THIS WEEK'S ARTICLES

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CASE NOTE, FAMILY LAW

The Court of Appeal pronounces on family dispute resolution

By Nigel Dunlop, Barrister and Mediator, Nelson

McKay v The Commissioner of Inland Revenue [2018] NZCA 138

The decision

In *McKay*, the Court of Appeal considered the privilege and confidentiality of a settlement agreement reached under the Family *Dispute Resolution Act 2013* (FDRA).

The appellant (M) had acknowledged the paternity of a child B in an agreement reached at mediation held under the FDRA. Based on the agreement, the Commissioner of Inland Revenue (CIR) found M to be the father of B and assessed him for child support.

M unsuccessfully argued first in the High Court, and then in the Court of Appeal, that the CIR was not permitted to have regard to the settlement agreement because it was privileged and confidential. Both Courts held that the agreement was neither privileged nor confidential.

Fundamental to the reasoning of both Courts is that the outcome of FDRA mediation must be distinguished from the process by which it is reached. The Courts characterised FDRA mediation as a form of "without prejudice" negotiation.

The Court of Appeal did not consider it necessary, however, to resort to common law privilege or to section 57(3) of the *Evidence Act 2006* to determine the case. It held that the statutory FDRA scheme was sufficient, and outlined its key features.

One such feature is section 14 of the FDRA, which in part reads:

> *(1) This section applies to a statement that a party to a family dispute makes to an FDR provider for the purpose of enabling the FDR provider to deal with the dispute.*
>
> *(2) No evidence of the statement is admissible in any court or before any person acting judicially, unless the statement is recorded in a family dispute resolution form.*

The Court of Appeal said that section 14 is specific legislative recognition of the desirability of facilitating negotiated outcomes, and that section 14(1) FDRA must be construed in light of the procedure referred to in the sections preceding it. At paragraph 34, the Court states:

"Bearing in mind the different potential outcomes of a family dispute resolution process contemplated by s 12, the recording of the resolution of all matters in dispute in a written agreement is a step taken after the FDR provider

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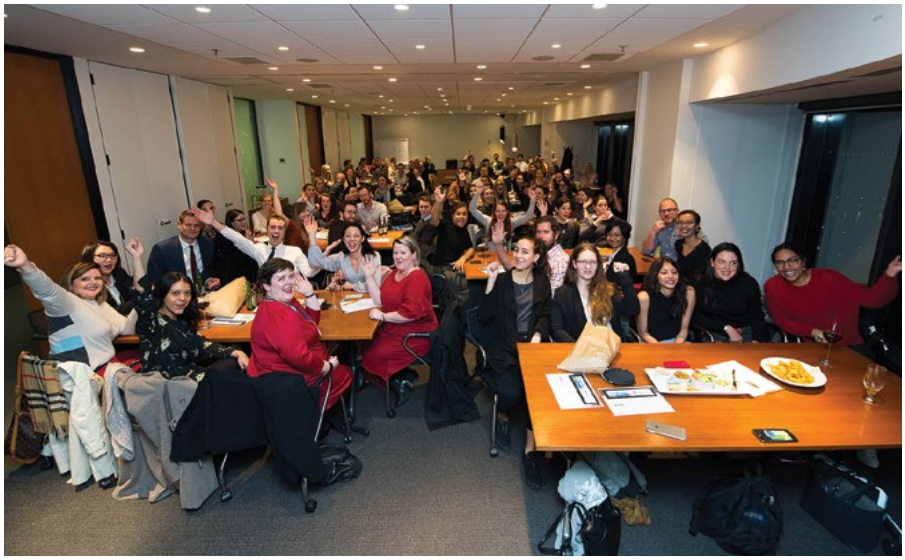

The Auckland Women's Lawyers' Association recently held its annual quiz night in Auckland. All lawyers were invited to participate, and the evening was a packed-out success, with the dress-up round producing particularly creative results. Thanks go to quizmaster Julia Whitehead from Wotton + Kearney and to Chapman Tripp for its generous sponsorship, which allowed for all ticket proceeds from the evening to go to Dress for Success.

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has dealt with the dispute. Unless the parties to the dispute are then able to use the written mediated agreement unilaterally, the FDR procedure and the result of it have little or no purpose." [footnote omitted]

Here, the Court of Appeal had in mind (inter alia) section 12(7), which provides that one of the mediation outcomes is that the FDR provider and the parties agree that resolution has been reached on all matters in dispute; and section 12(8), which requires the FDR provider to give each of the parties a form that states (a) all of the matters on which resolution has been reached and (b) the agreement reached in respect of those matters. The Court of Appeal noted that a section 12 form recording agreement having been reached on all matters allows for details of the agreement reached to be attached to the form.

In summary, the Court of Appeal found that section 14 of the FDRA indicates that the FDR mediation process is privileged, while section 12 indicates that the resulting agreed outcomes are not privileged.

The Court of Appeal found section 40 of the *Care of Children Act 2004* (COCA) to be a further indication that mediated outcomes are not privileged. In essence, section 40 is to the effect that parenting and guardianship agreements cannot be enforced under COCA, but some or all the terms of those agreements may be embodied in court orders.

The Court of Appeal said that parties would not be able to utilise this provision if their agreements were privileged. In making this point, the Court of Appeal noted that the use of mediated agreements is not confined to the making of consent orders. A party may unilaterally apply under section 40.

The Court of Appeal also considered whether, even if the mediated outcome agreement it was considering was privileged, it was nonetheless confidential. It found that the agreement to mediate signed by M at the commencement of mediation did not contain any agreement to that effect, and there is nothing in the statutory scheme to justify inferring it. It said that to the contrary, the fact that, in some circumstances, section 12 forms can be shared with the Family Court under section 13 of the FDRA provides a clear indication that the mediated agreement was not confidential to the parties.

Nigel Dunlop

> *McKay* is a welcome reminder that agreements to mediate should clearly address and distinguish the separate issues of privilege (the admissibility of evidence) and confidentiality (privacy in relation to the world at large).

Commentary

McKay is a welcome reminder that agreements to mediate should clearly address and distinguish the separate issues of privilege (the admissibility of evidence) and confidentiality (privacy in relation to the world at large). These agreements should make it clear that privilege and confidentiality apply to the process, but not necessarily the outcome.

Importantly, settlement agreements themselves should specify whether or not privilege and confidentiality attach to them. To the extent that the Court of Appeal might be taken to have suggested that absence of confidentiality should be the default position, I have some concern. Surely, in general terms, the outcome of family mediation should be kept private.

Another concern that I have is the dictum referred to above that "the recording of the resolution of all matters in dispute in a written agreement is a step taken after the FDR provider has dealt with the dispute".

It does not sit easily with the usual practice for settlement agreements to be drafted as part and parcel of the "without prejudice" discussion. Not until the parties sign the settlement agreement is it known whether there is in fact agreement, and it is only then that the "without prejudice" protection is lost.

Finally, it seems to me that interim settlement agreements reached part way through an ongoing FDR mediation process can be accorded privilege. This appears not to be precluded by *McKay* given that the parties intend to continue the process, and hence no section 12 form is issued at that stage.

That also appears consistent with section 57(3) of the *Evidence Act 2006*, which provides that privilege does not apply to "the terms of an agreement settling the dispute". An interim agreement of this nature does not settle a dispute.

This decision can be viewed at http://www.nzlii.org/nz/cases/NZCA/2018/138.html.

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