Advanced Practice Issues for Family Dispute Resolution Practitioners

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This article aims to assist Family Dispute Resolution Practitioners primarily in private practice. Our observation is that training rarely involves case management outside of the mediation room, and our experience with peer supervision is that the same issues arise time and time again. We would like to support practitioners with our thoughts on, and experience of, these issues. These include the issuing of s 60I certificates, the day-to-day practice management of parties and questions about suitable processes.

The main reason we have chosen to write this article is that there are many grey areas in Family Dispute Resolution (FDR) practice and although we have some direction from Attorney-General's Department and the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (the Regulations) we still find ourselves grappling with these issues on a day-to-day basis. In practice many Family Dispute Resolution Practitioners (FDRPs) have developed their own approaches to deal with these practice issues. In our regular practice-group meetings with a group of FDRPs, we often raise these grey areas to seek clarification and guidance. We have at times agreed and at others, hotly debated, the best way forward. More often than not, there usually is not one clear path or one right answer.

We recognise that there is a need for flexibility, but there are many occasions when it would be helpful to develop consistent practices across the field for the benefit of both practitioners and clients.

In researching for this article, so that we could provide more than practice-based feedback, we came upon the most recent fact sheet to support FDR practitioners, issued by the Attorney-General's Department. This fact sheet provides clarity on a few of the grey areas that have come up in our practice-group meetings.[1]

In this article, we will be using real-life case studies to highlight a number of issues we have grappled with over the years in practice. We do so in the spirit of learning and sharing. These are not isolated issues and by writing about them, we feel we could benefit others. Essentially, this is an evolving practice.

Amending Section 60I Certificates

There are five categories of certificates but problems come in all shapes and sizes! In particular we would like to look at Amending Certificates. The fact sheet considers many questions, including questions about the issuing of the s 60I certificate. Below, we explore one of them.

> Can an FDR practitioner amend a certificate to provide more information?

The fact sheet provides the following answer:

> FDR practitioners cannot amend the wording of a certificate and there is no ability to record comments on the certificate. FDR practitioners are not required to provide the Court with any additional information (including reasons) about why they have issued a particular certificate.

For many years, a common practice was to add a notation to the bottom of the s 60I certificate when one party could not attend due to financial constraints. The party was concerned that if they refused based on inability to pay private mediation fees, and were issued with the non-attendance certificate, they would end up with a costs order against them. That was one way of fulfilling our obligations and putting their

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[1] Australian Government Attorney-General's Department Section 60I certificates for Family Dispute Resolution (Web Page, October 2018) <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Documents/Fact-sheet-on-s60I-certificates.PDF>.

mind at ease. This direction gives us a clear indication of what is looked at. It also says that absolutely no variables are considered and from the court's perspective this is very much a "tick-the-box" exercise. So, while we are taking the issuing of the s 60I certificate quite seriously, tearing our hair out over having to inform a party they may be issued with a costs order if they refuse to attend, this is just another form for the court, and arguably for the solicitors as well. This makes our role quite vexed as we are the meat in the sandwich. We'll address how to deal with solicitors and parties wishing to be issued with the s 60I certificate a little later.

Another issue we would like to discuss is the options available to FDRPs when Party B is not contactable.

The fact sheet says:

> When an FDR practitioner cannot contact a person involved in the dispute, which certificate can be issued?

The answer provided is:

> There is no section 60I certificate to cover this situation. If there are no contact details for a person and the others involved in the dispute have no idea of how to find them, they can make an application to the court relying on the exception that one or more of the people to the proceeding is unable to participate effectively.

Previously, the assumption was that a non-attendance certificate would have been issued here. The exceptions that did not require a certificate as we understood it were urgency, domestic violence and if Family Court orders had been made in the previous 12 months. This direction is therefore relatively new. Essentially it says you are to refuse a party a certificate if you cannot track down the other party.

In one instance that we can report, the mother explained that the father was a schizophrenic living on the streets. This story was confirmed through an independent service and hence an inappropriate to mediate certificate was issued. It seems that Mum would have been able to make an application using the exception that one or more of the people is unable to participate effectively.

