# Are criticisms of family dispute resolution mediation valid?

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## The criticisms

A respected family law commentator appears negative about family dispute resolution (FDR) mediation. His concerns about FDR mediation include:

- It does not give rise to just settlements.
- Mediators, far from being impartial or neutral, are directive and interventionist, and shape outcomes by such devices as framing issues and shepherding discussion in the direction that they desire.
- Making mediation mandatory would give more power to mediators.
- Mediation outcomes promote the interests of parents, rather than their children.
- Mediation fails to address power imbalances.
- Mediation occurs despite being counter-indicated due to violence.
- Agreements reached at mediation are not durable.
- Mediators do not undertake their work according to a normative framework.
- There is no independent scrutiny of mediators.

## A short response

Having mediated some 650 disputes of all descriptions, I consider that all the above are important points about which mediators should be aware. But the criticisms are not valid. The concerns expressed, can be satisfactorily addressed. Finally, while acknowledging that mediation is less than perfect, it is important to remind ourselves that court processes are likewise less than perfect. The value and benefit of mediation should not be assessed in isolation from an assessment of litigation.

## Why mediation?

I admire the court process as much as I do mediation. It is important that we have a strong and effective Family Court. But for parties, litigation is frequently expensive, time consuming, divisive, traumatic and bewildering, resulting in delayed, unpredictable and unwanted outcomes. Sadly, the court process can at times be distressing or damaging to children, and achieve little or nothing for them, despite best efforts. By contrast, mediation is relatively timely, brief, informal and inexpensive. It encourages the restoration of communication, cooperation and trust between the parties, and the establishment of goodwill. It allows flexible and creative outcomes. It places decision making responsibility in the hands of the parties who know their children best. It encourages parents to constructively share information and ideas about their children. No outcome is imposed on them. Little wonder therefore that policy makers worldwide support mediation for the resolution of parenting disputes. In general terms, it is an excellent process for such disputes, and should be made *more* and *better* use of. It is therefore concerning how little use the Family Court has made of its power under section 46F of the Care of Children Act 2004 (COCA) to direct parties to attend FDR.

## A fuller response

Space does not permit a detailed response to each of the points the commentator makes, but at the risk of over simplification, I provide the following responses to each of the concerns listed above.

## Justice

Justice is an elusive concept, embracing such notions as procedural justice and substantive justice. Whatever it means, justice is not always achieved in mediation, but neither is it always achieved in court. The law is not always fair and just. Furthermore, the concept of justice extends beyond the law. Arguably, mediation has the potential to deliver justice where the law cannot, by having regard to considerations which courts are not able to take into account.

## Neutrality and impartiality

Mediators are not automatons. No less than judges they lend their humanity to the process in which they are engaged. Mediators inject realism, practicality and commonsense, expose deceit and deviousness, keep focus on the children, provide encouragement, and counter procrastination and indecision. Those who do not understand the mediation process can mistakenly characterise the devices by which mediators undertake these things as representing an absence of neutrality or impartiality. Mediator activism should be applauded.

## Power

I am surprised and saddened at the suggestion that mediators should not be allowed to become too powerful. Mediators do not think of themselves as powerful. They do not possess decision making authority over the parties. Is the real concern that mediation might limit the work of the court?

## Interests of children

Of course parents do not always put their children's interests before their own. Mediators try to address that, just as judges try to address that. I suggest that as a whole, courts no more achieve sublime outcomes for children than do mediators. It is true that courts can impose outcomes on parents whereas mediators cannot. But in some cases court outcomes are short-lived because they are imposed, whereas mediated outcomes are longer lived because they are not imposed.

## Power imbalances

This is a complex and difficult topic. I try my best to discuss it at *http://www.nigeldunlop.co.nz/services/mediation/domestic-violence-and-power-imbalances-in-mediation/*. Suffice to say that power imbalances are inevitable and endemic, and exist in both mediation and litigation.

