

Response by Family Mediation Scotland to:

Sheriff Court Rules Council Consultation on Sheriff Court and Alternative Dispute Resolution

Family Mediation Scotland provides mediation services for face-to-face discussion, assisted by an impartial mediator, enabling parents to co-operate in making arrangements for children, finance and property without having to resort to the possibly adversarial route through lawyers and courts. Mediators in FMS' fourteen services across mainland and island Scotland work with parents to reduce acrimony and bitterness, and help parents focus on their children, rather than the differences between them. FMS' services also offer special support directly to children to help them adjust to changes in their family.

Family Mediation Scotland (FMS) welcomes the Committee's consideration of ADR and welcomes Recommendation Five that a wide consultation process should be conducted among court users. Such a consultation should be as wide ranging as possible and in the context of family law should include those who have accessed family mediation services pre court action, during a court action and post action (e.g. mediating to update separation agreement provisions in the light of changed circumstances). Local Family mediation services regularly mediate with these parties all of whom are court users.

In specific response to the Questions posed we would remark as follows:

1a/b Both necessary and desirable for the reasons specified by the Committee. In addition to a judicial decision usually producing a winner and a loser ADR offers a much wider range of resolutions some of which the court may be unable to order. FMS notes that ADR has the potential to move disputes forward and in some cases while not achieving a final resolution may assist the court process by focussing the issues remaining in dispute thus saving court time and expense.

2a yes

2b The emphasis on encouraging rather than requiring parties to seek resolution by ADR is supported by FMS. FMS support the voluntary principle of ADR. There are many preconceptions and assumptions around what the mediation process entails. A requirement to attend an information meeting to explain to each party would assist parties to make a more informed choice whether ADR is appropriate for them.

Another way to promote ADR is a national campaign to raise the profile of all forms of ADR currently available in Scotland.

3a yes

3b Experience of some local FM services demonstrates that parties referred to them had not considered mediation before raising a court action.

4a no

4b Generally it would seem contradictory to require a party to specify reasons for non-participation in a voluntary process and there are circumstances where it may not be appropriate for a party to state, or for the other party to be aware of, the reasons for refusal to

consent to a referral to mediation e.g. fear of safety due to domestic violence in family cases. Further it may place such a person who does not feel safe in a more difficult position to refuse to refer. In such circumstances the trained mediator or service worker who initially meets such a party could indicate that a mediation service would not be appropriate.

5 A balance needs to be struck between a reasonable progress of the court proceedings and the ability of the ADR process to go forward at an appropriate speed to allow all issues to be identified and options generated. It is appreciated that there may be some conflict between these two speeds and perhaps some guidance of the times envisaged in draft Rule 9.A4 could be included?

6a Do not think so

6b The voluntary nature of ADR may be lost if expenses can be imposed. The definition of "unreasonable conduct" could for example put a party who is fearful of meeting the other party as mentioned in answer to 4a at a financial disadvantage.

7a yes

7b If the principle is that ADR should be encouraged then there seems to be no reason to distinguish on the grounds of value/type of action raised.

7c see 7b above

8a/b there has been experience of Family Mediation in Scotland for nearly 30 years. The referrals from court have resulted in many people learning of and about the mediation process.. While as specified before the process is voluntary there may be value in requiring parties to attend a pre mediation information meeting. While superficially there appears not to be a reason to continue the requirement in Rule 33.22 mediation/ADR has been particularly helpful in considering aspects of family actions such as parental responsibilities and rights, contact and residence at a time of personal distress and conflict between parents and a requirement to refer for information on mediation may continue to be of assistance to the parties and to the courts. The confidentiality of mediation/A D R proceedings should extend to all in terms of these proposed new rules.

9a Such inclusion may be of assistance to the court in considering whether to suggest mediation/ADR at a later stage of the proceedings. It is the experience in some Family Mediation services that some parties who try to mediate before the raising of a court action and who do not reach full agreement are able to mediate later on issues during the course of the court action.

9b Again there seems to be no reason to differentiate on value/type of action.

10 There are a variety of mediation/ADR services available at present including the in-house pilots in the three Sheriff Courts. Some family mediation services receive part funding which allows them to offer mediation to families in their geographical area and it is to these services the courts currently refer without cost to the court service. Family mediators receive specialist training, undergo regular continuing development training and have ongoing supervision and support. Recognition of special areas of expertise should included in any ADR provision to parties.

11a/b/c Allowing parties the dignity of privacy could encourage more open consideration of the issues in dispute. It is difficult to see any reason for differentiation between values of Small Claims or Summary Cause.

12 with reference to 9A.3-(1) and 9A.5 we refer to the answer at Q 4a on giving reasons for refusal to be referred.

13 With reference to the answers to Q 4a and to Q 12 we suggest that it is made clear reasons do not require to be stated and that the rule includes provision that not stating reasons is not in itself “unreasonable conduct” in terms of the proposed draft rule 9A.5

Family Mediation Scotland

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