THE FUTURE FOR FIGHTING FAMILIES

New directions for the development of family law dispute resolution in New Zealand

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INTRODUCTION

New Zealand family law processes are in a state of flux. The 2014 Family Justice reforms introduced mediation as a mandatory step between initiation of a parenting dispute and access to the Family Court. It seems likely that the scope of the Family Dispute Resolution (**FDR**) process will be widened, although when and to what extent is presently unknown. Collaborative law and family law arbitration are still in their infancy in this country but there are signs they are growing.

Given the changes that are occurring it seems timely to step back and consider family law processes as a whole. This paper tries to identify the various processes by which family law disputes are presently resolved and to offer some speculations as to the way in which they might evolve in the future.

The subject is a big one. There are many different kinds of family law dispute (relationship property, care and contact, child support, ex-partner maintenance, etc) and many different institutions, agencies and professionals helping to resolve them (counsellors, mediators, FDR providers, Family Court, Commissioner of Inland Revenue, arbitrators etc).

This complexity makes it all the more important that we aim for an overview. It is not always easy for professionals involved in the family law system to understand the wider context in which they are operating. That is so for counselling, mediation, arbitration, expert determination and other processes. Professional dispute resolvers cannot safely offer their assistance without understanding the legal boundaries within which they must operate. Straying outside the permissible boundaries could do considerable harm to the parties to a dispute and to the alternative dispute resolution (**ADR**) world in general.

DISPUTE RESOLUTION AND FAMILY LAW

This audience will require no persuasion that a defended hearing in the Family Court is the least attractive way of resolving a family law dispute. Defended court proceedings are prolonged, expensive and stressful. It is no criticism of Family Court Judges that they do not have time to micro-manage their cases, offer early fixtures or produce instant judgments.

Alternative methods represent a huge saving in time, trouble and expense. They are normally confidential. The parties are more likely to be satisfied with a solution that they themselves have helped to craft. The case for ADR in most kinds of family dispute is unanswerable.

For the purpose of this paper, "ADR" will be used to refer to any form of non-court process used for resolving family law disputes. There are four principal kinds:

(a) *Direct negotiation*, with or without the help of collaborative lawyers. No neutral third party ("**neutral**") is involved.

(b) *Assisted negotiation,* where a neutral helps the parties come to an agreement. Examples are counselling, FDR mediation, non-FDR mediation and arbitral settlement conferences.

(c) *Legal determination,* where a neutral listens to each party and then gives a legally binding decision. Examples are arbitration and expert determination.

(d) *Extra-legal determinations,* where it is sufficient for the parties' purposes to obtain a determination that is not legally enforceable. Examples are Islamic family law determinations,[1] arbitrations before the *Beth Din* (Jewish religious court of arbitration),[2] and agreements to abide by the decision of a respected neutral such as a family, religious or cultural leader.

The limits of ADR

The move to alternatives to Court has been enthusiastically supported by the current government. FDR is the obvious example. There is strong support for mediation and arbitration of civil disputes in general. Collaborative law and family law arbitration are developing overseas. The time is ripe for further development of family law ADR in New Zealand.

While encouraging innovative forms of ADR in family law, we must keep in mind the dangers of overreaching. It is important not to hold out to the parties the expectation that a particular process will produce an outcome which the law would not in fact support.

Not everyone needs a result which can be legally enforced. For the majority, agreement is likely to be sufficient. But most parties do want the assurance of enforceability. So the ADR world must be careful not to raise false hopes. And if an ADR practitioner sees a couple heading down a path which will not lead to a legally enforceable result, there would seem to be an obligation to point that out.

To take just one example, the way in which a parenting mediation is organised must cater for the possibility that the couple will fail to come to any agreement. In that situation no time will have been wasted if the mediator is FDR certified since a failed FDR mediation is a prerequisite to a court hearing. The opposite would be true if the mediator had not been FDR certified. In legal terms the latter kind of mediation is a no-exit street. There is no harm if the couple simply seek an outcome which they expect to observe voluntarily. But the procedural implications if they cannot agree must be clearly explained before they start.

One other example will illustrate the dangers. Arbitration rests on agreement. Couples can agree on the level of child support to be paid from one to the other. Consequently, one might

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[1] Laura Ashworth "Islamic Arbitration of Family Law Disputes in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2010).

