

Family Dispute Resolution – it’s not happening (much)

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The aim

FDR represented an ideological shift. Those involved in parenting and guardianship disputes should no longer expect the state (in the guise of the Family Court) to resolve their disputes. Such disputes should be resolved privately.

The reality

Is FDR the default position for resolving parenting and guardianship disputes as intended? To find out, I made an Official Information Act (OIA) request of the Ministry of Justice. I wanted to know how the number of parenting and guardianship applications made to the Family Court compared with the number of FDR cases. I also wanted to know how often judges have exercised the power they have under section 46F of the Care of Children Act 2004 to direct cases to FDR.

Here are the bald results of my OIA request. For the two-year period from 1 January 2015 to 31 December 2016:

- 16,957 guardianship and parenting applications were made to the Family Court
- 220 section 46F directions were made
- 3,122 FDR mediations were completed
- 2,869 exemptions to FDR were made by FDR providers.¹

These figures show that:

- Few cases are the subject of FDR relative to the number of court applications
- Few directions to FDR are made by judges relative to the number of court applications
- Almost 50% of applications for FDR do not result in completed mediations

In short, the widespread use of FDR to resolve parenting and guardianship disputes is not occurring. In the 2015 calendar year there were 1,504 completed FDR mediations, and in the 2016 year 1,618. This year may be not much different.

Why the under-utilisation of FDR?

There are, in my view, multiple reasons why there is less use of FDR than was expected when it was introduced on 31 March 2014. Reasons include the following:

- FDR, unlike its predecessor, the early

intervention programme (EIP), lacks the imprimatur of the court, and hence respondent parties, who are often content with the status quo, consider themselves at liberty not to engage in it – although EIP mediation was not compulsory, parties perceived it that way.

- Given that legal aid is not available for lawyers to represent parties in FDR, and that FDR usually takes place when no lawyer for child has been appointed, there is little involvement of lawyers in it. FDR is therefore not a part of the everyday working lives of family lawyers. Thus FDR is a somewhat remote and opaque process to many lawyers, which understandably means that it is not always given due encouragement in client advice.
- Domestic violence is commonly viewed as a counter-indicator to mediation. Given the prevalence of domestic violence, this results in FDR often being ruled out on account of it.
- Judges are not directing parties to FDR as often as is warranted. It is difficult not to reach this conclusion, when over the past two calendar years, during which judges have been dealing with a large volume of cases, only 220 directions have been made. This may in part be due to FDR being even more remote from and opaque to judges, than it is to lawyers. The failure of judges to direct more cases to FDR undermines the FDR system. If parties who have made it to court without FDR were to



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know that there was a high chance that the court will direct them to FDR, then they will be more inclined to undertake FDR in the first place, and FDR will be seen to have the endorsement of the court.

Solutions

There will be many solutions to the poor uptake in FDR. Fundamentally, however, prospective parties, lawyers and judges need to continuously have regard to the benefits which FDR offers. These benefits include the opportunity for constructive face to face discussion; the re-establishment of communication, trust and goodwill; flexible and finely tuned outcomes; reduced expense; reduced delay; reduced stress; and better long-term cooperation with regard to the upbringing of the children.

¹ In such cases FDR providers have decided under section 12 of the Family Dispute Resolution Act 2013 that FDR was inappropriate, for a range of reasons, including non-participation by one party.

