

ALTERNATIVE DISPUTE

RESOLUTION

Presented by

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15 March 2012

ALTERNATIVE DISPUTE RESOLUTION

Separating couples are strongly encouraged by the Federal Government to take responsibility for resolving disputes themselves in a non-adversarial manner and to reach their own agreements. The Family Law Act 1975 (Cth) and the accompanying Family Law Rules 2004 (Cth) stipulate in what circumstances separating couples must use alternative dispute resolution processes. The Best Practice guidelines for Lawyers doing Family Law work, prepared by the Family Law Council of Australia, aims to encourage a constructive and conciliatory approach to the resolution of Family Law disputes.

'Alternative Dispute Resolution', is the term used in Australia to describe the process whereby disputes are dealt with by methods that do not require a decision by a Court and is central to the practice of Family Law.

Alternative Dispute Resolution encompasses –

- Settlement conferences
- Counselling
- Mediation
- Conciliation
- Arbitration
- Early Neutral Evaluation
- Family dispute resolution
- Collaboration

Settlement Conferences

Settlement conferences are sometimes called ‘a round table conference’, and they involve a meeting between the parties to a dispute with appropriately qualified experts that can assist in the resolution of a matter usually including their legal representatives and other experts such as accountants and tax planners. The meetings are confidential and used to discuss and try to resolve both parenting and financial issues arising from the breakdown of a relationship and to try to agree to a parenting plan and finalise property settlements without an independent mediator involved.

Counselling

The process of counselling involves the help of a Counsellor to assist separating couples and their family members discuss underlying emotional issues of their relationship and the practical resolutions of relationship issues or matters in dispute. Better communication between parties usually leads to better agreements. The parties’ lawyers are not normally included in this process and in many instances the process is child inclusive.

Family Relationship Centres have been set up all around the country and offer free mediation and counselling funded by the Government and are run according to guidelines set by the Government. They are operated by non-governmental organisations with experience in counselling and mediation.

Mediation

Mediation is a process that involves an impartial third party who is engaged to help the parties negotiate an agreement themselves. The mediator does not have any authority to make decisions and does not have an advisory role. The mediator tries to help the parties solve their own problems in order to reach a resolution on any issues between them by negotiation. This process is similar to a settlement conference but is facilitated and led by a third party. Lawyers are normally an integral part of this process.

Conciliation

Conciliation is a process that also involves an impartial third party, usually an independent lawyer who helps the parties, affected by separation to reach an agreement by negotiation. The conciliator may provide expert advice on what the outcome would be if determined by a Court. The conciliator does not make a decision on matters in dispute. The Federal Magistrates Court and the Family Court provide in-house conciliation services. However, where the parties wish to choose their conciliator or have a property pool valued in excess of one million dollars the Courts will usually refer the matter to private conciliation or mediation at the parties' expense. The Court-conducted conciliation differs from private conciliation. It is conducted by Court Registrars who have limited powers to make directions and the Registrar's services are paid for by the Court. Lawyers form an integral part of the conciliation process and are active in preparing the parties for conciliation.

Arbitration

Parties affected by the breakdown of a relationship can now agree to refer their dispute to an impartial third party who assesses the facts and determines any disputes according to law (similar to Court adjudication). Parties can choose their own arbitrator and the time and the place for arbitration. In Australia legally binding Arbitration can only be used for property and spousal maintenance disputes. Disputes about child support, child residence or contact cannot be arbitrated at all. Arbitration may be used to settle all property and financial matters or some disputants decide to arbitrate one matter in conflict such as the valuation of a business and then try and settle other matters by negotiation, such as the division of assets. The arbitrator has no power to join third parties and has limited powers to make orders affecting property rights of third parties. The arbitrator can do so only where third parties consent in writing to enter into a written Arbitration Agreement thereby binding themselves to the decision of the arbitrator.

Who is eligible to be a Family Arbitrator?

Only certain Arbitrators can arbitrate and register their Awards under the Family Law Act.

The Arbitrator must have completed specialist training and be included in the Law Council of Australia's list of Practitioners approved by the Council.

Effect of the Arbitration Award

An Arbitration Award is registered in the Family Court and has the same effect as an Order of the Family Court except that parties have 28 days from service of the Award to object.

An Arbitrator can refer a question of law arising from the arbitration to the Family Court or the Federal Magistrates' Court.

Review of Arbitration Award

A single Judge of the Family court or the Federal Magistrates' Court can review an Arbitration Award on a question of law and vary the Award where –

- It was obtained by fraud, or
- The award is void, voidable or unenforceable, or
- Where circumstances have arisen since the Award was made making it impracticable for some or all of it to be carried out, or
- The Award was affected by bias or procedural fairness in the way in which the Arbitration was conducted.