[2] *AI v MT* [2013] EWHC 100 (Fam) (English ruling that arbitration before the *Beth Din* in New York could proceed subject to English Court's right to review the result).

think, one could issue a binding arbitration award as to the level of support payable. But in fact either party could at any time apply to the Inland Revenue Department for a formula assessment. Again, it would be unfair to the couple to allow an arbitration or other form of private determination of child support to proceed unless they understood that the result could not be legally enforced. There is room for more family law arbitration but we must tread warily. The last thing we want is to have parties expend time, cost and trouble on an arbitration only to find one day that, contrary to their expectations, the award is not legally enforceable.

Because these questions of jurisdiction are complex, it is necessary to examine each kind of family law dispute carefully before deciding which ADR processes might assist in its resolution.

Types of family law dispute

Four typical kinds of family law dispute are:

A. Relationship property
B. Parenting and guardianship
C. Child support
D. Ex-partner maintenance.

Those are the four selected for further discussion in this paper. Of course there are many other kinds of family dispute that are equally important. They include:

- Adoption
- Care and Protection (CYFS)
- Deceased estates e.g. testamentary capacity, will interpretation, Family Protection and testamentary promises
- Domestic Violence
- International/Hague Convention
- Mental Health
- Paternity
- Protection of Personal and Property Rights.

There is clearly the potential for ADR to play an important part in resolving some of these other kinds of dispute. In this paper, time and space will not permit discussion of anything other than the four core topics identified earlier.

A. RELATIONSHIP PROPERTY

Relationship property disputes particularly lend themselves to ADR processes 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, solutions adopted by the parties will be valid and enforceable.[3]

It follows that relationship property disputes can be resolved by:

(i) *Direct negotiation*, with or without the help of collaborative law practitioners;
(ii) *Mediation* with a mediator who does not need to be FDR accredited as a prelude to a Family Court hearing; and/or
(iii) *Determinative proceedings* in forms which include court, arbitration, expert determination and extra-legal determination.

Of these various processes, the one requiring special mention for relationship property purposes is arbitration. Arbitration usually offers a number of advantages compared with court proceedings. These include speed, confidentiality, the opportunity to choose the decision-maker, continuity of, and ready access to, the decision-maker, and procedural flexibility. Those advantages are normally attainable in any kind of arbitration. But the two that have particular application to relationship property are (1) information-gathering and (2) arb-meds.

(1) Information-gathering

The feature that marks out relationship property from most other forms of family dispute is the special role of information-gathering (i.e. investigation and disclosure of past and present financial and property particulars). With this type of dispute, investigation and disclosure usually need to precede any agreement. There is often disagreement, delay, or lack of cooperation, over disclosure. It will often be helpful to resolve relationship property disputes in the context of a regime that includes mandatory information-gathering. Once the information is obtained, agreement will usually follow. But if it does not follow, the same mandatory regime can, if necessary, lead on to a determination with minimum loss of time.

It follows that if voluntary negotiation of relationship property has not worked within a relatively short time, it will usually be in the interests of both parties to issue some form of determinative proceedings. That should provide the framework of disclosure and identification of issues that will indirectly lead to agreement.

Handled in the right way, arbitration can provide a more efficient disclosure process than court. This is due to the procedural flexibility of the process, ready access to conferences before the same decision-maker, and the inquisitorial powers of an arbitrator.[4]

(2) Arb-meds

It is possible for one third party neutral to combine an arbitration with a mediation without offending against natural justice so long as the process is handled in the right way. The opportunity for an exploration of settlement often arises during an issues conference. It is

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[3] Robert Fisher "Relationship Property Arbitration" (2014) 8 NZ Family Law Journal 15.
[4] Fisher, above n 3 at 20.

important for the arbitrator not to caucus with the parties or give the impression that the case has been predetermined. But even given those constraints, arb-meds save much time and cost and are frequently successful. The parties are already there with their advisers. They will be focused on the issues. Usually the parties are saved the time and cost of having an independent mediator get up to speed on the issues.

In a more elaborate case it is also possible to have a second neutral, a mediator, sit in on the issues conference with the arbitrator. The mediator can caucus with the parties and convey offers between the two parties. If negotiations fail, the arbitrator is still on hand to give the procedural directions necessary to take resolution of the dispute forward.

Potential disadvantages of arbitration

Although there are several advantages to arbitration in relationship property disputes, it does not follow that arbitration will always be the best option. Under the law as it presently stands, court is still preferable where the dispute needs 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.

