

Response by Family Mediation Scotland to:

SCOTTISH CIVIL COURTS REVIEW

Family Mediation Scotland provides mediation services for face-to-face discussion, assisted by an impartial mediator, enabling parents to co-operate in making arrangements for children, finance and property without having to resort to the possibly adversarial route through lawyers and courts. Mediators in FMS' affiliated services across mainland and island Scotland work with parents to reduce acrimony and bitterness, and help parents focus on their children, rather than the differences between them. FMS' services also offer special support directly to children to help them adjust to changes in their family.

Family Mediation Scotland (FMS) welcomes the Consultation Paper on the Scottish Civil Courts Review. Local Family Mediation services regularly mediate with parties who have accessed family mediation services pre court action, during a court action and post action (e.g. mediating to update separation agreement provisions in the light of changing circumstances). All of these parties are court users.

With reference to Family Mediation services in Scotland, FMS would offer the following answers/comments:

Chapter 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

1. Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?

At present the rules of civil procedure in both the Court of Session and the Sheriff Court encourage an "adversarial" attitude between the parties involved in the cases. It is essential that there is investment in the education of the legal profession (judges and solicitors) re what mediation is so that they are better able to encourage and refer.

In family cases this begins with the Pursuer serving an Initial Writ containing a number of averments about the Defenders character which are designed to portray them as "unfit" parents and show the Pursuer in a more "virtuous" light. Not surprisingly the Defender's often already dim view of the Pursuer is reduced even further and the chances of an amicable, early settlement are almost non-existent. Matters are not improved by the time the parties reach a Child Welfare Hearing as instead of being a way to ascertain the best way forward at the earliest stage, these hearings are often a way for both sides to try and blacken each others character further. This often leads to parties becoming entrenched in their point of view and it can be very difficult to shake that in due course. Having reached this point, parties can forget that they are in fact parents, able to make their own decisions outwith the court system.

From the foregoing it is clear that the rules of civil procedure, in as far as they relate to family matters, should have an overriding objective of reaching a "consensus" between the parties on a settlement rather than one being imposed by the Court. Parties should be encouraged by the procedure itself to attempt to reach a solution themselves rather than become more entrenched in their views and let a Sheriff make crucial decisions for them.

2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

At present the Court has the power to refer parties to mediation at any time during the course of the proceedings. In practice, this is often done either in cases where it is clear that the action itself has been precipitate or where the Court has tried every other option open to it and mediation is seen as a last gasp attempt to move things on. FMS considers that it should be formalised within the Rules of Court to encourage parties to consider mediation to bring about a cultural change and to make solicitors responsible for doing this. Family Mediation is defined as 'a voluntary process which gives parents who are separating or living apart the opportunity to make their own arrangements for their children's future' so the emphasis on *encouraging* rather than *requiring* parties to seek resolution by mediation is supported by FMS. There are many preconceptions and assumptions around what the mediation process entails. A requirement to attend an information meeting, or Intake session, to explain to each party would assist parties to make a more informed choice whether mediation is appropriate for them. Requiring parties to consider mediation and come to an informed decision on whether it would be an appropriate option in their case would, we suggest, encourage rather than compel the effective use of mediation.

3. If so, how should this be done and at what point or points in the progress of a dispute?

As indicated in 2, above, the ideal way to proceed is for any party considering raising proceedings to be required to attend an individual Intake session prior to any proceedings being raised. The other party should also be encouraged to attend an individual session. Attendants at Intake should be advised of the benefits of mediation etc and encouraged to consider it seriously before embarking on any subsequent action. This however should not mean that parties who do proceed with an action should be denied access to mediation as their case progresses. The rules should allow for parties to be reminded as they proceed of the ability to access mediation at any stage should they feel that it may be more suitable to resolve their differences. For some people it does take the actual experience of taking part in the process to realise that there are better options for them. It would also be helpful if the rules allowed for parties or agents to simply notify the court of a decision to refer to mediation and automatically suspend procedure meantime rather than having to wait for the next Child Welfare Hearing or having to enrol a motion to have same fixed to advise the court of what has been agreed.