Early Neutral Evaluation

An Early Neutral Evaluation is a process where the parties engage an expert usually an experienced Counsel to provide an early focus on complex commercial matters at the very early stages of the case.

The early neutral evaluation will offer parties a case management strategy or overall resolution of a case and will evaluate the strengths and weaknesses and merits of each side of the case.

Collaboration

Collaborative Law is a relatively new process in Australia and involves both lawyers acting for parties to a breakdown in a relationship together with the parties themselves entering into a contract agreeing that the Lawyers will not bring the matter to Court if their clients are unable to reach a settlement and resolve their dispute.

In the event where clients of collaborative lawyers cannot reach an agreement using the Collaborative Law system of dedicated meetings to discuss all matters arising from the relationship breakdown, then both parties' lawyers must retire from the case and the parties will need to retain new lawyers if they wish to take their issues to Court.

Family Dispute Resolution

Family Dispute Resolution ('FDR') is the terminology used in the *Family Law Act 1975 (Cth)* ('the Act') for some of the alternative dispute resolution processes already described above.

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Section 10F defines FDR as a process other than judicial process –

- a) In which a family dispute resolution practitioner helps people affected by separation or divorce to resolve some of their disputes with each other; and

b) In which the practitioner is independent of the parties involved in the process.

Essentially FDR is mediation facilitated by a FDR practitioner who is authorised to provide the parties with an FDR Certificate and is sometimes called counselling, mediation or conciliation.

FDR and Parenting Cases

Section 60I

FDR is compulsory in most parenting cases before proceedings can be issued in the Courts, and parties must make a genuine effort to resolve their dispute through FDR before issuing in the Courts.

Exceptions

FDR is not appropriate where –

- Orders sought are by Consent.
- There is a history of violence or safety of the parties.
- Risk of abuse to a child.
- Contravention of Court Orders.
- Circumstances of urgency.

Section 13C

Section 13C of the Act empowers the Court to make orders referring parties to FDR at any stage of proceedings on its own motion.

Section 62B

Section 62B of the Act obliges the Court to inform parties in parenting proceedings about FDR and family counselling services.

Section 69ZQ

The Act requires a Court in children's matters to encourage FDR where appropriate.

Section 7ONEC and 7ONFE

The Act provides that the Court may impose FDR as a condition of a bond where parenting orders are breached.

FDR and Financial Disputes

The requirements for FDR in financial disputes are set out in the *Family Law Rules 2004 (Cth)* ('the Rules') and also include exclusion to participate in FDR in cases involving family violence, fraud and cases of urgency.

Rule 1.05 and Schedule I

Rule 1.05 requires compliance with pre-action procedures set out in Schedule I save for the exceptions mentioned above.

Lawyers Obligations

Schedule I, Part I, clause 6(1) stipulates the Lawyers obligations to as early as practicable –

- Advise clients of ways of resolving the dispute without starting legal action;

- Give clients documents prepared by the Court (if applicable) about dispute resolution services available to them.

The Court recognised that pre-action procedures cannot override a lawyer's duty to his or her client and that sometimes it is impossible to comply with pre-action procedures because a client may refuse to take advice. However, a lawyer has a duty as an officer of the Court to comply with the pre action procedures where possible.

All these processes require the co-operation of the parties and a commitment to problem solving issues that have arisen from the changing circumstances of their family living arrangements, relationships and financial matters.

These processes are not a substitution for independent legal advice. However it is critical that Lawyers advise their clients of the options available, help their clients to understand the applicable law and try and help them negotiate informed agreements where possible. When engaging in alternative dispute resolution the Lawyers are integral in assisting their client's choose the best process to suit their circumstances and to prepare their client's for ADR.

Sometimes the ADR process will not resolve all issues between parties, however, even partial agreement can help narrow the issues in dispute and save the parties substantial time and money when going to Court.

Advantages of Alternative Dispute Resolution

- Confidentiality and privacy as the process remains confidential.
- Speedier, cheaper and a less stressful way of resolving conflicts than an adversarial procedure.
- Less formal process.
- Parties can be innovative and develop solutions best suited to their particular needs.
- Family relationships between family members are usually not as negatively affected when they resolve their issues by negotiation.
- Where all matters are not resolved, issues in dispute may be reduced by partial agreement or arbitration.
- Independent third parties can usually be selected at a time and place that suits the parties.
- Where agreement is reached parties avoid the uncertainty of an imposed outcome.

Preparation for ADR

- Carefully explain to clients the options available.
- Where a third party practitioner is to be privately engaged, carefully select a practitioner to suit the needs of the parties.
- Analyse issues in dispute and issues in agreement. Identify what areas require clarification or further information before attending ADR.
- Communicate with third party ADR practitioners and check whether they require further material.