MIND THE GAP

Advising clients prior to

There’s a gap between the rhetoric and reality in family dispute resolution, but there are ways to correct that, argues Mark MacDiarmid.

There are ways to correct that. The best known of these recent cases, providing a useful roadmap for the conduct of interim hearings, there have been numerous other decisions from the Family and Federal Magistrates’ courts slowly settling the obscuring sediment kicked up over the last few years. So whatever we may think of the recent amendments, from a practitioner’s point of view the task of navigating through Part VII of the FLA is unquestionably becoming easier.

But what about non-lawyers? The explanatory memorandum of the amending Act noted that the new amendments “advance the government’s long-standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner”.

One of the most conspicuous results of the policy was the establishment of the current requirement for most parties in dispute to “make a genuine effort to resolve that dispute by family dispute resolution” before a Part VII order is applied for. Family dispute resolution (FDR) is defined in s.10F of the FLA as follows:

Family dispute resolution is a process (other than a judicial process):
(a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
(b) in which the practitioner is independent of all of the parties involved in the process.

As a result, most of the parties who in the past would have taken their dispute directly to the court must now first participate in FDR, at a Family Relationship Centre (FRC) or elsewhere.

In passing the amending Act, it was parliament’s intention that parents reach agreement where possible, and s.63B of the FLA spells this out in the following terms:

“The parents of a child are encouraged:
(a) to agree about matters concerning the child; and
(b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
(c) to use the legal system as a last resort rather than a first resort; and
(d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
(e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.”

Noble goals indeed, but even this act of legislative optimism recognises that enforceability may be an issue. The note to s.63B adds that parents “who seek enforceable arrangements require court orders. These can be obtained by consent.” Of course, whether by consent or otherwise, orders are required, and s.65D provides that the court may make such parenting orders as it thinks proper, “subject to ss.61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division [6].” Section 60CA demands that all of this occur in the context of the “paramount consideration” of the best interests of the child, which is elaborated in s.60CC.

So, most parents in dispute must attend FDR. If they succeed in coming up with an agreed parenting plan (whether with the assistance of FDR or without it), and want that plan to be enforceable, they are obliged to file for consent orders. If they fail, they proceed to seek parenting orders directly from the court. Now, since the court must regard the best interests of the child as the paramount consideration, and since s.60CC provides extensive directions to the court in how to ascertain this, and since the court must also take into account the requirements of ss.61DA (presumption of equal shared parental responsibility when making parenting orders), 65DAB (parenting plans) and the provisions of Division 6, it follows that there is quite a considerable amount of new law standing between parents (whether in agreement or not) and the finalisation of their matter in the form of orders (whether by consent or otherwise).

Herein lies the problem.

The entire FDR process takes place in the shadow of an edifice of complex, recent law with more than enough twists and turns to trip up experienced players with practising certificates, never mind unrepresented participants in FDR.
family dispute resolution

Given this, you’d think that an obvious step when introducing the amending Act would have been to ensure that people obtain clear, accessible legal advice before negotiating their parenting plans. You’d be wrong. In fact, the most obvious obligation of ‘advisers’ in connection with the making of a parenting plan is “to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances.”

And who might these ‘advisers’ be? According to s.63DA(5), “adviser means a person who is: (a) a legal practitioner; or (b) a family counsellor; or (c) a family dispute resolution practitioner; or (d) a family consultant.”

Clearly, the FLA is predicated on the possibility of people going through the entire process of FDR without necessarily obtaining advice from a legal practitioner. Specifically (and somewhat bizarrely), there is no requirement that people obtain clear advice on the meaning of the paramount consideration of the best interests of the child and how it might apply to their particular circumstances; the mandated advice is in relation to possible outcomes that are all themselves legislatively subject to the (unexplained) requirements of the best interests of the child, itself a complex, legal expression. Certainly, the pre-trial procedures set out in the Family Court Rules (FCRs) provide for the trading of information between litigants and for the participation in alternative dispute resolution. However, as is the case with the FCA, the FCRs do not provide for a detailed explanation of the client’s legal position, other than with respect to costs.

Dr Jennifer McIntosh and former Family Court of Australia judge Professor Richard Chisholm note in a recent (and much-debated) study that there is nothing in the FLA that precludes parents from drawing on the lessons of research when making parenting arrangements, particularly given that the outcome of a shared living arrangement might leave a child with feelings “of being richly shared or deeply divided.” McIntosh and Chisholm emphasise that “it has arguably become more important for professionals to identify family contexts that do not have the basic structural or relational requirements to make substantially shared care a viable developmental option for their children.”

