Evaluation of alternative dispute resolution in family cases in england and wales...

In recent years there has been a greater emphasis placed upon non-court alternative dispute resolution in family cases.

Evaluate the use of alternative dispute resolution in family cases in England and Wales. To what extent can this emphasis bring positive benefits for clients and affect the way in which solicitors advise their clients.

Executive Summary:

There has been a growing emphasis on the use of alternative dispute resolution (ADR) throughout the years in family cases within England and Wales.

This is evident by Part 3 of Family Procedure Rules 2010(FPR)[1]which lists the courts' powers to encourage and facilitate the use of ADR instead of traditional court litigation.

This discussion takes the view that despite the obvious benefits of ADR such as mediation there are blatant gaps in the practice, engagement and availability of information for the public. These issues restrict the use and hinders the extent of the positive benefits that only ADR can provide in comparison to litigation.

This discussion shall explore the development of ADR and the options available in England and Wales in comparison to other jurisdictions. It will also review the advantages and disadvantages of ADR for clients and the impact it has had on family practitioners and the approach of the court. Finally, if appropriate, proposals for reform or improvement.

1. The development and rationale for placing a greater emphasis on alternative dispute resolution in family cases

The development of ADR within England and Wales demonstrates that the government has favoured an alternative to litigation within the family courts. There are many positive benefits of ADR such as reducing the confrontational nature of litigation and giving parties control over the issues discussed enabling them to reach settlements on terms agreed between them. It provides an environment to preserve relationships amicably and avoids the winner versus loser mentality of court litigation.

Initially, developments of ADR began with the introduction of collaborative law roughly 15 years ago, influenced by a Canadian model of dispute resolution. For this period many solicitors were trained to be collaborative lawyers specialising in this method.

Moreover, ADR later progressed, and the method of arbitration was introduced. Despite being available for family disputes it has been quite uncommon for this method of ADR to be used.[2]

Quite recently arbitration developed to provide a family arbitration scheme in 2012 under Part I of the Arbitration Act 1996[3]and the Institute of Family Law Arbitrators' Arbitration Rules. Later developments led to the introduction of the Children Arbitration Scheme in 2016 for private children disputes.[4]

In addition, the introduction to Part 3. 3 of FPR 2010 provided the court with the power to encourage parties to consider ADR, not only at the start of proceedings but throughout it. Although the court cannot compel parties to

participate in ADR there are cost penalisations for parties who unreasonably fail to consider ADR.

This led to further developments in ADR such as the introduction of the Mediation Information Assessment Meetings (MIAM) following the Family Justice Review in 2011. This was further embodied into a statutory requirement by s. 10 of the Children and Families Act 2014.[5]

The MIAM procedure requires parties to attend a MIAM with a mediator before issuing proceedings, or to prove that a MIAM was attempted but has been unsuccessful and or is unreasonable to participate in. This is an apparent move to encourage families to reach agreements outside of court provided they do not fall within the exemptions.

The changes to the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO)[6]continue to provide legal aid funding for mediation despite being withdrawn from private family disputes.[7]This is a deliberate move to focus on the use of mediation to resolve private family law disputes ‘ as part of an emphasis on diverting appropriate cases away from court.’[8]

The rationale behind the emphasis and encouragement behind ADR is to lessen hostility in already emotionally charged family matters. This is because it has been recognised for some time that there are certain family matters that are not suitable for court[9]. There is also the rationale that mediation would lessen the pressure of the family courts’ ever-increasing case load and the ‘ cost of court litigation on the public purse.’[10]

2. The options available of alternative dispute resolution in family cases and how they compare to other jurisdictions

As mentioned above there are a variety of ADR methods available in family matters such as arbitration and collaborative law. However, on the one hand, the options of arbitration and collaborative law although useful there has been a steady decline in their use for settling family disputes.[11]

On the other hand, mediation could be considered the most commonly used method of ADR and most encouraged by the government in England and Wales for family disputes. For this reason, this discussion will focus on this option of ADR going forward.

The options of mediation and its different forms in other jurisdictions show great differences in how it is practice and implemented. For example, countries such as Finland, mediation consists of three different procedures, out-of-court mediation, court mediation as an independent procedure and lastly, mediation to implement a decision. The processes for each method are entirely voluntary, confidential and free of charge. However, in Finland different type of matters are dealt with by different methods of mediation. For instance, the out-of-court mediation is led by social services and family mediators for disputes regarding issues such as custody and child arrangements. Quite significantly, in contrast to England and Wales, the Finnish government encourage parties to settle and negotiate between members of the family and if this fails to then call upon counselling services and other social services.