In other instances, we are put under undue pressure by lawyers to issue a s 60I certificate because the lawyer for Party A believes we will not successfully reach Party B despite being able to provide their contact details. We are obligated nonetheless to comply with our professional obligations to reach both parties in order to make a proper assessment about suitability. Often, in the past we have in fact reached Party B, and have assessed the matter as unsuitable instead of issuing a refusal-to-attend certificate. If the pressure from Party A's lawyers comes from a place of urgency, requiring the matter to go to court quickly, we as FDRPs can push back to say they do not require a certificate as this situation falls under the exemption rule. With this direction, we now have a clear guideline to refer solicitors to if they do not accept it.

Another question from the fact sheet is:

> Does an FDR practitioner need to speak with all people involved with the proposed FDR before making a decision that the matter is not appropriate?

The answer provided is:

> No. This is a matter for the professional judgment of an FDR practitioner.

The different directions highlight the complexity of this evolving practice and the need for more direction to streamline the industry.

In our view, as a matter of good practice, it is incumbent upon us to make all efforts to contact both parties.

We would suggest FDRPs need to think carefully about why we are issuing a certificate based on one person's story, remembering we have all had cases where it has been hard to reconcile the significant differences in the way each party has experienced or expressed what has happened in the relationship. Also, when we issue not appropriate certificate without talking to the other party, we miss the opportunity to explain that it is only a point-in-time assessment. This may deter the other party from seeking mediation in the future at a time when it is appropriate. We also miss the opportunity to inform people about the process and their broad options, this information may not be as readily accessed or well imparted if they enter the system once the other party has filed.

From our point of view, the purpose of the intake is not only to assess suitability but to also educate and inform the parties of the process and various options available to them. If we take that direction at face value, the direction that it is not imperative to meet with both parties, then we lose that valuable opportunity.

Following on from this we would like to turn to a favourite issue for all FDRPs the issue of genuine effort. In particular, we want to look at the following question as outlined in the Attorney-General's Fact Sheet:

> What are the possible consequences for the people involved in the dispute if a "non-genuine effort" certificate is issued by an FDR practitioner?

The answer provided is:

> If a certificate is issued including a "non-genuine effort" certificate, the court may order people to attend FDR before hearing the application.
>
> The court may also take into account that a "non-genuine effort" certificate has been issued when deciding if a costs order should be made against a person.

What this means is that we are no longer simply required to mention costs, but also, that if a genuine effort is not made, it may be flicked back to FDR by the Judge anyway. Until recently we were not aware of this protocol.

To that, we ask: *What behaviour constitutes a "non-genuine effort" certificate?*

The answer in the guidelines is consistently to refer to the FDRP's discretion, which makes us the meat in the sandwich. We recognise the guidelines cannot be prescriptive and there must be room for discretion. But would we benefit from some documented precedents? We think we would. We would feel more protected and reassured when making these decisions.

One argument is, how can you say someone has not made a genuine effort if you have not given them guidelines on what a genuine effort is? In the literature people have tried to define a genuine effort, but we have yet to see a definition that we would be comfortable explaining to a party beforehand. From our perspective we should not issue such a certificate lightly and we do advise to exercise caution when doing so. Having said that, we have had some very rare instances when a non-genuine effort certificate has been issued.

The assessment process is a very subjective one and relies heavily on our own professional judgment. The line between what could be considered genuine and not genuine is not clear at all.

There are many other grey areas that are not directly addressed by any guidelines we have found, and which we feel may be beneficial to look at. We are not saying we have all the answers, but we have the questions.

When do you issue the failure to attend certificate considering a difficult party's deliberate attempts to avoid you?

The research says that the more experienced a practitioner, the more likely they are to issue a not appropriate certificate. Experienced being defined as having three or more years of hand on experience.

