

SPEECH FOR THE LEGAL AID BOARD CONFERENCE IN DUBLIN - 2012

Good Morning Everyone and thank you to The Legal Aid Board for inviting me to speak here today. Like you, we are going through changes in our family legal system in England and Wales and are working on new strategies to address those changes, and continue to help families going through separation and divorce. We are also doing our best to promote mediation as a better way of dealing with family breakdown than going to court. And, like you, we have a focus on children and doing what is best for them.

As we've heard, there is overwhelming evidence that mediation is better than court when it comes to minimising the detrimental effect divorce has on children. That's because mediation minimises the conflict between the people involved. The court system, of course, is an adversarial process which will always leave someone unhappy and most people very much poorer after all the associated court costs. It is, as I often tell people, a no brainer. Mediation is quicker and cheaper than going to court and provides long term solutions for children.

For those who may not know a great deal about National Family Mediation I should tell you that we are the largest provider of mediation in the country. We have 47 services in England and Wales and provide around 16,000 mediations a year. All our services offer child inclusive mediation and most of our mediators have specialist training in dealing with children in divorce.

We have had legal aid for family mediation in England and Wales since 1999 when it was brought in under the Access to Justice Act. It did come in by a rather circuitous route as the ambition to provide family mediation was first introduced in the Family Law Act 1996 but as parts of that Act were shelved along with no fault divorce, it was hived off into the access to Justice Act. The upshot of this is that anyone now wishing to apply for legal aid for their divorce should have a meeting with a mediator to consider suitability for mediation

and to assess eligibility for public funding. This means people with low incomes can receive legal aid for mediation and they do not have to pay it back. That's different from the legal aid they may receive for legal advice from a solicitor which they do have to pay back when the divorce is settled. That comes as a shock to some people. What is about to become a bigger shock is that the cuts in legal aid which we expect to come into practice next year, will mean that there won't be any legal aid for legal advice any more. No legal aid for family solicitors. But at the moment at least, there is still going to be legal aid for family mediation.

Now, there's an up and a down side to this for us. The good thing is that the government is directing people to mediation. Well, people with low incomes anyway. What's bad about this change is that most of our work, including legal aid work, comes from referrals from solicitors. If they are no longer receiving legal aid there is no obvious incentive for them to refer clients to us. The second problem is that the government is not promoting mediation loudly enough, which is making us concerned that people don't yet know enough about mediation to find us themselves.

The government says mediation should be the first port of call for anyone getting divorced and they introduced a protocol last year stating that anyone applying to the court for a divorce has to show they have had a meeting with a mediator first. That hasn't really worked. A recent survey of 100 courts in England and Wales showed that 80% of people using the court to battle out their divorce had NOT tried mediation first and the judges involved were doing nothing about it. As of last month, in the Queen's speech to parliament, the protocol to try mediation first will become a "statutory pre-requisite". In short, judges and courts will be required to check that couples coming before them have at the very least had a meeting with a mediator before proceedings can be started. The government clearly thinks that will make the difference. I'm not holding my breath. Divorce is so much part of the legal system in England and Wales I think it will take more than a mere change in the law to persuade people to look outside that process for a means to end their marriage.

I do understand that it is a big ask to expect people who may well hate each other at the time of getting divorced, to sit down and talk about it. To ask them to be sensible and reasonable about how to divide their finances and property and, oh yes, what to do about the children. At the moment, to many people, mediation seems mad. What I want to do is show that it is considerably more crazy to ask a judge to rule on how people should look after their children or whether they should sell their family home when it comes to divorce, and part with thousands of pounds in payments to lawyers in the process. Far too many people are currently finding the process of divorce – the adversarial process of divorce – as traumatic as the divorce itself. Divorce is a highly emotional and controversial process. But it isn't one that should necessarily lead to a legal or court battle.

