5 Mediation and other methods of dispute resolution

Mediation

84. Following the publication in 1990 of the Law Commission's Report on The Grounds for Divorce. The Government accepted that mediation should have a central part in resolving matrimonial disputes. The Family Law Act 1996 (FLA 1996) was firmly based upon the view that mediation had great potential for minimising the adverse consequences of marital breakdown. The Act made it a requirement that those in receipt of Legal Aid must first attend a meeting with a mediator.

85. Section 13(1) of the FLA 1996, which has never been brought into force, gives a court power in divorce proceedings to give a direction requiring each party (whether legally aided or not) to attend a meeting "for the purpose of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them and of providing an opportunity for each party to agree to take advantage of those facilities".

86. Section 13 is within Part II of that Act, which made widespread provision relating to new grounds for divorce and a structure to encourage reflection and consideration before a divorce case proceeds. After pilot studies, and for reasons unconnected with our present inquiry, Lord Irvine of Lairg (the then Lord Chancellor) announced in January 2001 that the Government no longer intended to implement Part II and would repeal it at the most suitable opportunity.

87. The Committee received a great deal of evidence indicating that the adversarial nature of court proceedings was not the best way to get a helpful resolution of contact disputes and related issues (see paragraph 34ff above). In oral evidence, it was suggested that introducing a degree of compulsion to attend a preliminary meeting with a mediator, where it was safe to do so, did not necessarily lead to a reduction in the effectiveness of this method of dispute resolution. Currently, although litigants who apply for legal aid have to explore the option of mediation, this is not the case with privately funded litigants. This can lead to problems where only one party is publicly funded, since the other party can opt out of exploring the option.

88. Dame Elizabeth Butler-Sloss highlighted another problem noting that:

the trouble with mediation is it is means-tested, so if you are on Legal Aid you get it free but if the other parent is not legally aided, and quite often father is not, he is going to have to pay several hundred pounds to go to mediation, and if he is not very keen it is not really an encouragement for him to do it. We live in a resource-restricted world, but if we are to make mediation work, at whichever stage, to have a money barrier… may not be the best use of [resources].

89. It is clear that none of these proposals should be seen as an easy way of ending court-based litigation. Mr Anthony Douglas, the new chief executive officer at CAFCASS, commented that:

I have visited 70 of our teams now and reviewed over 500 cases in the last three months and I think what has been happening is that the assumption of competence on behalf of both parents in private law cases, in other words, they could be mediated relatively easily with a good mediator, is just not borne out. What is there often in a case is one or both parents perhaps with a serious mental health difficulty, with an anger management or

violence problem, man or woman, with very poor circumstances, socially and economically, with considerable deprivation, with a child who has already had poor parenting before the separation. These cases mean that often you are looking at the least detrimental alternative and trying to protect a child's long-term psychological well-being.

90. The Government was not enthusiastic about promoting compulsion. The Under-Secretary of State at the DCA, Baroness Ashton of Upholland, told us that:

Our conclusions at the moment are that there is a sort of almost contradiction in terms, if I can put it like that, between compulsion and mediation that we felt it was really important for the courts to give a very strong steer that couples should consider mediation, that they should be looking to do that, but we have not got as far as saying that they should be compelled. It would take primary legislation to do that. We are not convinced from those we have spoken to and, I agree, there have been some interesting very well considered views taking different views, if I might say that, around this, but our view at the moment is that we think it better to have a very strong steer, and the role of the courts in that is absolutely critical, but not to say, "You are compelled to sit in a room to try to find a solution to this."

91. In its proposals the Government has not adequately distinguished between a compulsory exploratory meeting with a mediator and forcing people to mediate. Moreover, it could not adequately explain the differentiation between its treatment of publicly and privately funded litigants. Rt Hon Margaret Hodge MP, the Minister of State for Children, Young People and Families, Department for Education and Skills, commented:

What we are saying is that where public money is strongly involved, it would be sensible to try and go down that route [of compulsion]. It is a judgment. It is whether it should be an expectation or compulsion, and you can play that either way. I think what you will find with the reforms that we have introduced today is that the expectation is now so strong that consideration of whether mediation will work in a particular set of circumstances will occur in, I would have thought, most cases, with the exception of domestic violence cases where it is not safe for that to take place.

92. On the basis of the evidence we received, we support giving courts the power to direct parties to attend an introductory meeting with a mediator as established by s 13 of the Family Law Act 1996 (as we note above in paragraph 83, this provision has never been brought into force). This could result in a significant proportion of cases being diverted out of the court system and towards mediated settlements. We recommend the implementation of FLA 1996, s 13(1) in an amended form so that it applies not only to divorce cases but to all private law child disputes. Such a power could also help to create a general acceptance on the part of litigants and their solicitors that the court would expect them to have engaged in an exploratory meeting with a view to mediation and would not look favourably on litigants who had failed or refused to do so.

93. In our view, a process by which the court directed parties to a preliminary meeting with a mediator prior to agreeing to hear the case would not run counter to the sound argument that you cannot force people to mediate.

94. The Government has recognised that mediation may be a good way to steer people out of the court system, but there remains an inconsistency whereby those who wish to claim legal aid are required to consider mediation first, but those who are privately funded can ignore this process. Where it is safe to do so (and subject to the court's discretion), we

believe that all parties should be required to attend a preliminary meeting with a mediator on the basis described in section 13(1) of the Family Law Act 1996.