4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

In the context of family mediation: there are circumstances where it may not be appropriate for a party to state, or for the other party to be aware of, the reasons for refusal to consent to a referral to mediation e.g. fear of safety due to domestic violence in family cases or if one or other party was a Schedule 1 offender. Further it may place such a person who does not feel safe in a more difficult position to refuse to refer. In such circumstances the trained mediator or service worker who initially meets such a party could indicate that a mediation service would not be appropriate.

5. What form should mediation or other methods of dispute resolution take and how should this be funded?

FMS would recommend that family mediation be provided out with the courts systems, and that formal mediation is clearly seen as separate from the court so that it is perceived as independent and impartial. It is also important that mediators referred to by the court are 'quality assured' e.g. in the case of family mediators, by Family Mediation Scotland.

Clients would then be encouraged to view the mediation as impartial and independent of the system. Family mediators receive specialist training, undergo regular continuing development training and have ongoing supervision and support. Recognition of these special areas of expertise should be included in any mediation provision to parties. Scottish Government funding for family mediation services should have a coherent and inclusive approach to making the service available in all areas in Scotland, and to as diverse a client group as is appropriate. At present the FM services provide a quality service on a very small budget but if the suggested way forward was adopted the number of cases referred to mediation would greatly increase for Intake sessions alone and a resulting increase in mediation cases so future funding would require to take into account that increase and be set at a more realistic level.

6. In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

In case where referrals are to be made either by agents or by the court then it would be helpful if a letter of referral containing all relevant information could be e-mailed either by the agent or by the Sheriff Clerk. This would allow the service to act quickly in keeping the momentum going rather than waiting for a week or more whilst a letter is drafted and sent out in the post or for even longer where no letter is sent and parties are expected to approach the service themselves. Similarly any interlocutors or other documents relevant to the referral, e.g. reports could be sent this way.

7. To what extent should the court control the conduct and pace of litigation

In terms of family actions there must be a degree of control over the conduct and pace of such cases. There is a tendency at present to let family matters "drift" somewhat and not seek an expeditious resolution and that is not in anyone's interests. On the other hand there are occasions where a period of no action may be necessary, e.g. a contact arrangement being tested and monitored over a period. These cases do need to be controlled to ensure that once the requisite period is over the matter is returned quickly and the further procedure necessary identified and begun. In other cases there are ways in which parties themselves can be seen to be obstructive. Examples of this can be a request for a Continued Options Hearing to allow further adjustment of the pleadings and no such adjustment takes place. Similarly, after the Options Hearing (or Continued Options Hearing) and before any Proof or other diet fixed, a motion to amend is made, granted and the diet discharged and the subsequent amendment is trivial. Controlling both the conduct and the pace of the case would help eliminate these problems and may allow the court to identify cases more quickly which may be suitable for mediation.

8. What types of case would benefit from (a) judicial case management and what types of cases would benefit from (b) case-flow management?

Family cases as indicated in 7, above, should probably have an equal amount of judicial management and case-flow management.

In Addition:

FMS would like to emphasise the findings of the National Audit Office in March 2007:

“.. that family breakdown cases which are resolved through professional mediation are cheaper and quicker to settle, and also deliver better outcomes.

The NAO said that there is scope to improve the value for money of the legal aid budget through increasing the take-up of mediation in cases of family breakdown.

In the sample of cases it reviewed, the NAO found that over 95 per cent of cases settled through mediation were resolved within nine months and all within 12 months. However, only 70 per cent of cases completed by non-mediation routes were settled within 18 months.

Despite these benefits, take-up of mediation in cases funded by legal aid is low and although solicitors and legal advisers have a duty to advise their clients of the option of mediation, a survey of clients indicates this isn't always happening.

The watchdog concluded that there may be a financial disincentive to solicitors of advising people about mediation because if a case is settled out of court, this will result in a loss of potential fees for them”.