Furthermore, the court mediation method covers matters related to the custody, housing, rights of access and financial support relating to children. It is a separate procedure to proceedings. This method is also voluntary and requires the consent of both parties. It should be considered whether there is any merit in grouping different types of family disputes for different types of mediation with various levels of powers. Mediation within England and Wales could benefit from this division as it would ensure that particular disputes that are suitable for mediation are directed towards mediation before reaching court litigation.

Moreover, within Finland the mediator is a judge assisted by an expert, such as a psychologist or a social worker.[12]Whereas as in Sweden, the mediator is appointed and chosen by the court and if a decision ordering mediation is made, it does not require the consent of the parties.[13]In comparison to the mediation here, a mediator is a neutral party which does not offer advice and instead encourages communication and listening between parties. It may be useful to consider whether judges could play a role as mediator and remain neutral.

Further examination of ADR shows that in some jurisdictions like Italy, prior mediation is in fact compulsory before initiating court proceedings for family dispute such as family business agreements.[14]In Czech Republic, similar to the court powers under Part 3 FPR, a court may order the parties to meet a registered mediator for a maximum of three hours and, at the same time, suspend the proceedings. Refusal without good reason may lead to penalisation in the form of an award for costs at the conclusion of the proceedings.[15]

There are vast differences in how ADR is implemented and practiced in different jurisdictions in comparison to England and Wales. As mentioned before, mediation requires parties to attend a MIAMs before starting court proceedings. This although in concept is logical in placing a greater emphasis on ADR it does not enforce a degree of compulsion on parties to do so. The requirement is easily overlooked and sometimes completely ignored. It could be argued that some obligation on parties to at least attend and attempt mediation without hostility should be implemented to an extent as it is in other countries such as Finland, Sweden and Italy. In addition, it may be worth considering penalising parties that are hostile and deliberately disruptive during mediation to increase the extent of ADR participation

3. The advantages and disadvantages of alternative dispute resolution in family cases

It is success is clear from the amount of successfully settled matters, that mediation as a form of ADR works well for family clients. Research undertaken in 2017 has shown that family mediation resulted with a 70% success rate for separating couples with an outcome of whole or partial agreement.[16]The rate of success is likely due to mediation giving parties the control, flexibility and neutrality required to settle their disputes. Mediation is beneficial as it is user-friendly and adaptable to the individual needs of a diverse range of family structures and cultures.[17]

The benefits of mediation in comparison to the court litigation is that it is a good platform to discuss non-legal issues, such as emotions. There is also the benefit of availability of legal aid[18]remaining available for parties who

meet certain requirements and do not exceed the income threshold. The MIAM requirement is also very informative in that it advises clients on the other possible methods of non-court dispute resolution and assesses the risk of harm or domestic violence against either party and a child. This means that families are then signposted to the relevant agencies and services that could help solve issues without the need for court proceedings.

However, for all the benefits mediation offers there are also serious downfalls in how it is offered. The first issue with the mediation requirement is that it is first monitored at a point in time where the parties have a clear intention to litigate; when they fill in court forms to commence court proceedings.[19]

This is slightly contradictive of the emphasis and rationale of ADR. It would be more logical for mediation to occur first and then with relevant papers such as the unique reference code and other details can parties obtain court forms to fill out.

Secondly, there is a real issue on the lack of the understanding of the use and benefits of ADR. Parties seem unaware and uninformed of how methods of ADR such as mediation can resolve their matters. The final report of the ADR Committee of the Civil Justice Council[20]supports this view. Parties seem uncertain as to how a neutral party that does not provide an opinion or take sides can help bring about an agreement.

Thirdly, perhaps linked to the issue of awareness, the level of participation is still lower than expected despite the availability of legal aid. The use of mediation declined after the post-LASPO changes and failed to recover since

with figures currently standing out just over half in comparison to pre-LASPO.[21]According to official statistics for the period of October to December 2018 MIAM participation increased by 4% in comparison to the previous year.[22]Although, these figures shows a general increase which is promising for future use, currently the ‘ supply of mediation exceeds demand.’[23]

4. The impact of the emphasis on alternative dispute resolution on the work of family legal practitioners and the approach of the courts

The impact of the greater emphasis on ADR has led to an increased duty on family practitioners to consider and encourage their clients to attend mediation. However, family practitioners have not been able to inform potential clients of the use of mediation as a big chunk of their clientele who cannot afford legal advice privately, and now no longer qualify for legal aid, are not seeking help for their family matters.[24]Thus, they are not receiving advice about ADR altogether. There is also the suggestion that family solicitors are not implementing the FPR rationale and emphasis on ADR. Instead, solicitors are ignoring the MIAM requirement in practice or are not encouraging clients to mediate.