The Family Resolutions Pilot Project

95. A major recent initiative established by the Government is the Family Resolutions Pilot Project. The general aim of this is to divert parents into a non-court process involving court issued information, parent education and an attempt to achieve an agreed parenting plan. The working method for this Pilot Scheme is that following an application to the court the parents will receive a letter from the judge advising them to take part in the project and explaining the process. Cases where there is a risk factor will then be filtered out and sent for a finding of fact and a recommendation as to whether they are suitable for the scheme. There will then follow a three stage process which was described by Ms Mavis Maclean CBE, Senior Research Fellow, Department of Social Policy and Social Work, University of Oxford (who was involved in designing the pilot scheme) in an article in the magazine Family Law as follows:

Parents are separately invited to group meetings where a video Hearing from Children is shown in which the children describe their experience of parental separation. The video is followed by a discussion dealing with the impact of parental conflict on children;

A session designed to work on 'conflict management', in which parents are separately invited to group workshops on managing family contact after separation. The session is designed to focus on learning skills for conflict management and the specific context of conflicted contact;

A session designed to encourage 'planning post-separation parenting'. At this stage, parents would be invited together to meet with an adviser from CAFCASS. They might be given examples of parenting arrangements that work for other families with children at similar ages, similar geographical distances and work situations. Those parenting patterns would be provided as examples of what works for others and not as prescriptive options.

96. We received a substantial volume of correspondence concerning the planned Family Resolutions Pilot Project. Much of this focused on the Pilot Project's differences from the Early Intervention Project which had been established in Florida. For example, Ms Caroline Willbourne, a barrister who sits as a deputy district judge of the Principal Registry of the Family Division, raised this issue in an article in Family Law (November 2004). She said:

…that (Early Intervention) lost its way in Whitehall bureaucracy—is borne out by the project's history. Put forward as a fully articulated concept ready for installation, it has not been seen since… How did this happen? One answer is that "Family Resolutions" is the name of an old CAFCASS project which was undefined and unfunded. From the moment that the EI project first went to DCA in the autumn of 2003. it became evident that EI would attract funding. CAFCASS was well placed to claim EI as its own project.

97. In the House, the Minister for Children commented that:

The family resolutions pilot project was developed by the Department for Education and Skills working with colleagues in the Department for Constitutional Affairs to ensure that it was amended to reflect British circumstances. That seems to me a common sense approach…

98. This view was generally reflected in comments made by Mrs Justice Bracewell. In particular, she indicated that there were differences between Early Intervention as practised in Florida and the project which had been piloted. She noted that in Florida the scheme is compulsory, whereas Family Resolutions is not, stating that the reason for this is that primary legislation would be required to make the pilots compulsory and the inevitable delay in passing legislation would have prevented the start of the pilots, which were urgently needed.

99. The main issue in question appears to be whether 'parenting plans' should be entirely advisory, or whether an element of compulsion should be introduced to ensure certainty. Mrs Justice Bracewell claimed that:

The Florida project uses standard templates for parenting plans which have been devised by the courts and child experts. A parenting plan is presented to all parents who cannot agree, and they are required to adhere to it pending further negotiation and resolution of the problem. This format works well in Florida but there have been concerns within the steering committee, of which I am a member, that such a rigid approach might not suit the diverse and multi-ethnic families with many different styles of parenting in this jurisdiction.

The Government's Pilot scheme has judicial support.

100. There are dissenting views about this. In oral evidence, Mr Philip Moor QC, the Chairman of the Family Law Bar Association, commented that:

We strongly support the Early Interventions Pilot Project (which has become the Family Resolutions Project). There is a slight problem with that and that is in our view the parenting plans were a good idea and we liked the idea that you have a sort of template for these cases and that the parents that went into the system knew that unless there was something pretty exceptional in the case the template was the sort of order that the court would be thinking of making. We thought that set things out pretty clearly for them at the beginning and that is a project that we would like to see carried through… We would like to see the parenting plans in there and we would like it to be pretty well known that that is what the judges are going to do if the mediation breaks down and there are no good reasons for a change from the parenting plans.[

101. In her written evidence Ms Celia Conrad echoed this view, stating that:

The Pilot Project's aim is to reduce the number of families litigating in court by 75%. Having clearly defined contact guidelines, to be implemented in the event that the parents cannot agree a schedule of contact, and procedures for resolving most normal contact disputes months before they reach court would help achieve this. This is because if the parties know what order is liable to be made by the Court there is less point in litigating. These are all major plus points for such a system.

102. In January 2005, the Department for Education and Skills issued a document entitled Putting Children First: A Guide and Planner for Separating Parents. This has sometimes been portrayed by the Government as the introduction of 'parenting plans'. While this document may well be of assistance to parents, and on that basis we welcome it, it is not the sort of template document that critics had in mind.

103. Various groups told us that the Family Resolutions Pilot Project is not being operated

as the originators of the project envisaged. The Government says that it is impossible to pilot a scheme based on the 'Florida Model', since any form of compulsion would require primary legislation. There is no current evidence as to the success or otherwise of the pilot project currently being tested in the UK. Nonetheless, the Committee has received evidence from the judiciary that they are broadly content with this pilot project. We emphasise the need for adequate resources to be dedicated to the pilot project and that the results be published at the earliest opportunity. It is disappointing that the potential of the 'Florida Model' remains untested in the UK.