But there is no legislative mandate for this to occur; and, other than for those people who are accepted into the NSW Legal Aid Commission’s Family Law Conferencing program, there is not even an available grant of legal aid to obtain advice prior to undertaking FDR (although people may access limited free legal aid policies to allow for a small, one-off grant for legal advice prior to participation in FDR. Currently, in NSW, legal aid is available only to fund limited FDR itself (and the Legal Aid Commission’s own family law conferencing), but the merits test precludes a grant for advice prior to the commencement of proceedings in other cases.

In referring to these two potential interventions I used the word ‘obvious’ advisedly. Obvious they are; guaranteed solutions in themselves they are not. There is another ingredient that is essential if we are to maximise the prospects of FDR working in the best interests of children in a context where participants are frightened, angry and stressed. That ingredient is clear, accurate, compassionate lawyer/client communication. But do we as legal practitioners always have the skills and training required to deliver this? Somewhat disturbingly, communication consistently appears to be one of the areas in which clients feel most let down by their legal representatives.

According to the most recent annual report of the Office of the Legal Services Commissioner (OLSC), complaints about lawyers’ communication ran at close to 25 per cent of all telephone enquiries made by the OLSC in 2005/06 and 2006/07, way ahead of costs and negligence complaints (see OLSC statistics table). Equally disturbingly, the area of legal practice that attracted the most complaints in recent years was family law, running at close to 20 per cent of all telephone enquiries, and well ahead of conveyancing, civil and probate.

Of course, the data on legal matters raised may well be explained by the family jurisdiction being one of the most conflictual areas of the law, with high levels of emotion and frustration being very

“We now need to place much more emphasis on formal, interpersonal skills training.”
common among clients. However, when coupled with the data from the first table, this explanation must surely operate as a challenge for those of us working in this jurisdiction to really focus on developing and improving our communication skills to meet the heightened needs of our clients. I work with a free legal service advising people at social and economic disadvantage, and I am regularly in contact with men and women at various stages both in their progress through the court, and in their often ambivalent dance with our profession. I have spoken to individuals who have spent years cycling through the family law mill, often represented all the way, in circumstances where no-one has ever explained how the FLA works and how it specifically applies to their matter. Or, if these issues have been explained, the explanation has not been accurately understood by the client.

This is a problem for all litigants, whether represented or not, because sections such as s.90CC of the FLA have a clearly educative role in setting out what the legislature considers to be in children’s best interests. If parents don’t grasp this legislative expectation, it is difficult to see how they can conduct themselves consistent with it. This is only one of many weak links that not only aggravate the already difficult situation that many parents and children find themselves in after separation, but also make the job of the court, independent children’s lawyers and other practitioners much more difficult. Given failures of this magnitude, I believe it is up to the legal profession, not our clients or unrepresented litigants, to step up to the plate and take responsibility for improving communication and the broad dissemination of quality advice. I hasten to emphasise that I am not suggesting that this perceived failure of communication is due to ill-will on the part of medical practitioners. We must act as interpreters who make this law accessible to all members of our community who lack our training and to whom the operations of the FLA can take on the most intimidating opacity. If our methods of work and prevailing communication standards preclude the appropriate discharge of this responsibility, then we need to rethink our model of service delivery and our training demands. In a recent article advocating interdisciplinary and interagency collaboration to improve human rights outcomes, my colleague Tracey Willow and I asserted that “we lawyers receive precious little formal training in interpersonal skills; perhaps it’s time this training deficit was addressed.”

If we don’t take up the job of making the legal system more hospitable, who will?

ENDNOTES

4. s.60(1).
5. From 1 July 2006 there are now 64 FRCs operating throughout the Commonwealth.
6. Note to s.65DA(2) FLA.
7. See Schedule 1 to the FCRs.
10. This program allows for eligible clients to be represented by solicitors throughout the entire process of FDR. More information is available on the NSW Legal Aid Commission’s website at www. legalaid.nsw.gov.au/app/index.asp?pgid=592.
13. McIntosh and Chisholm, above n.8.
14. See, for example, Kathryn Robertson’s article “Active listening - More than just paying attention” on the Royal Australian College of General Practitioner’s website: www.racgp.org.au/ afp/2006/02/5780 at 3 August 2008.