The impact of the emphasis on the approach of the courts has meant that the court must consider throughout the proceedings whether at any given time ADR can be considered to resolve issues. If it becomes apparent that mediation or a form of ADR is more suitable than court litigation, the court has the power suspend proceedings for parties to attempt ADR.

However, it is argued that there is little evidence to suggest that family courts are consistently implementing the 2010 FPR. Instead judges and court

officials are only checking that the relevant boxes on court form such as C100 and Form A, FM1 have been ticked.[25]There is little evidence to support that the court has ever rejected application for failure to attend a MIAM.[26]In fact, reviews have shown that according to the Ministry of Justices 2015 research on 300 divorce and children files, 176 did not have the required mediation forms, only one was flagged up but did not indicate whether this had been taken up with the applicant or their representative. [27]

5. Conclusion, proposals and rationale for any further reform.

Proposals

The first proposal would be for the family court system in England and Wales to properly check that the MIAMS requirement has been complied with by ensuring both parties have ‘ at the very least attended a MIAM before they have an appointment with court.’[28]If not, the court should consistently investigate why parties have failed to comply with the practice direction. It is strongly proposed that the court should refuse to list proceedings until a genuine attempt at mediation has been attempted to prevent superficial compliance. This is not to suggest that parties should be forced into mediation but instead to ensure parties and solicitors are not sidestepping this requirement in practice. In France, family mediation is never compulsory although it is encouraged. Recently, the French government has introduced an experimental scheme of compulsory mediations for disputes over parental responsibility.[29]

It would be worth returning to see the results of this scheme and whether, if any certain situations compulsion is beneficial. It should be clarified that this report does not support the idea of forcing parties to mediate. However, research into other jurisdictions methods and options of ADR highlight that greater extent of obligation would be in fact beneficial to increase the use of mediation.

This could be achieved by strengthening judges gateway powers to include cost orders in family cases where it is justified and refusing to list particular issues such as parental responsibility cases that have not genuinely attempted mediation. Although, it can be argued to an extent that the MIAMS requirement does exactly that, it is claimed that these powers are not exercised consistently.

In Mann v Mann [2014][30]Mr Justice Mostyn highlighted the parties cannot be compelled to participate in mediation. He suggested that an Ungley Order could encourage parties to consider and even take reasonable to attempt to settle via mediation. This is because they would be aware of the risk of a cost order being made against them at the end of the proceedings if they are unable to justify a refusal to reasonable settlement.[31]

Second agreed proposal is for ADR methods such as mediation to be taught and to be ‘ better embedded within university law education.’[32]This is also listed in the Civil Justice Committee report as recommendation 5.[33]It is understood that currently the Solicitors Regulation Authority (SRA) for the Qualifying Law Degree (QLD) make no specific reference to ADR. There is also no specific ADR reference in the SRA code of conduct.[34]It would be

useful to consider the intention of the Law Society of Scotland (LSS) Practice Rules to include this within the mandatory part of the code, as well as the obligation for solicitors record advice to be reviewed and supervised by LSS. [35]This sort of approach ‘ may be of value in England and Wales too.’[36]

Thirdly, it would be useful for there to be widespread campaign of national awareness surrounding mediation. The promotion of mediation on a national level would really improve the general public’s awareness and understanding of mediation as well as its availability.[37]It should be promoted in a way whereby clients are aware they can access mediation without the need for contacting a solicitor. This is also supported by the Civil Justice Committee at recommendation 2.[38]

Conclusion:

In conclusion, it appears that the current statistics show an increase in the participation rate of mediation however clearly more needs to be done. There are still issues with what can only be described as superficial compliance, awareness and use of ADR within England and Wales. There are many benefits ADR such as mediation, but it is becoming a resource wasted. The government’s emphasis and rationale is clear, some disputes are better suited for out of court resolutions but this message is being greatly ignored. Point blank compulsion is not the answer however there needs to be a greater degree of compulsion in order to increase use of ADR. If the greater emphasis for ADR is ever going to see results it is essential that the use of the court’s gateway powers is used more consistently and frequently. It is also very important for the support of the rationale for ADR to be

implemented into practice from both solicitor’s but also court officials. Superficial compliance is only a waste of time and resources and with an already over burden court system, the benefits of ADR like mediation will go unused and wasted if not genuinely utilized.

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