B. PARENTING AND GUARDIANSHIP

Parenting and guardianship disputes cover matters relating to children, such as their day-to-day care (custody); contact with family members/whanau (access); residence; schooling; medical treatment; culture, language and religion; and changes to their name.

Until recently, such cases made up approximately 40 per cent of the Family Court's work.[5] However, as a result of wide-ranging new laws which came into effect from 31 March 2014,[6] access to Court for determination of most parenting and guardianship disputes will not be granted unless FDR has been attempted. Exemptions exist in some cases such as those involving urgency, domestic violence or care and protection proceedings.

Parties to a parenting or guardianship dispute are free to reach agreement on their own, through a collaborative law process, or with the help of a non-FDR neutral.

For the majority, agreement is likely to be sufficient; they will simply voluntarily observe their agreement. Alternatively they may apply to the Family Court for a Consent Order to record their agreement, however reached.[7]

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[5] Judith Collins, Minister of Justice "Address to Arbitrators' and Mediators' Institute of New Zealand (AMINZ) on the new Family Disputes Resolution Service" (Northern Club, Auckland, 25 March 2014).
[6] See for example the Family Dispute Resolution Act 2013 and the Family Courts Amendment Act 2013.
[7] The court looks for willing consent by both parties to an agreement that is in the best interests and welfare of the children, before making an order. See www.justice.govt.nz/family-justice/about-children/making-decisions-about-children/using-the-family-court/when-we-agree.

However, where parties cannot agree, mediation before an FDR mediator is necessary before they can apply to the court for a determination of their dispute. For this reason it seems likely that most parties – and their lawyers –will prefer to use an FDR mediator from the beginning.

What does this mean for non-FDR ADR processes?

As recourse to court is available only to those who have attempted FDR, the recent law reforms make non-FDR dispute resolution methods less attractive.

Where the parties are willing to voluntarily observe an arrangement, any ADR method may assist. Collaborative law, which eschews recourse to the courts as a matter of course, will be as valid under the FDR regime as it ever was.

Where the parties are willing to be 'internally' bound by the authority of a decision-maker, determination by a respected neutral will also suffice. This can be the case, for example, where the parties are willing to submit their dispute to a tribunal in accordance with their religion or culture.[8]

Where the parties require enforceability of their arrangements, agreement is the key to obtaining a court order by consent.[9] Consensual ADR methods (direct or assisted negotiation) will therefore be helpful as they focus on agreement between the parties.

Whether there is jurisdiction to submit disputed parenting and guardianship matters to a third party for legally binding determination seems doubtful. It is true that the current climate encourages party autonomy and that nothing expressly prohibits non-Court determinations of this kind. However the Courts have traditionally retained a supervisory role over parenting and guardianship matters. It seems likely that the Family Court would decline to directly enforce this type of third party determination.

That may be contrasted with recognition of such determinations as persuasive. There is nothing to prevent a Family Court Judge from electing to adopt a third party neutral's decision as the provisional basis for the Court's own order if the neutral and the process had the Court's respect. In such cases the Court might be inclined to adopt the solution proposed in the absence of reasons for questioning whether it would be in the best interests of the child.[10] This is an area in which relations between the Family Court and the ADR world may develop over time. It is also possible that at some point Parliament will step in to hasten the process, as has occurred in some overseas jurisdictions. But unless and until one of these developments occurs, it would be unsafe to assume that third party determinations in relation to parenting and guardianship will be judicially recognised.

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[8] See, for example, Laura Ashworth "Islamic Arbitration of Family Law Disputes in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2010). For a discussion of how a non-legally binding determination can be endorsed by the courts, see *AI v MT* [2013] EWHC 100 (Fam) (30 January 2013) (where the English High Court approved and endorsed an arbitral decision made by a Beth Din, a rabbinical tribunal).

[9] See the text to footnote 7 above.

[10] For an English example see see *AI v MT* [2013] EWHC 100, above n 8.

C. CHILD SUPPORT

The Child Support Act

Financial support of New Zealand children is closely regulated by the Child Support Act 1991.

Parents may agree (directly, or with assistance) on the financial amount each will contribute to their children's support. They can then elect whether to voluntarily adhere to their agreement or to register it with the Commissioner of Inland Revenue. If the agreement is registered, Inland Revenue (**IRD**) will administer and enforce it.[11]

Where parties cannot agree, either may apply to the IRD for a formula assessment of child support.[12] A formula assessment is a fixed calculation based on income (capped at two and a half times the average wage) and number of children of qualifying age. The IRD has substantial statutory power to enforce an assessment.

