New way of resolving relationship property disputes

By Robert Fisher

Earlier this year a decision of the Supreme Court concluded another drawn out battle over relationship property. The couple had lived through a series of procedural and interlocutory skirmishes in the Family Court, three substantive judgments in the Family Court, two judgments in the High Court, two judgments in the Court of Appeal and a judgment in the Supreme Court declining leave to proceed further. In the process, intimate family details, and the names of the actual family businesses, were published for all to see (*GFM v JAM* [2014] NZSC 32). Altogether this spectacle occupied ten years.

What the formal summary masks is the personal cost. Experience shows that the longer the delay, the harder it is to distinguish between pre- and post-separation property, the longer the unwilling stake in each other's affairs, the greater the legal cost, and the longer the need to live with uncertainty, friction and stress. The process in *GFM v JAM* must have taken a heavy toll on those involved.

Nor would the couple have been alone in their predicament. Lucky separating couples reach early agreement on property. The not-so-lucky need time and outside help. Although the best form of help is usually mediation, mediation alone may not suffice. Many who separate need the spectre of proceedings before they can bring themselves to provide adequate disclosure or take a realistic approach to settlement. In some cases nothing will work other than a division imposed from above.

That need for a backstop is why we have courts. But delays in family courts are notorious, world-wide, and inevitable. About a third of all New Zealand and Australian marriages end in divorce. The expectation for de facto relationships is no better. Even where the partnership lasts a lifetime, there will eventually be a deceased's estate against which competing claims are possible.

All this translates into a huge number of family law disputes. Family Courts the world over have too much to do. Where courts have too much to do, case management will be perfunctory, trial waiting lists long and judgments delayed. Is there an alternative?

Many western countries have turned to family law arbitration. Family law arbitration has its own statutory basis in Australia, Ontario, British Columbia, North Carolina, Colorado, Connecticut, Indiana, Michigan, New Mexico and New Hampshire. In England and Scotland, family arbitration centres have been set up to offer trained family arbitrators applying procedural rules designed specifically for family disputes.

For an innovative country, New Zealand has been strangely slow out of the blocks in this respect. So far New Zealand family law arbitration appears to have been confined to some ad hoc relationship property arbitrations (arbitrations held before individual arbitrators without any special institutional framework).

The relative scarcity of family law arbitration here is probably a tribute to our Family Court. New Zealand was among the first to introduce a court dedicated to family matters. Our Family Court has long been admired overseas for its specialisation and expertise. But it is time to ask whether it might usefully be supplemented by increased family law arbitration.

Whether we should offer family law arbitration across the board is a big subject. Jurisdictional issues differ according to the kind of dispute. The arbitration of some kinds of dispute would be possible only with empowering legislation. But a good place to start is relationship property.

Relationship property disputes particularly lend themselves to arbitration because the Property (Relationships) Act 1976 expressly provides for resolution of disputes by contract. So long as appropriate signing formalities are observed, and the couple do not try to adopt some radical relationship property regime that would be unacceptable in New Zealand, relationship property arbitrations are valid and enforceable.

Validity does not mean that relationship property arbitration will always be the best course. Under the law as it presently stands, court would be the better option in circumstances where a relationship property dispute would have to be combined with certain other types of claim in one hearing. Sometimes, for example, a relationship property dispute is best heard in conjunction with a family protection or testamentary promises claim or some other dispute involving third parties who are unable or unwilling to commit to arbitration.

Those cases aside, however, the arbitration of relationship property disputes has much to offer. The advantages relative to court proceedings include the following:

- *Speed.* Arbitrators control their own caseload. There can be no excuse for delay. Lawyers can check time estimates before appointing a particular arbitrator.
- *Flexibility.* A judicial system catering for multiple cases and judges requires standardised procedures. Each arbitration is a one-off. Subject to compliance with natural justice and the arbitration agreement, an arbitration can be run in the way that best suits the particular parties and the particular dispute. Some disputes can be resolved on the papers, some in a round-table discussion and some after a week's formal hearing. The venue can be someone's sitting room, a boardroom, or a large hearing room. The coat can be cut to fit the cloth.
- *Party autonomy.* In court a litigant must take the package offered by the state. In arbitration the parties choose the relationship property regime, the procedure and the judge. They are more likely to be satisfied with the outcome of a process that is their own creation.
- *Information-gathering powers.* The key to relationship property cases is to gather the relevant information. Once both sides have all necessary information they will usually settle. The courts can assist up to a point by requiring an affidavit of assets and liabilities, discovery, and compliance with related interlocutory orders. But the information-gathering

powers of an arbitrator are much wider. An arbitrator can call the parties and their accountants to a conference and swear everyone present as witnesses. The arbitrator can then lead a round table discussion designed to get to the bottom of the issues or to identify the sources needed to resolve them.

- *Confidentiality.* As a general principle Family Court judgments are publishable while arbitration awards are not. Names in court judgments will usually be anonymised on application and there are special prohibitions for children and domestic violence. But in a country of this size, such measures are likely to be ineffectual. Few are happy to have their personal and commercial history broadcast to the world.
- *Finality.* Once an arbitration award is issued, the opportunity to prolong matters by appeal or review is severely curtailed. That may be contrasted with the opportunity for multiple appeals following a Family Court judgment. The cruellest thing one can do for an unhappy couple is to provide them with endless opportunities to continue their dispute.
- *Choice of decision-maker.* The court tells the parties who the judge will be. In arbitration the parties choose the judge. Their choice can be informed by the needs of their particular dispute and the skills, personality, experience, and available time, of the candidates.
- *Continuity.* Because they live with a file from the beginning, arbitrators have more prospect of running the proceedings with an understanding of the ultimate issues, responding to interlocutory applications at short notice, and requiring cases to be prepared and presented in a way that will best suit their methods. In our larger courts, that level of judicial continuity is usually impracticable.
- *The opportunity for "med-arbs".* Provided that an arbitrator does not caucus with the parties, predetermine anything, or give the impression that he or she has predetermined anything, arbitration can be combined with mediation. The opportunity to combine distinct forms of dispute resolution in one process cannot be replicated in the Family Court.

As yet those potential advantages may not be widely understood in New Zealand. Overseas experience suggests that this will change over time.

There are signs that this has already started. There is some increase in the number ad hoc relationship property arbitrations, albeit still very few. As family lawyers become more familiar with arbitration, the second step is likely to be arbitration on a wider front in an institutional setting. Recent experience in England suggests that this might take the form of a joint venture between a dispute resolution organisation (perhaps the Arbitrators' and Mediators' Institute of New Zealand) and a family law organisation (perhaps the Family Law Section of the New Zealand Law Society). The third and final step might eventually be specific legislation supporting family law arbitration on a more ambitious scale. Such developments would bring relief to litigants and remove some of the pressure on our Family Court.

This article began with one relationship property case. It may be of interest to conclude with another. Both cases involved multi-million dollar businesses.

In the second there were five telephone conferences, inspections of specified documents, directions over chattels, exchange of written briefs, exhibits, submissions and chronologies, a two-day substantive hearing and a substantive decision. No appeal was possible. Nor could names or details ever be published. The whole process took six months from beginning to end. The latter case was an arbitration.

Robert Fisher QC, is a full-time arbitrator and mediator in Auckland. The legal basis for this article is provided in Robert Fisher Relationship Property Arbitration *(2014) 8* NZ Family Law Journal *Issue 2 (forthcoming).*

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