## Violence

This fraught topic is also addressed at the link referred to above. I will comment no further other than to mention there is a mistaken tendency to conflate the reference to domestic violence in section 46E(4)(f)(ii) of COCA with the same reference in section 12(1)(b) Family Disputes Resolution Act 2013 (FDR Act). *Continued on next page...*

# Times Past: family law in the 1890s

Have you ever wondered how law dealt with domestic issues in early colonial New Zealand? Divorce was seen as shameful and scandalous. The first legislation to regulate divorce was the Divorce and Matrimonial Causes Act 1967. A man could divorce his wife if she committed adultery, but a woman could only divorce her husband if he committed adultery plus another act such as rape, incest or extreme cruelty. Separation and desertion were more common. In the 19th century separation was far more easily achieved than divorce. The number of married couples living apart was not recorded. Some couples simply stopped living together, while others, particularly those with more to lose, had complex legal arrangements. The right of parents to physically discipline their children to correct behaviour was first formalised in law by the Criminal Code Act 1893.

In the New Zealand Police Gazette for 1893 there are a number of entries of a domestic nature. Most of them relate to the abandonment of wives and children.

Further research shows that the orders for maintenance would have been made under the Destitute Person's Ac t 1877. The Act provided for the support of destitute persons, illegitimate children and deserted wives and children. It set out a clear process for making claims and the power is given to the resident Magistrate to determine eligibility and quantum. In addition it gave the resident Magistrate the power to determine custody of children, issue warrants for arrest and order sale of properties to recover maintenance.

Maintenance was limited to paying for "feeding, clothing, teaching and training".

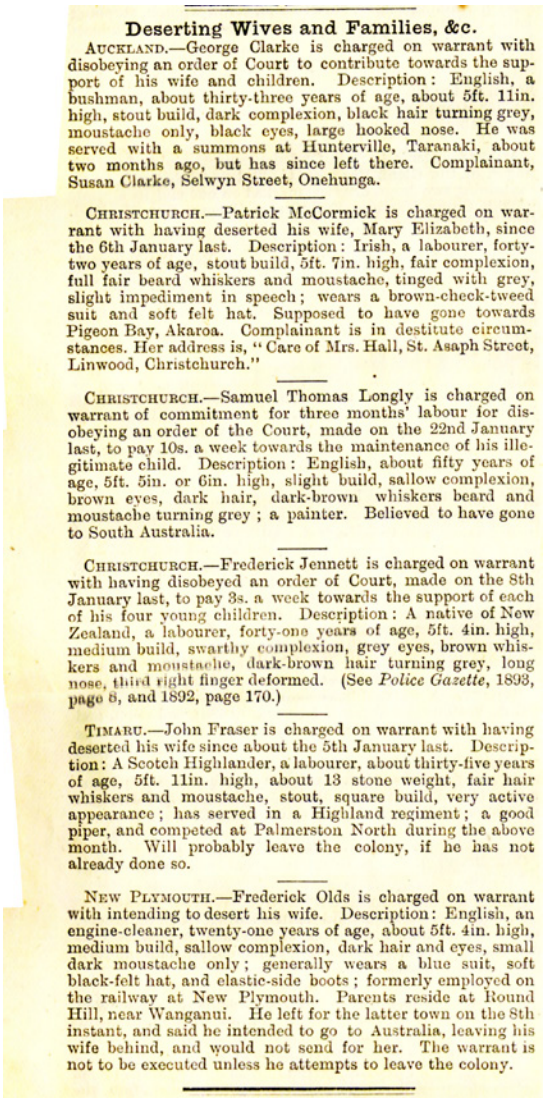
The pool of people against whom orders could be made included parents, step parents, grandparents, children and male siblings.

The maximum amount payable was 20 shillings per week. It is not easy to see exactly what criteria the resident Magistrate's used to reach a decision.

The Act provided for enforcement in a number of ways but they included that a defaulting parent would be arrested and brought before the resident Magistrate.

The entries in the New Zealand Police Gazette show the amount of child support that men were expected to pay at that time. The amount of support varies considerably. Sam Longley was required to pay 10 shillings a week for a child whereas Fred Jennett paid 12 shillings for his three children.

The Reserve Bank of New Zealand web based 'Inflation Calculator' is useful to convert an earlier price into a current one, giving a sense of the significance of a historical value. The calculator does not tell you the price of a particular produce in today's terms. The calculator tells us that 12 shillings in 1892 would purchase a basket of goods and services which would have cost $115.28 in 2015.