Formula assessments can be challenged by application to the Commissioner of Inland Revenue. The grounds for challenge are strictly limited and require "special circumstances".[13] Where, however, a lump sum settlement or transfer of property has previously been made for the benefit of the children, the Commissioner can take this into account and review a formula assessment accordingly.[14]

Access to Court is usually available only after an application to the Commissioner has failed to produce the desired result.[15] Fortunately a formula assessment of child support via the IRD is much easier to obtain than a Court order for other parenting or end-of-relationship disputes.

The role of agreements

A voluntary agreement is automatically suspended if either the paying or receiving parent applies for a formula assessment.[16] On the application of either the paying parent or the receiving parent, the level of maintenance resulting from a formula assessment will be substituted for the level provided for in the voluntary agreement.[17] Agreements are therefore important for psychological reasons only. They do not affect the outcome if either party chooses to stand upon his or her legal rights.

What does this mean for ADR processes?

Broadly speaking the parties lack the capacity to contract out of IRD control of child support. Agreements reached via collaborative law processes, mediation, or counselling are not binding even when registered with the IRD. Determinations by third party neutrals could do

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[11] Part 3 of the Child Support Act 1991 (**CSA**).
[12] CSA, ss 8 and 10.
[13] CSA, ss 91, 104 and 105.
[14] CSA, s 105(2)(c)(ii).
[15] CSA, Part 7.
[16] CSA, ss 14, 17, 18, 20 and 65.
[17] Discussed further below: s 105(2)(c)(ii).

no more than assist the parties by pointing out to them what the result would be of applying a formula assessment.

The scope for ADR assistance with child support is therefore limited. Even here, however, ADR appears to have its place in two important respects:

(a) To produce a child support agreement where it seems likely that the parties will voluntarily comply; and/or

(b) To produce a one-off transfer of money or property in lieu of future periodic payment.

As to (a) (**voluntary compliance**), it is not at all uncommon for couples to negotiate agreements which will never require enforcement because one parent elects to pay more than formula assessment in the interests of his or her child. Extra-legal determinations may also be effective if the parties feel internally compelled to comply with the result. That can be the case where a neutral decision-maker has cultural, religious or social standing that the parties accept as authoritative.[18]

As to (b), the transfer of a lump sum or other property (**one-off transfer**) to provide for future child support could be resolved by negotiation, direct or assisted, or by neutral determination. The one-off transfer to provide for future child support could be included in a relationship property compromise or arbitration so long as it were clearly designated as such.

A one-off transfer may be preferred where the paying parent does not wish to be subject to a review of their income by the IRD.[19] Of course it will be possible only where there is sufficient property or cash is available to replace periodic child support payments. One-off transfers might assist in ways beyond their ability to provide finality. They have the potential to reduce conflict between parties, because they remove the need for ongoing financial transactions between the parties.

Care must be taken however: if challenged before the IRD, a one-off transfer may not be considered a sufficient substitute for future periodic payments. There is also the possibility that a change in circumstances warrants a review of child support arrangements. That can occur, for example, where the parents significantly change the time proportions in which they share the care of their children.

D. EX-PARTNER MAINTENANCE

Parties to a former relationship are statutorily liable to maintain their former partners (spousal, civil union, or de facto) in specified circumstances.[20] Each partner is, however, obliged to assume responsibility, within a period of time that is reasonable in all the

[18] See footnote 8 above.
[19] Under s 105(2) of the CSA.
[20] Family Proceedings Act 1980 (**FPA**), s 64(1).

circumstances of the particular case, for meeting his or her own needs.[21] The maintenance can take the form of a periodical sum, a lump towards future maintenance or a lump sum towards past maintenance.[22]

A party seeking ex-partner maintenance may apply to the Family Court for an order.[23] Alternatively the parties may enter into an agreement for the payment of maintenance which they may either voluntarily observe or register with the Commissioner of Inland Revenue for administration and enforcement.[24]

The legislation governing ex-partner maintenance is badly drafted. The Family Proceedings Act 1990 (**FPA**) was drafted without thought for maintenance agreements. The Child Support Act 1991 (**CSA**) pays no regard to the limited persons who can apply for maintenance under s 67 of the FPA. Neither expressly abrogates the traditional common law view that a maintenance agreement is an illegal attempt to oust the jurisdiction of the Courts.

