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 HAS BEEN A STEADY FLOW of case law developing and clarifying the way in which matters involving children are now dealt with in the family jurisdiction since the new Part VII of the *Family Law Act 1975* (Cth) (FLA) was introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the amending Act). While *Goode and Goode*[1] is 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.[2] 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".[3]

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"[4] 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."

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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.[5]

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 orders, 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."[6]

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.[7]

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".[8] 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".[9]

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,[10] there is not even an available grant of legal aid to obtain advice prior to undertaking FDR (although people may access limited free advice directly from a legal aid office or from a community legal centre). If clients don't receive mature, informed, proactive advice, then there is a heightened risk that some children will "slip through the safety net designed to ensure that children do in fact benefit from shared parenting".[11]

"We now need to place much more emphasis on formal, interpersonal skills training."

So there's room for improvement on at least two obvious fronts. First, an amendment to the FLA (possibly to s.63DA) requiring that prospective participants in FDR obtain much more comprehensive advice at an early stage from experienced family law practitioners. Second, a change to 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 of 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

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.60CC 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 legal practitioners (however personally many litigants take not having their telephone calls returned). Family lawyers are busy people, running practices that often have large numbers of active, labour-intensive files. It can be extremely difficult to keep up with the requirements of correspondence, drafting, court preparation, firm administration, client interviews and so on. However, it is deeply regrettable that the first thing to disappear beneath the avalanche of demands on many lawyers' time is the one thing that some of us believe is indispensable to the just operations of the legal system: *communication adequate to the requirements of the client*. Frequently, practitioners will attempt to bridge this gap with correspondence and other written material. My experience is that written material can be useful, but is often insufficient if not accompanied by a verbal explanation.

It is vital that people who are subject to the FLA have the earliest, appropriately accessible opportunity to understand its application to their lives. Perhaps more than any other single piece of legislation in this polity, the FLA delivers the will of parliament, and hence, indirectly the will of the broader community, deeply into the lives of parents, children and other family members. It can potentially change the course of family relationships in a way that is only rivalled by state care and protection laws, and hence routinely operates in territory where human rights are at their most vulnerable.

In the case of FDR, it is imperative that people receive, not simply advice about their legal position (which in itself would be a great advance on what is currently on offer for most FDR participants), but, as Jennifer McIntosh and Richard Chisholm suggest,[13] advice about what research suggests will work best for children post-separation.

I've given some suggestions above on how to address the legislative and funding deficits. But how to solve the communication problem? There really can only be one answer here. Just as the legal profession has made enormous efforts in recent years to reduce professional indemnity claims by adopting improved practice processes and mandatory continuing legal education, we now need to place much more emphasis on formal, interpersonal skills training. Skills such as active listening can significantly improve the quality of communication, and for this reason now form a central part of the training of medical practitioners.[14] Given the statistics from the OLSC quoted above, there is every reason why we in the legal profession ought to be seeking out similar training as a matter of priority.

Our profession is the one to whom the administration of the FLA has been primarily entrusted; and to discharge this responsibility adequately we must accept that we are more than simply advocates. 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 inter-agency 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".[15]

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

Nature of telephone enquiries*

	03/04 %	04/05 %	05/06 %	06/07 %
Communication	14.9	11.0	23.3	22.1
Costs complaint	18.9	16.0	16.4	17.4
Negligence	13.5	11.8	10.6	12.4
Costs disclosure	3.2	4.8	8.0	8.7
Ethical	9.1	11.7	9.8	8.6

Legal matters raised*

	03/04 %	04/05 %	05/06 %	06/07 %
Family	17.5	18.6	19.4	18.2
Conveyancing	17.6	13.8	13.6	13.6
Civil	8.9	10.7	10.8	12.2
Probate etc	9.9	9.7	10.4	11.4

*As a percentage of all calls

High-ranking topics or areas of law in complaint calls to the Office of the Legal Service Commissioner.[12]

ENDNOTES

1. [2006] FamCA 1247.
2. See, for example, Zoe Rathus' article "How Judicial Officers are applying the new Part VII of the Family Law Act: A Guide to Application and Interpretation" (2008)20(2) *Australian Family Lawyer* 5.
3. Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 1.
4. FLA s.60I(1).
5. From 1 July 2008 there are now 64 FRCs operating throughout the Commonwealth.
6. Note to s.63DA(2) FLA.
7. See Schedule 1 to the FCRs.
8. Jennifer McIntosh and Richard Chisholm, "Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation" (2008) 14(1) *Journal of Family Studies* 9.
9. Ibid 1-2.
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/asp/index.asp?pgid=592*.
11. Ibid 9.
12. The statistics in the tables are drawn from the OLSC's 2003/04, 2004/05, 2005/06 and 2006/07 Annual Reports: *www.lawlink.nsw.gov.au/olsc* at 25 July 2008.
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/200512/5780* at 3 August 2008.
15. Mark MacDiarmid and Tracey Willow, "To Coerce or To Collaborate: Human rights lawyers relating with other professions" (2008) 33(2) *Alternative Law Journal* 86. ❑