At National Family Mediation, we are tackling the changes in legal aid, and the new opportunities to direct people to mediation, in a variety of ways. First, we are working in partnership with solicitors to produce fixed fee packages for clients. This is a combination of mediation sessions and meetings with a solicitor for a fixed fee. For the easy cases, where couples WANT to work things out for themselves, this is proving relatively simple. Agreements are made in mediation and then each party goes to their own solicitor to have the agreement checked and sent to court for a consent order. This can also work for more complex cases where there may be more room for dispute. It just takes a bit longer. But if both parties are willing to work with mediation there is no reason mediation won't work for them. There are then the cases where mediation isn't suitable. Mediation won't work. And I want to pause here for a minute.

Why won't mediation work in these cases? Is there something wrong with the mediation process? No. Is there something wrong with the mediator? No. Our mediators are highly trained in all aspects of family law, negotiation skills and conflict management and they've usually spent 2 years or so getting together their portfolios before they can practice. Really, nothing wrong with the mediator. So what makes some cases unsuitable for mediation? The answer is simple. Too few people including family solicitors actually understand what

mediation is and how it works and consequently one or both of the parties decide they don't want to mediate. That's the problem, and apart from a few exceptional cases of domestic abuse, that is the ONLY reason mediation won't work.

I make a point of this because if you talk to some lawyers or read about mediation in the newspapers at home, the caveat that always comes with debates about mediation is that it "isn't always suitable", as if there's something wrong with it. "It isn't suitable" is what was said by court officials and judges in 80 percent of divorce cases in the recent survey I spoke about earlier. This was their excuse for not ensuring those going to court for a divorce had been asked to show evidence they had tried mediation first.

Why is that? If there's nothing wrong with mediation you may argue there's something wrong with our judges. And you may be right. But I would argue there's something seriously wrong with our culture where the minute anyone decides to get a divorce their knee jerk reaction is to find a lawyer and possibly go to court.

So where is the evidence mediation is effective and more importantly cost effective. There are two particular pieces of research that I want to refer to.

The first is the National Audit office report completed in 2007 called Legal Aid and mediation for people involved in family breakdown. Its was a value for money report that looked at provision and delivery since legal aid was introduced and gave recommendations about improving uptake and addressing disincentives..

Sir John Bourn, head of the National Audit Office, said:

“One in three in our survey told us that they had not been made aware that mediation was an option. The Legal Services Commission needs to publicise the advantages of mediation and remove the financial disincentives to solicitors of recommending this option to their clients. Mediation can provide a less

adversarial route than the courts for many families involved in family breakdown and result in savings in legal aid of over ten million pounds a year.”

Broadly the findings were that mediation is cheaper and quicker than going to court and produces longer lasting and more durable outcomes for families.

Time and Money:

The average cost of legal aid in non mediated cases is estimated at £1682 compared with £752 for mediated cases representing an additional cost to the tax payer of £74Million

Mediated cases are quicker to resolve taking on average 110 days compared with 435 days for non mediated cases

Exemptions Barriers and Incentives:

The exemptions from mediation have been drawn too broadly and for many the assessment and eligibility process is used as a tick box exercise without a genuine attempt to engage with mediation

There remains a general lack of understanding and awareness amongst the general public and professionals working with families including the law about how mediation works and what it can achieve

There are no requirements on non legally aided parties to attend a meeting with a mediator and this is then recorded as mediation having failed when in truth it has never been tried

Exemptions table NAO report

Whilst these have been altered since the NAO report they are in my view still too many exceptions and the responsibility for exempting cases should be reduced further to ensure that the mediator is responsible for the assessment.