**Deserting Wives and Families, &c.**

AUCKLAND.—George Clarke is charged on warrant with disobeying an order of Court to contribute towards the support of his wife and children. Description: English, a bushman, about thirty-three years of age, about 5ft. 11in. high, stout build, dark complexion, black hair turning grey, moustache only, black eyes, large hooked nose. He was served with a summons at Hunterville, Taranaki, about two months ago, but has since left there. Complainant, Susan Clarke, Selwyn Street, Onehunga.

CHRISTCHURCH.—Patrick McCormick is charged on warrant with having deserted his wife, Mary Elizabeth, since the 6th January last. Description: Irish, a labourer, forty-two years of age, stout build, 5ft. 7in. high, fair complexion, full fair beard whiskers and moustache, tinged with grey, slight impediment in speech; wears a brown-check-tweed suit and soft felt hat. Supposed to have gone towards Pigeon Bay, Akaroa. Complainant is in destitute circumstances. Her address is, "Care of Mrs. Hall, St. Asaph Street, Linwood, Christchurch."

CHRISTCHURCH.—Samuel Thomas Longly is charged on warrant of commitment for three months' labour for disobeying an order of the Court, made on the 22nd January last, to pay 10s. a week towards the maintenance of his illegitimate child. Description: English, about fifty years of age, 5ft. 5in. or 6in. high, slight build, sallow complexion, brown eyes, dark hair, dark-brown whiskers beard and moustache turning grey; a painter. Believed to have gone to South Australia.

CHRISTCHURCH.—Frederick Jennett is charged on warrant with having disobeyed an order of Court, made on the 8th January last, to pay 3s. a week towards the support of each of his four young children. Description: A native of New Zealand, a labourer, forty-one years of age, 5ft. 4in. high, medium build, swarthy complexion, grey eyes, brown whiskers and moustache, dark-brown hair turning grey, long nose, third right finger deformed. (See *Police Gazette*, 1893, page 8, and 1892, page 170.)

TIMARU.—John Fraser is charged on warrant with having deserted his wife since about the 5th January last. Description: A Scotch Highlander, a labourer, about thirty-five years of age, 5ft. 11in. high, about 13 stone weight, fair hair whiskers and moustache, stout, square build, very active appearance; has served in a Highland regiment; a good piper, and competed at Palmerston North during the above month. Will probably leave the colony, if he has not already done so.

NEW PLYMOUTH.—Frederick Olds is charged on warrant with intending to desert his wife. Description: English, an engine-cleaner, twenty-one years of age, about 5ft. 4in. high, medium build, sallow complexion, dark hair and eyes, small dark moustache only; generally wears a blue suit, soft black-felt hat, and elastic-side boots; formerly employed on the railway at New Plymouth. Parents reside at Round Hill, near Wanganui. He left for the latter town on the 8th instant, and said he intended to go to Australia, leaving his wife behind, and would not send for her. The warrant is not to be executed unless he attempts to leave the colony.

NZ Police Gazette – 1893

The question to be asked is should "family" rather than the government be responsible for "destitute" citizens?

## ARE CRITICISMS OF FAMILY DISPUTE RESOLUTION MEDIATION VALID?, *Continued ...*

The former confers rights on parties. The latter confers discretion on mediators. Past violence does not necessarily render mediation inappropriate.

### Durability of agreements

I question whether mediated outcomes are any less durable than court imposed outcomes. We all know that parties often quickly depart from the terms of court orders with alacrity. Even if a mediated agreement does not endure, the parties may nonetheless continue to benefit from the mediation. This is an important topic that needs to be the subject of careful, comparative, New Zealand-based research.

### Normative framework

There is in fact a wide consensus of best practice and acceptable practice in the mediation of parenting disputes, underpinned by the FDR Act, the expectations of the Ministry of Justice, suppliers and approved dispute resolution organisations, and reinforced by peer discussion.

### Independent scrutiny

Just as the arcane arts which lawyers practice in private can be exposed to the light of day through professional disciplinary processes, so too is that the case with mediators.