Some delay tactics we have heard are:

> "You're harassing me" ie leave me alone;
>
> "I don't need to talk to a mediator because I have a lawyer";
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> "I've already started the process elsewhere";
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> "I've got my own mediator";
>
> "I need to talk to my lawyer first".

There are a lot of issues about timing – usually one party not wanting to come because delaying is in their best interests, and we all know this is usually Party B.

Sometimes the underlying reason for wanting to delay also makes the mediation process inappropriate, but the problem is, until we are able to have a meaningful conversation, we do not always know this.

We have had a Party B saying yes, he very much wanted to mediate but just was not making an appointment. He said, "I'll get back to you when I get back from an upcoming work trip", "I just want to have another chance to talk to Mum before we mediate" and then finally, "We can work this out on our own, just give us a bit of time." This is at the same time as Mum saying that there is no way they could work it out and that she was wanting to mediate as soon as possible as he was allowing her very little time with their children.

We explained to Dad that he needed to make a decision about whether, as well as wanting mediation, he was willing to attend. We explained that as far as possible we accommodate people's timetables but that he had already been given more time than was the organisational policy so unless he had very good reasons, he needed to make an appointment in the next week or we would be obliged to complete a non-attendance certificate.

He did make an appointment and what followed was a story of a person who was used to being in control, by his own story did not mind using intimidation and showed repeatedly he had a very strong sense that it would be best for everyone, especially the children, if he bent the children's mother, who he still referred to as his wife, to his will. He gave a number of examples of when and how he had achieved this in the past as examples of what a good father he was.

We issued a not appropriate certificate after they both refused the offer of a legally assisted mediation. With the benefit of hindsight, we need not have been so accommodating and should have just issued a non-attendance certificate earlier on.

The point of the above story is that delay is a flag that all is possibly not well in the situation for mediation. Timing is vital: both parties have to want to mediate. Delay is just another part of intake discussion around timing.

Do We All, as FDRPs in Private Practice, Streamline the Way We Navigate Parties in the Process of Their Separation?

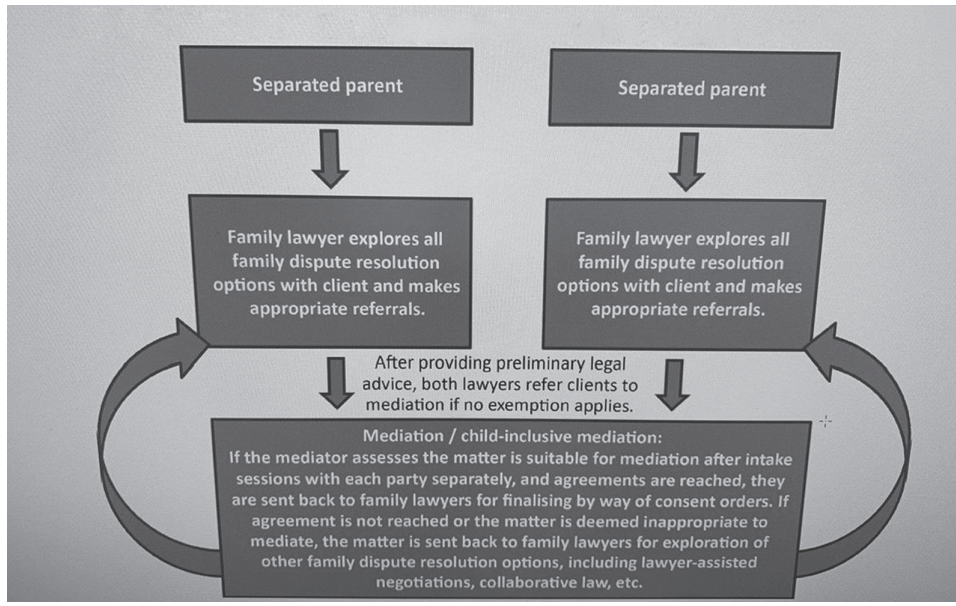
There are many people out there who are confused about where to go immediately following their separation. Increasingly we are experiencing people phoning us as a first port of call. This is a change from when we first trained when, in our experience, people generally called us after consulting with their solicitors.