By implication from the CSA an agreement for the payment of maintenance would no longer be regarded as an illegal attempt to oust the jurisdiction of the Courts. A maintenance agreement therefore appears to be enforceable in the sense that it is binding in contract and capable of supporting a judgment for arrears. However such an agreement does not appear to prevent one of the parties from applying to the Family Court for a maintenance order in order to escape from the agreement.[25]

There is no difficulty over an application to the Family Court if it is made by the payee-partner. Whether the payer-partner has the status to apply is open to debate. There is a conflict between the CSA (which says he or she can)[26] and the FPA (which confines applications to the payee-partner).[27] This uncertainty is unfortunate given that it is the payer-partner who would usually want to escape the agreement by seeking a lower amount from the Family Court. The better view appears to be that the CSA has amended s 67 of the FPA by implication and that the payer-partner also has the status to apply.

The criteria the Family Court must apply when deciding whether to grant an ex-partner maintenance order, and if so for what amount, are closely controlled by statute.[28] Whether the highly defined criteria leave room for the Court can take into account an existing agreement

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[21] FPA, s 64A. Those circumstances include: the ability of the partner to become self-supporting; the responsibility assumed for ongoing daily care of dependent children; the standard of living while together; and the undertaking of a reasonable period of education or training to increase the earning capacity of the partner: s 64(2).
[22] FPA, s 69.
[23] FPA,s 67. In determining an amount payable as maintenance the Court must have regard to certain matters and circumstances ss 65–70B.
[24] CSA, Part 3, ss 47 to 66A.
[25] FPA, ss 67 and 70; CSA, s 66.
[26] CSA, s 66.
[27] FPA, s 67.
[28] FPA, ss 63 to 66.

is also open to debate. On balance, however, the Court probably can give the agreement some weight.[29]

To summarise, it seems that parties can enter into legally valid agreements providing for ex-partner maintenance. Arrears due under such an agreement can be recovered by a civil court judgment in contract. However the agreements can at any time be overtaken by an application for a maintenance order in the Family Court. On hearing such an application the Family Court is closely controlled by statutory criteria but can probably pay some regard to the existence of the agreement as one of the relevant considerations.

What does this mean for ADR processes?

As with child support, agreements for the periodical payment of ex-partner maintenance can be registered with IRD for enforcement purposes.[30] However, unlike child support, any change to such an agreement requires an application to the court; a far more expensive, time-consuming and difficult process than applying to Inland Revenue for a formula assessment of child support. In the meantime the agreement stands as a legally enforceable contract.

There is wide scope for ADR assistance with ex-partner maintenance. The possibilities include:

(a) Negotiated agreements to make periodical payments;

(b) Negotiated agreements to make a one-off transfer of money or property in lieu of future periodical payments;

(c) Extra-legal determinations where it is foreseeable that the parties will comply for religious, cultural or moral reasons;

(d) Legally binding arbitrations or expert determinations.

There is no difficulty with the first three of those avenues. Agreements to make periodical payments are specifically contemplated under the CSA. They can be registered and enforced through that agency or through the civil courts.

An agreement to make a one-off payment of a lump sum has the advantage of achieving a clean break. Although the payee-partner could not be prevented from subsequently applying to the Family Court for maintenance, the fact that significant capital had been transferred should remove or reduce the need for maintenance. It should also influence the Family Court's (admittedly limited) discretion.

It follows that ADR methods which can assist the parties to reach agreement, such as mediation, counselling and collaborative law processes, have an obvious role in achieving such agreements.

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[29] See room to take into account discretionary factors in ss 63(2)(a)(iii), 64(2)(a)(iii), 64A(3)(iv) and 65(2)(e).
[30] The current regime appears less flexible than that provided for prior to 1992 via the then s 85 of the FPA.

As to (c), non-binding neutral determination may assist where parties feel internally compelled to comply, such as where the neutral decision-maker has cultural, religious or social standing that the parties accept as authoritative.

Questions remain over (d). There is currently room for further research and debate over the legal status of arbitration and expert determination of ex-partner maintenance. The signs are promising, however, given the normal assumption that anything that can be the subject of a binding contract can be the subject of an arbitration.[31] There is also support from ss 21A and 32(2) of the Property (Relationships) Act which together permit maintenance orders and compromises by contract under that Act.