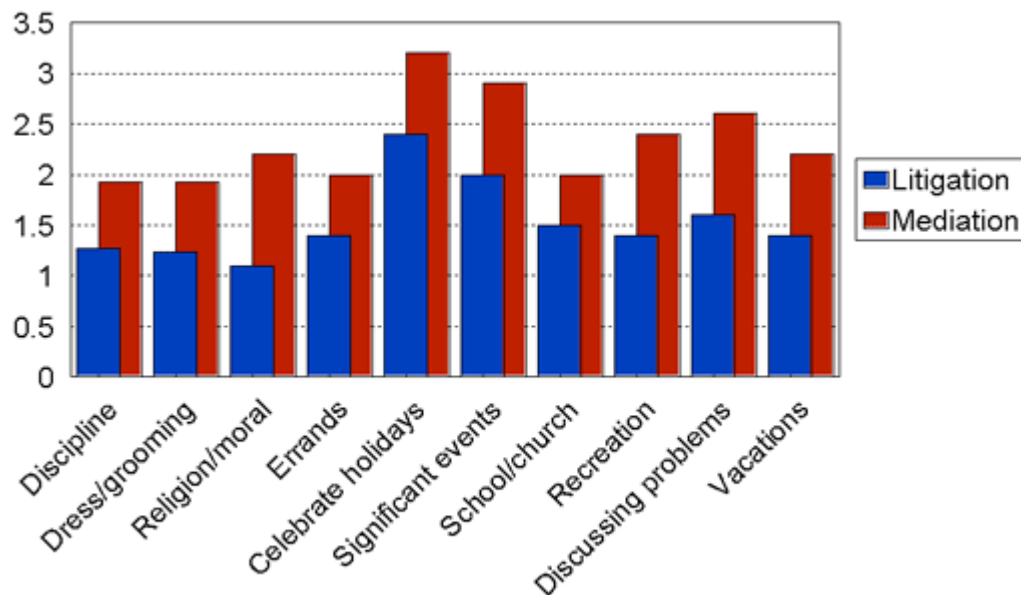
The financial incentives not to mediate remain too attractive to legal advisors and the implementation of the pre application protocol has not addressed the shortcomings of the existing exemptions criteria. This will probably create the same low take up of mediation that currently exists.

The numbers going through mediation are increasing but slowly at around 1000 per year. The total number of legally aided mediations is around 19,000

The emotional benefits of mediation can best be summarised by Robert Emery's research.

His Study

- Used a high conflict group - families who had filed for contested custody hearing
- Used random assignment (the magic of science) — a flip of a coin determined whether families went to mediation or adversary settlement
- Sample was young and low income
- Mediation was short-term (5 hr average) and problem-focused but sensitive to emotions, especially grief
- Was a longitudinal study — families were followed for 12 years



Based on residential parent report

What you can see from this graph is the enduring successful outcomes of mediated settlement where separated parents respect and value the contributions they each make to their children's lives.

And these I think are outcomes that we would all wish to achieve because these families whilst working together at parenting also take care of their own affairs without recourse to statutory agencies and services.

And so In order for mediation to work as it should, we need to make it socially unacceptable to go to court to sort out our own private disputes including divorce.

Now, we've always been told that divorce is a legal process, which it is, but that is a very small part of what happens in divorce especially when children are involved. What really matters is how individuals behave, how they sort out their private financial affairs, and how they plan their future lives as separated parents. Those arrangements are always more successful in the long run, if they can be made by agreement. We know that as mediators, and many family solicitors know that too. And yet if you ask people on the street how you get divorced nearly all of them will say you need a lawyer.

You don't need a lawyer, actually. You don't need a lawyer to get married and you don't need one to get divorced. What you do need in divorce, is someone who can help you see beyond the red mist that often accompanies divorce, someone who can take you through the practicalities of building new lives as separated people and separated parents. And someone who can provide you with the right legal advice to support the agreements you have negotiated in mediation. And that means shifting the emphasis from divorce as being an exclusively legal process to one where legal advice and mediation work hand in hand not either or.

Internationally there are many examples of compulsory mediation. In Norway for example 3 hours of mediation are provided free of charge and people cannot go to court until there are arrangements in place for the children and that includes financial arrangements.