A paper published in 2012 in the Family Law Review[2] reported anecdotally what was evident to us in private practice at that time. That was that parents were more often seeking legal advice first and then being referred to mediators if no exemption applied. Now, in 2019, we are noticing that more and more people are seeking our services immediately following their separation, as a first port of call, and we think it would be beneficial to see a consistent approach in navigating these parties through the system.

The 2012 model looked somewhat like this:

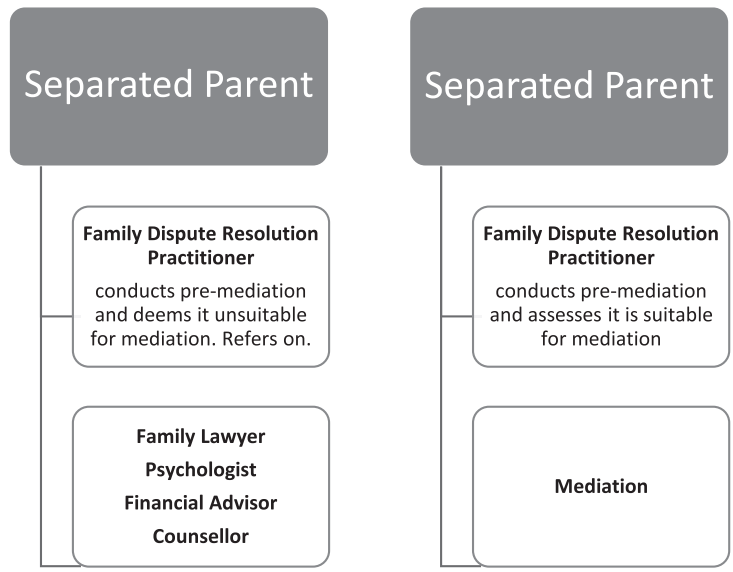
[2] D Jaku-Greenfield, "Family Dispute Resolution: The Importance of Clear Protocols for Cooperation between Family Relationship Service Providers and Family Lawyers" (2012) 2(4) Fam L Rev 225.

FIGURE 1. Ideal framework for multidisciplinary Family Dispute Resolution 2012



The 2019 model looks like this:

FIGURE 2. FDR Pathway, 13 years down the track – Mediators' Perception



This new approach, with people coming to us first, is a positive step. It means there is an increased awareness and maybe a change in attitude towards mediation. It means we, as a profession, are becoming more recognised and respected.

Because of this, FDRPs have a duty of care to make referrals to other appropriate services, such as lawyers, psychologists, financial advisors, and social support services. There has been a significant shift in how separated parents are accessing dispute resolution processes.

Accessing services is increasingly complex and no longer a linear process but rather one in which the separated parent has a multitude of options available to them. While this is empowering for separated parents (they can choose their own adventure), it can also be confusing to know which path to take.

Now that there are so many more entry points and players, the big question is do we continue as an ad hoc group of individuals under the banner of FDR or do we move towards streamlining our practices so that parties can expect some form of standardised services wherever they go?

The profession is not going anywhere … it's here to stay, and the existing guidelines could be bolstered by continuing this conversation.

To recap by way of summary, these are things that we have learned over the years and that have helped define how we practice:

Do undertake the pre-mediation or intake, whenever possible.

Do not allow Party A to convince you that Party B would not engage.

Do make an effort to get both parties into the intake room.

Do not make such an extraordinary effort to get them into the joint mediation room.

Do trust your judgment with issuing s 60I certificates.

Do not hesitate to ask your colleagues what they might do in the same circumstances.

Do try to separate yourself from the process emotionally.

Do not torment yourself over the struggle of which type of certificate to issue.

Do consider the timing of a mediation.

Do not feel you are punishing a party by assessing that the timing of the mediation is not right.

Do equip yourself with a good referral network and have a multidisciplinary approach.

Do not operate in isolation.

Do take a collaborative approach with colleagues and consider co-mediating matters.

Do not be afraid to reach out.