Mediation for Reconciliation

The Family Law Act 1996, Part 2, provided for "information meetings" for parties contemplating divorce. Under provisions which remain on the statute book, the requirements relating to "information meetings" had to be satisfied before the court could make a divorce or a separation order.

Attendance at information meetings.

8.— (l) The requirements about information meetings are as follows.

(2) A party making a statement must (except in prescribed circumstances) have attended an information meeting not less than three months before making the statement.

(3) Different information meetings must be arranged with respect to different marriages.

(4) In the case of a statement made by both parties, the parties may attend separate meetings or the same meeting.

(5) Where one party has made a statement, the other party must (except in prescribed circumstances) attend an information meeting before—
(a) making any application to the court—
(i) with respect to a child of the family; or
(ii) of a prescribed description relating to property or financial matters; or
(b) contesting any such application.

Pilot studies in the late 1990s however dissuaded the then Lord Chancellor from bringing the provisions into force. The report on the pilot studies included the following observations:

"The research has concluded that none of the six models of information meeting tested over a two-year period is good enough for the implementation of Part II on a nationwide basis. It has shown that, for most people, the meetings came too late to save marriages and tended to incline those who were uncertain about their marriages towards divorce. Whilst people valued the provision of information, the meetings were too inflexible, providing general information about both marriage saving and the divorce process. ***People wanted information tailored to their individual circumstances and needs***. In addition, in the great majority of cases, only the person petitioning for divorce attended the meeting, but ***marriage counselling, conciliatory divorce and mediation depend for success on the willing involvement of both parties***."

For anyone who, like myself, is both a solicitor and a mediator, the two extracts I have highlighted above indicate that the subjects of the research, or at least one out of every couple, were more comfortable retaining a solicitor than a mediator. And there is an obvious logic to this. If one member of a married couple has come to the bitter conclusion that their marriage is over,

the next step for them is to start working out the practical consequences of that conclusion. They have little motivation to pay someone who is outside that marriage to attempt to persuade them that it can work after all.

The Children and Families Bill 2013, which by the end of the year had reached its report stage in the House of Lords, will if enacted finally repeal these inactive provisions. They will, however, introduce instead a requirement for a different type of 'information meeting'. The Mediation Information and Assessment Meeting (MIAM) is already something an applicant in family proceedings is 'expected' to attend save in exceptional circumstances under Practice Direction 3A of the Family Procedure Rules, but Section 10 of the draft Bill would make it compulsory in many cases.

10 Family mediation information and assessment meetings

(1) Before making a relevant family application, a person must attend a family mediation information and assessment meeting.

(2) Family Procedure Rules—

(a) may provide for subsection (1) not to apply in circumstances specified in the Rules,

(b) may make provision about convening a family mediation information and assessment meeting, or about the conduct of such a meeting,

(c) may make provision for the court not to issue, or otherwise deal with, an application if, in contravention of subsection (1), the applicant has not attended a family mediation information and assessment meeting, and

(d) may provide for a determination as to whether an applicant has contravened subsection (1) to be made after considering only evidence of a description specified in the Rules.

(3) In this section—

"the court" means the High Court or the family court;

"family mediation information and assessment meeting", in relation to a relevant family application, means a meeting held for the purpose of enabling information to be provided about—

(a) mediation of disputes of the kinds to which relevant family applications relate,

(b) ways in which disputes of those kinds may be resolved otherwise than by the court, and

(c) the suitability of mediation, or of any such other way of

resolving disputes, for trying to resolve any dispute to which the particular application relates;

"family proceedings" has the same meaning as in section 75 of the Courts Act 2003;

"relevant family application" means an application that—

(a) is made to the court in, or to initiate, family proceedings, and

(b) is of a description specified in Family Procedure Rules.

(4) This section is without prejudice to sections 75 and 76 of the Courts Act 2003 (power to make Family Procedure Rules).

The draft Bill leaves it to the Family Procedure Rules to determine the sanction for failing to attend a MIAM. In essence, however, this is limited to the court refusing to issue or deal with the applicant's application. Anecdotal evidence from courts around the country since Practice Direction 3A was introduced suggests that judges have been reluctant to impose such a sanction where it is a matter for their discretion.

