Why Mediate or Arbitrate Family Law Matters? Key considerations for solicitors when advising clients. Anne-Marie Rice[1]

The figures in the Family Court of Australia's Annual Report for 2014-2015 indicate that more than a quarter of cases awaiting final determination (that is, a trial) have been in the system for at least 12 months, with almost half of that number not having been allocated a trial despite proceedings having been commenced more than 2 years earlier. Delays for the allocation of trial dates in the Federal Circuit Court are also dire and now routinely exceed 12 months.

Given the pressure on judicial resources in both the Family Court and the Federal Circuit Court, parties to family law proceedings can be certain of only one thing – the delays in reaching a trial are unlikely to abate quickly.

While these delays create significant stresses for parties already embroiled in court litigation, they also create an ideal environment for methods of dispute resolution (long referred to as Alternate Dispute Resolution "ADR") which do not require a trial.

The most readily adopted form of ADR amongst family lawyers has historically been mediation. It is a process now familiar to those practising regularly in this jurisdiction and one long embraced by the courts in the form of Conciliation Conferences. The recent trial delays have seen judges of both the Family Court and the Federal Circuit Court encourage parties to embrace private mediations wherever possible in an attempt to decrease the number of matters in which a trial is required. In Queensland at least, mediations enjoy a very high rate of settlement.

Although it has been possible, under the *Family Law Act* and *Regulations,* for parties to family law proceedings to register an arbitrated award for many years, to date there has been a very limited uptake of this form of dispute resolution.

However, the amendments to the *Family Law Rules* (in the *Family Law Amendment (Arbitration and Other Measures) Rules 2015*), set to commence on 1 April 2016, and the current court delays create a climate ideal for the increased application of this form of dispute resolution in financial matters. There is currently no capacity to make or register an arbitrated award in parenting matters.

In addition to a thorough understanding of the new Arbitration Rules, there are a number of considerations for practitioners advising when clients about Arbitration and/or Mediation.

CHOICE OF PROCESS

The key factor distinguishing Arbitration from Mediation is the extent to which the client has a say in the outcome.

Although the scope of an Arbitration, and indeed the terms on which it is conducted, can be tailored to the individual circumstances of the matter, the process is akin to a private trial and ultimately the

[1] Anne-Marie Rice is the Principal Mediator at Rice Mediations and Dispute Resolution and a Director of Rice Naughton Family Law. She is a Law Society Accredited Specialist in Family Law. Rice Mediations offers parties the opportunity to engage in the Med-Arb model referred to in this article.

decision is made by a third person (the arbitrator) and imposed on the parties to the dispute. One of the reasons why private arbitration has not been readily adopted to date may be that parties have preferred that any decision imposed on them be made by a judge, in circumstances which they feel or can justify as being unavoidable, as opposed to them voluntarily bringing about circumstances in which a decision will be imposed on them.

In a mediation, the matter is resolved because both parties are prepared to accept the negotiated outcome. A party's decision to settle at a mediation is entirely theirs and is reached after a series of compromises, frequently about both technical and commercial issues. In parenting matters, mediations (or Family Dispute Resolution) can be a powerful tool in preserving, or even improving, the ongoing relationship between co-parents. That dynamic can rarely be preserved where the outcome is imposed on the parties by the arbiter of fact.

The extent to which a party might personally influence the outcome of a mediation (or at least **perceive they influence the outcome) is significantly different to the extent that they can personally** influence the outcome of an arbitration. As family lawyers well know, a client's perception about the process of dispute resolution that has been utilised can be as important as the outcome. In fact, studies have shown that parties are more likely to feel satisfied with a less than ideal outcome if the process used has been satisfactory to them.

An arbitrated award provides certainty and clarity, potentially without the same extent of compromise to a client's legal position but, if a client feels aggrieved by the decision reached by the arbitrator, other concerns may surface. It is important that practitioners consider the legal needs and non-legal drivers of their clients when advising about the process of mediation and of arbitration.

CHOICE OF EXPERT

Obviously, the choice of arbitrator or mediator is an important one and using appropriately qualified experts is essential.

Arbitrators must be properly trained and registered and have the requisite degree of experience for the matter. Similarly, mediators – whose skills and expertise differ widely – should be carefully, if not strategically, selected. Practitioners should give thoughtful consideration to the choice and skillset of the mediator to be engaged and ensure that the mediator is nationally accredited and follows the National Mediation Guidelines. Where necessary, consideration should also be given to whether the mediator is a registered Family Dispute Resolution Practitioner so that all aspects of the family law matter can be addressed.

Both mediators and arbitrators can be solicitors or barristers and practitioners should give consideration to what particular qualities and skills best suit the particular matter. One of the advantages of the private dispute resolution system is that the "one size fits all" model necessarily imposed by the courts does not apply.

The skills of counsel are different to those of solicitors and both have particular strengths. Like mediation, arbitration is not just for "big" or "complex" matters. There are enormous opportunities to engage in effective arbitration where more modest pools are at stake and where the parties'

financial affairs may be less intricate but where, nonetheless, the parties are unable or unwilling to reach a compromise. In those circumstances, and particularly where either of the parties to a mediation may be unrepresented, the skills that solicitor-mediators/solicitor-arbitrators hone over many years of direct client contact may be particularly beneficial.

There is also an opportunity to combine these two methods of dispute resolution in a cost effective and timely way. The notion of the "Med-Arb" model is not new and has been contemplated by experienced mediators and arbitrators for some time. The model affords the parties the opportunity to reach an agreement at mediation about matters that are able to be compromised (or which cannot be the subject of an arbitration – such as parenting issues) and to refer to an independent arbitrator only those contentious issues about which no agreement can be reached. The matter could then return to mediation for the finalisation of any aspects which remain outstanding after the arbitrated award is known. The knowledge that the matter will return to that forum may provide the arbitrator with greater flexibility and creativity in devising the award and, similarly, the knowledge that a "circuit breaker" can readily be found provides the mediator with the tools necessary assist the parties to finalise matters as quickly as possible.

Whether embracing mediation or arbitration and whether engaging counsel or a solicitor for the role of mediator or arbitrator, the current court climate compels practitioners to fully understand the options available to their clients, develop an appreciation of what services are provided by the various experts in the market and advise their clients accordingly.