise if there has been a comprehensive privileged mediation outcome and/or open heads of agreement on the terms of the mediation outcome and the parties and their lawyers ask me to draw up a draft consent order, either at the mediation meeting or subsequently. It has to be filed at court by the applicant’s lawyers. It cannot be filed by the mediator. Solicitors usually undertake the formal recording of any agreements that may be reached in mediation after you have taken their advice. This includes drawing up a separation agreement or draft court consent order. I am willing to do this drafting if agreed by you and your lawyers. This has sometimes the advantage that the drafting is undertaken in a neutral fashion. Your signing of a draft consent order will make the mediation outcome open and as close to binding as possible in family law matters.

Termination of mediation

22. I am concerned to ensure that you enter into and continue with the mediation process able to discuss and negotiate freely together without risks of threat or harm or duress. Please inform me immediately and privately if you have concerns about your ability to negotiate freely and/or your safety.

23. You may terminate the mediation at any stage. I may also terminate the process if I do not think it appropriate or helpful to continue. In either such event, I will provide information as to other options available to you to progress your case and resolve any outstanding issues.

Mediation fees

24. My fees are £££ per hour (plus VAT/but no VAT as I am not VATable/but no VAT as you are both non EU resident [*review VAT fees arrangements if only one is EU resident*]) plus reasonable expenses. You are each liable in full for my charges but they can be shared equally or in any other way as may be agreed by you and with me. Exceptionally, I may require payments on account including for costs of preparation of documents. I will send bills after each session or as may be agreed with you. I require outstanding bills to be paid before any mediation session begins. [I require payment (by cheque or credit card) at the end of each session when I will give details of my fees to date.]

25. Depending on the issues, 3 or 4 sessions are commonly required, but more or less may be needed. Often sessions are of about 90 minutes duration but the first is invariably longer and subsequent sessions can be longer or shorter dependant on what needs to be covered and how the sessions develop. In exceptional cases where disclosure has already been given and where you agree, mediation can be in just one session with a view to producing an immediate outcome but the session would then be longer than 90 minutes but with a final conclusion time agreed in advance.

26. The hourly charging rate also applies for any work that may be required in preparation for

mediation sessions and between sessions, for example in reading documents submitted, drafting documents or interim documents, and in the preparation of the final documentation as set out above. I will give an estimate, if requested, for the drafting process.

Regulation *(Please check these terms with your firm's individual policy/terms of business and adapt if required. Amend if a sole practitioner).*

27. I will work with you as a mediator in a manner which I trust and expect to be fully satisfactory to you both. Any concern you may have as to my practice or the service provided by me should be referred to me in the first instance. If I am unable to resolve this with you directly, any complaint or concern you have will be considered through my firm's complaints procedure, and thereafter if it is still unresolved you may refer your complaint to Resolution for consideration in accordance with their complaints procedure. Please let me know if you would like a copy of their Complaints and Compliance Rules and their details, and I will provide this to you.

Dated the day of 200

.....
XXXXXXXX - Mediator

I agree to the above terms which I have read and understood :

Signed : Dated

Signed : Dated