More recently Australia took a very bold step and introduced new legislation and the relationship centres. At the time it was driven through in an attempt to stop adversarial court proceedings. But the relationship centres are more than just a gateway to the court, they provide a full range of services to families at times of difficulty, and that could also mean helping families resolve problems before they separate. There is a sufficient body of evidence to support the effectiveness of mediation and the benefits it can bring to the parents of today and the parents of tomorrow. Relationships breakdown of that there is no doubt and as professionals we have a responsibility to ensure that services are available so that separation can be managed in the least damaging way.

Emerging evidence of the benefits of mediation using the child inclusive model practices in Australia should prompt us all alter our practices.

These are some of the outcomes achieved as extrapolated by

Jane walker Prof Emeritus Newcastle University.

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Changing the public mind set isn't easy. Not at all easy you may think, and you are right. But it can be done.

When I was a teenager, just a few years ago, it was cool to smoke. Many of us of a certain age grew up when smoking was acceptable. Smoking in restaurants, smoking in the workplace, smoking at home around the children - absolutely fine. Medical advice about the dangers of smoking had some effect. The high cost of smoking had some effect, but change in smoking habits only really came about when it became socially unacceptable. To use the analogy of going to court in divorce, you can smoke, as a last resort, but please go and stand outside to do it. It is now, largely, socially unacceptable to smoke at all and certainly unacceptable to smoke in front of the children.

The same is true of drink driving. Remember the "one for the road"? That isn't acceptable now. Most of us also agree it's bad to smack children or drive so fast in built up areas that you may knock children over and kill them. In short, there are lots of things we used to do that damaged children that we don't find acceptable now.

So it should be with going to court to sort out a divorce. I want the next generation to look at us in horror and say "What! You asked a man with a wig what you should do with your children and whether you should sell your home! Are you mad? And you paid good money for that!"

I am not expecting this change to come overnight and we are not standing back and doing nothing in the meantime. Along with our fixed fee packages we are lobbying the government to do more to promote mediation. And the FJR does give us another opportunity address the critical and costly problems in the family justice system. The report has made many recommendations for fundamental reform of family justice in England and Wales. The government has accepted all bar three of the recommendations but implementing change in a depressed economy is going to be hard when really funds need to be invested to help the reforms take shape. Nonetheless mediation is given a

more central role and a priority is being given to providing better information to the public so that they can resolve matters themselves. And we are working with government to deliver an “information hub” to take people through the options in divorce using the internet. As many people do use the internet now we hope that will be a useful tool, and we are part of the government working group to implement the idea. We are also actively promoting our services with GPs, Citizens Advice Bureaux, schools and anyone else who deals with separating families.

What we are finding in promoting mediation is that we need help, from everyone. We cannot convince people the best way forward for them is through mediation, without support from everyone who knows about what we do and how much better it is to mediate than litigate. No one wants to get divorced. It’s not something they plan or think about before it happens to them so we need everyone who may be advising people at the start of the divorce process to direct them to mediation.

If we all say the same thing, internationally, we may just stand a chance of changing people’s minds and perceptions of separation and divorce. Our experience is that when people come to us first, before they’ve started a legal battle, mediation is very likely to work. When they come to mediation after months or more of legal fighting, it can still work but is more difficult because adversarial positions have been taken and are often quite entrenched.

But however people come to us, they leave considerably richer than those who battled it out in court and with a proper plan for their future. And that plan for the future is what really benefits children. Children want the fighting to stop. Always. And they usually want a relationship with both their separated parents. That can only happen for the benefit of children, when parents put their children first. And that’s what mediation is all about. That is our message. Look to the future. Don’t go to court. Go to mediation and keep control of your future and your money, and keep in contact with your children.

And so to Ireland as you are about to embark on reforms of your own. I say do take the best of services and initiatives from around the world and do take account of some of the pitfalls and consequences that have been encountered and factor them in to your delivery plan. Educate your family solicitors about the benefits of mediation and develop a system where mediators and family law advisors are working together with a common aim. Agreed resolution to family breakdown and conflict. Because that end goal is what is in children's best interests.

Thank you