THE FUTURE FOR THE FDR SYSTEM

The FDR service is presently confined to parenting and guardianship disputes, although it may be used to discuss relationship property disputes if it will help the parties agree about the children, and if the mediator agrees.[32]

It is foreseeable that Parliament will progressively extend FDR to encompass:

a. relationship property disputes. To be legally valid and enforceable, the resulting agreement would need to be either (a) certified by independent lawyers or (b) the subject of an application to the Family Court for an order by consent.[33]
b. Ex-partner maintenance disputes. Any resulting agreement would be enforceable under normal contractual principles, although it may not prevent an application to the Court for a maintenance order.

It seems less likely that FDR will be extended to child support disputes, given the already significant resources engaged in the Inland Revenue Child Support system.

THE FUTURE FOR COLLABORATIVE LAW

Meaning and use of collaborative law

Collaborative law mandates cooperation between the parties involved. It requires each party to have the support and counsel of a collaboratively trained lawyer throughout the dispute resolution process. Both lawyers and clients execute an agreement which prohibits either lawyer from representing their respective clients in the future if the process breaks down. If either party chooses to withdraw from the process and go to Court, both must instruct new lawyers.

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[31] Law Commission *Arbitration* NZLC R20, 1991 at [231].
[32] Ministry of Justice - Family Justice "Options for Dividing Property" www.justice.govt.nz/family-justice.
[33] Sections 21F and 25 of the Property (Relationships) Act 1976.

Collaborative law allows for psychologists, counsellors, accountants and other appropriate experts to be included as part of its process. It can also allow for mediation and arbitration of specific issues, if required.

It is mainly used in family disputes, particularly in relation to separation and divorce. It is increasingly used overseas, with national organisations established in several countries,[34] as well as in states of Australia and the United States.[35] By mid-2012 over 1,400 family lawyers in England and Wales, a quarter of the membership of the national family law association (Resolution),[36] were trained in the collaborative law process.[37] Its use and growth have been supported by the English judiciary.[38]

It has been said to have the "*potential to dramatically change the field of family law".*[39]

Collaborative law in New Zealand

The Collaborative Law Association of New Zealand was incorporated in 2011, offering training and membership to lawyers, psychologists, accountants, mediators and counsellors.[40]

Collaborative law is acknowledged to be "relatively young" here, with few trained practitioners.[41] Given its benefits and growth in other common law jurisdictions it seems likely to become increasingly available in New Zealand, although a critical mass of trained practitioners will be essential to its expansion.

THE FUTURE FOR FAMILY LAW ARBITRATION

If overseas trends are anything to go by, family law arbitration is about to grow in New Zealand. The real question is how far it will go. Several different levels are possible.

1. Ad hoc Family Law Arbitration

At the most modest level, family law arbitrations can be conducted as ad hoc proceedings conducted against a generalised background of arbitration law. New Zealand and Ireland are jurisdictions where that form of family arbitration continues to be the only possibility. In this country family law arbitration appears to be presently confined to relationship property disputes by arrangement with individual arbitrators.

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[34] See for example England's at <www.collaborativefamilylaw.org.uk>; the French Association at <www.droit-collaboratif.org/accueil-1-1-1> (in French), which welcomed 311 newly trained practitioners in the first half of 2014; and Collaborative Family Lawyers of Canada at www.collaborativelaw.ca>.
[35] See, for example, <www.collaborativeprofessionalswa.com.au> and <collaborativecouncilflorida.com>.
[36] www.resolution.org.uk.
[37] Elizabeth Edwards, Chair of Resolution "Address to Collaborative Conference" (Edinburgh, Friday 1 June 2012) at 6.
[38] References provided at <en.wikipedia.org/wiki/Collaborative_law>.
[39] Sherri Goren Slovin "The Basics of Collaborative Family Law - A Divorce Paradigm Shift" (2004) 18 (2) Amer J of Family Law 74.
[40] See <www.collaborativelaw.org.nz>.
[41] Selina-Jane Trigg, Chair of the Collaborative Law Association, on her website: www.familylawresults.co.nz//banner-right-24/collaborative-law.

While it would be possible for a third party neutral to give a decision on parenting, guardianship and child support, the result would not be legally binding. Under the law as it presently stands, the most the decision could amount to would be a relevant consideration when the Family Court came to exercise its discretion.

The potential role of arbitration and expert determination for ex-partner maintenance is more promising but more research and analysis is needed on that topic.