Section 10(1) of the draft Bill, unlike section 8 of the Family Law Act 1996, also fails to impose the corresponding sanction upon the respondent to any application if they fail to attend a MIAM. In view of the conclusions of the research done in the late 1990s - that mediation depends for its success upon the willing involvement of both parties - this is surprising. It is hard to see applicants and judges finding mediation to be a viable option if only one party is obliged to consider it, and the willing involvement of both parties is required for it to have a chance of success.

On the positive side, the meeting which the applicant must attend is not just to provide 'information' about a range of matters, but specifically to carry out an 'assessment' of the suitability of mediation for resolving the issues between the parties. An assessment requires the person conducting the meeting to take into account the individual circumstances and needs of the parties, and thus should ensure that the meeting is not too inflexible and general. The respondent to an application is also 'expected' to attend a MIAM under the Practice Direction if invited to do so. Anecdotal evidence from practitioners since Practice Direction 3A was introduced, however, suggests that individual circumstances can be tailored so as to indicate that mediation is unsuitable under the criteria identified in the Practice Direction.

Section 8 of the Family Law Act 1996 envisaged a very wide remit for the meetings:

(6) In this section "information meeting" means a meeting organised, in accordance with prescribed provisions for the purpose—
(a) of providing, in accordance with prescribed provisions, relevant information to the party or parties attending about matters which may arise in connection with the provisions of, or made under, this Part or Part III; and
(b) of giving the party or parties attending the information meeting the opportunity of having a meeting with a marriage counsellor and of encouraging that party or those parties to attend that meeting.
(7) An information meeting must be conducted by a person who—
(a) is qualified and appointed in accordance with prescribed provisions; and
(b) will have no financial or other interest in any marital proceedings between the parties.
(8) Regulations made under this section may, in particular, make provision—
(a) about the places and times at which information meetings are to be held;
(b) for written information to be given to persons attending them;
(c) for the giving of information to parties (otherwise than at information meetings) in cases in which the requirement to attend such meetings does not apply;
(d) for information of a prescribed kind to be given only with the approval of the Lord Chancellor or only by a person or by persons approved by him; and
(e) for information to be given, in prescribed circumstances, only with the approval of the Lord Chancellor or only by a person, or by persons, approved by him.
(9) Regulations made under subsection (6) must, in particular, make provision with respect to the of information about—
(a) marriage counselling and other marriage support services;
(b) the importance to be attached to the welfare, wishes and feelings of children;
(c) how the parties may acquire a better understanding of the ways in which children can be helped to cope with the breakdown of a marriage;
(d) the nature of the financial questions that may arise on divorce or separation, and services which are available to help the parties;
(e) protection available against violence, and how to obtain support and assistance;
(f) mediation;
(g) the availability to each of the parties of independent legal advice and representation;
(h) the principles of legal aid and where the parties can get advice about obtaining legal aid;
(i) the divorce and separation process.

As this section of the Act was never brought into force, no Regulations were ever made under it. But the scope of the meetings, which would have been part of the 1990s pilot study, can be seen in section 8(9)(a)-(i). Mediation noticeably comes sixth on the list of nine, whilst at the top of the list is information about marriage counselling and other marriage support services.

I could have entitled this article *Reconciliation to Mediation*. For this is evidently the trend illustrated by the soon-to-be-repealed statute and the provisions which are set to replace it. The primacy has passed from the objective of saving saveable marriages to a process which keeps parties out of the court system.

I entitled it instead *Mediation for Reconciliation*, as this still acknowledges the legislative trend, whilst also affirming that mediation has a wider remit than just providing a cheaper and quicker route to divorce and provision for children and finances than the court can provide.

I have mediated not only family issues, but commercial, neighbour, and political issues also. Mediation can be an educative process for those involved in it. Problems with a relationship of any kind can result from failure in precisely the area mediators can assist with: communication and discussion of key issues in the relationship. Parties to mediation can learn to have the hard conversations they were unable to have before. Accumulated resentment and frustration can be acknowledged, and agreement reached on more constructive ways forward. To paraphrase Nelson Mandela, people learn to hate, and they can learn to love. It is a shame if during such a process of learning, the end result is predetermined as being the separation of the parties.

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