2. Institutional Family Law Arbitration without specific legislation

At a second level lies institutional family law arbitration conducted against a background of unspecialised arbitration law. In England and Scotland, for example, a group of family law organisations and the Chartered Institute of Arbitrators combined to produce a joint solution. They adopted a set of rules (the IFLA Scheme) and an institution to administer them (the Institute of Family Law Arbitrators).[42] Under the IFLA Scheme, property and financial disputes are submitted to an accredited family law arbitrator for resolution in accordance with conventional substantive law. A similar scheme exists in Scotland where the Family Law Arbitration Group Scotland (FLAGS) administers the arbitration of child and financial disputes in an institutional setting.[43] Although these schemes are in their infancy, they appear to have been greeted with enthusiasm.[44]

A potential weakness of these schemes might be uncertainty over the legal status of the awards that result. At least in England, there is a risk that even financial awards could be challenged as attempts to oust the jurisdiction of the courts. The effect of s 34 of the Matrimonial Causes Act 1973 is that a maintenance agreement which purports to restrict the right to apply to the courts is void.[45] On the other hand the Supreme Court has held that effect should normally be given to nuptial agreements.[46] To meet these uncertainties, the IFLA Scheme includes a mutual promise to facilitate a consent order in the Family Court endorsing the terms of the award once made. But one wonders about the enforceability of such a promise once the losing party sees the award. It also introduces the opportunity for a Family Court judge to decline to endorse the award, however persuasive the latter ought to be.

3. Statutory Family Law Arbitration for financial matters only

To overcome these uncertainties some jurisdictions have elevated family law arbitration to the third level of giving family law arbitration its own statutory basis. In Australia the Family

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[42] Institute of Family Law Arbitrators <ifla.org.uk>; Joanne Harris "Legal bodies team up to launch Institute of Family Law Arbitrators" (22 February 2012) The Lawyer <www.thelawyer.com>; Rhys Taylor "Family arbitration — a soft launch or a hard landing? Some provisional thoughts" (26 February 2012) Family Law Week <www.familylawweek.co.uk>; and Marilyn Stowe "Introducing family law arbitration …" (22 February 2012) Stowe Family Law LLP <www.marilynstowe.co.uk>.

[43] FLAGS <www.flagscotland.com>; and Scott Cochrane and others "FLAGS unfurled"(18 March 2013) The Journal <www.journalonline.co.uk>.

[44] Rima Evans "A Decent Proposal" May 2013, The Resolver (Quarterly magazine of the Chartered Institute of Arbitrators) 11.

[45] See further "Statutory Arbitration in Ancillary Relief" [1008] Fam Law 26 where Thorpe LJ pointed out that "… the advantages of arbitration can only be assured if arbitration rests on a statutory foundation that prevents a party from rejecting the arbitrator's award."

[46] *Radmacher v Granatino* [2010] UKSC 42.

Law Act 1975 (Cth), as amended in 1991, authorises and regulates arbitration for property settlement, maintenance and financial agreements, both Court-ordered and by agreement.[47] Family law arbitration is supported by specific legislation in other jurisdictions including Ontario,[48] British Columbia, North Carolina, Colorado, Connecticut, Indiana, Michigan, New Hampshire and New Mexico.[49]

4. Statutory Family Law Arbitration including non-financial matters

Specific legislative support for family law arbitration overrides traditional common law restrictions against attempts to oust the jurisdiction of the courts. Consequently it is purely a policy question for the legislature to decide upon the jurisdiction to be conferred on family law arbitrators.

In the United States the Model Family Law Arbitration Act would confer jurisdiction for virtually all family law matters except child abuse and protection orders. States such as North Carolina have adopted legislation along similar lines. Consequently all the core issues faced by a separating couple, including child custody and support, can be resolved by arbitration along with property and financial matters in such places.[50]

NZ developments

In New Zealand there is a growing view that spouses and parents should be encouraged to resolve their own differences by agreement.[51] Parliament has given spouses the power to enter into agreements governing ex-partner and child support.[52] It seems only a matter of time before specific family law arbitration legislation is enacted as in other jurisdictions overseas.

Until there is specific family arbitration legislation it seems likely that the options will continue to be either arbitration confined to relationship property or determinations which do not purport to be legally binding. Much depends on the attitude of New Zealand lawyers, family professionals, ADR practitioners and judges. In England, for example, the support for family law arbitration is so strong that representatives of all sectors have combined to support it.[53] The English judges have also made it clear that in the absence of strong reasons to the contrary, they will be keen to convert non-binding ADR determinations into court orders.[54]

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[47] http://www.aiflam.org.au/arbitration.php
[48] Arbitration Act, 1991, S.O. 1991, c. 17, Family Arbitration, O. Reg. 134/07, and Family Law Act, R.S.O. 1990.
[49] Burleson "Family Law Arbitration" (2008) 30 Campbell L Rev 297 at 297.
[50] http://law.justia.com/codes/north-carolina/2005/chapter_50/article_3.html.
[51] Ministry of Justice "Family justice reform: Questions and answers" (23 May 2014). http://www.justice.govt.nz/policy/justice-system-improvements/family-court-reform/family-justice-reform-questions-and-answers.
[52] Currently the Child Support Act 1991 s 58.
[53] See discussion of the IFLA scheme above.
[54] *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam); *AI v MT* [2013] EWHC 100 (Fam); http://www.familylaw.co.uk/news_and_comment/financial-remedies-s-v-s-financial-remedies-arbitral-award-2014-ewhc-7-fam?#.U6y3ntKSykk

THE FUTURE FOR EXTRA-LEGAL DETERMINATIONS

Determinations by a third party neutral can be "extra-legal" in the sense that they cannot be directly enforced as if they were court judgments or arbitration awards. Examples referred to earlier are Islamic family law determinations,[55] arbitrations before the Beth Din (Jewish religious court of arbitration),[56] and agreements to abide by the decision of a respected ADR practitioner in a dispute which only the courts can ultimately resolve. For Maori, the main impetus for reinforcing marae-based justice seems to have so far been criminal justice[57] but there must equally be room for marae-based family law decisions.[58]

Lawyers are used to thinking in terms of processes that could ultimately be enforced through the courts if required. Certainly it seems safest to assume that a couple will want direct legal enforceability if they have not expressed a desire for any other approach.

In fact, however, it seems that many couples are not looking for anything more than the decision of a person or institution that they will both respect. Religious or cultural influences can provide a powerful reason for compliance. Others are content to abide by a decision due to the advance promise that they would do so, because they can see that the decision represents the outcome that a court would impose anyway, or through sheer inertia.

Two developments seem likely to give further impetus to extra-legal determinations in this country. One is the growing multi-culturalism here. As each religious or ethnic community develops in New Zealand, the chances grow that it will bring with it its own set of family values and processes. The other is the sympathetic attitude towards ADR shown by overseas judges. Reference has previously been made to the strong support of English judges in their readiness to convert non-binding ADR determinations into court orders in the absence of reasons to the contrary.[59] If a similar approach developed in New Zealand this would reinforce the role of extra-legal determinations.

CONCLUSIONS

Predictions are always dangerous. However we would speculate that even without any further legislation the next few years will see the following developments in the resolution of family law disputes in New Zealand:

- Growth in collaborative law.
- Growth in the arbitration of relationship property disputes.

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[55] Laura Ashworth "Islamic Arbitration of Family Law Disputes in New Zealand" (unpublished dissertation for LL.B (Hons) University of Otago 2010).
[56] *AI v MT* [2013] EWHC 100 (Fam) (English ruling that arbitration before the *Beth Din* in New York could proceed subject to English Court's right to review the result).
[57] For a discussion of the criminal equivalent see Colin Keating, "Judicial Functions on the Marae" http://www.firstfound.org/vol.%201/keatring.htm.
[58] The different values involved are summarised by the NZ Law Commission in "Maori Participation in the Family Court" http://www.nzlii.org/nz/other/nzlc/report/R82/R82-13_.html.
[59] *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam); *AI v MT* [2013] EWHC 100 (Fam); http://www.familylaw.co.uk/news_and_comment/financial-remedies-s-v-s-financial-remedies-arbitral-award-2014-ewhc-7-fam?#.U6y3ntKSykk

- Growth in the extra-legal determination of most kinds of family law dispute.
- Extension of the FDR scheme beyond the care, contact and guardianship of children.
- Growth in not-for-profit and commercial organisations offering institutional support for family dispute resolution.

Two further developments also seem likely in the longer term:

- A judicial readiness to convert extra-legal determinations into Family Court orders in the absence of clear reasons to the contrary.
- Parliament's extension of arbitration into at least all financial matters arising from a separation and potentially into other areas such as parenting and guardianship.