

Suggestions to the *Family Law Act 1975*

Question 26. In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

- 1.1 A substantial portion of the family disputes are actually settled by mediation prior to reaching the Family Court. It might not be far from truth to say that more than 90% of the family disputes settle at the mediation stage. Accordingly, it is suggested to strengthen the framework for mediation. I am an FDRP; I have handled & settled a number of family disputes. Consequently, this submission focuses on the procedural issues in family mediation.
- 1.2 In the current scenario, a person ("Applicant" or P1), who is embroiled in a family dispute, typically, contacts a Family Relationship Centre (FRC) or a Family Dispute Resolution Practitioner (FDRP) to provide details to commence mediation against the person with whom he/she has a dispute.
- 1.3 The FRC or FDRP then sends a 'letter' to the other person ("Respondent" or P2) asking about his/her interest to participate in the mediation. This letter often causes considerable anxiety to the Respondent because this letter would indicate that the Applicant met with the FDRP. So, the Respondent often forms the wrong impression that the 'FDRP is not a neutral person; but, the FDRP has already met with the Applicant and much of the confidential information between P1 and P2 (including family violence) has already reached FDRP'. Consequently, many Respondents tend to think of the FDRP as an advocate of the Applicant, and not as a neutral, independent person who could be engaged for the mediation process.
- 1.4 This perception may be changed, and the starting point of the mediation process may be streamlined, by introduction of an appropriate form that captures the essential information about the Applicant and the Respondent. Simply, this would be the 'Mediation Application Form' to be filled-in and lodged by the Applicant. Section 10F provides for family dispute resolution. It is suggested that the Family Law Act 1975 be amended in Division 3, Section 10F, in such a way to include a form for commencing family dispute resolution; the following sentences at Section 10F may be appropriate.
 1. *A person may commence family dispute resolution by lodging Form 1, or by providing substantial details in the form of a signed letter, to the family dispute resolution practitioner or to an organization that employs the family dispute resolution practitioner.*
 2. *The family dispute resolution practitioner may then serve Form 1, or a redacted version of Form 1, on the respondent who is identified in Form 1. On the request of the applicant, the family dispute resolution practitioner may redact the address, email and telephone number of the applicant from Form 1 before serving it on the respondent.*

- 1.5 In practice, while more than 95% of the Applicants do not wish to hide their contact details, a small percentage of Applicants like to safeguard their address & contact details because of past animosity between the Applicant and the Respondent. Accordingly, the Act shall provide that the FDRP may mask the contact details of the Applicant, if requested to do so by the Applicant.
- 1.6 A sample of Form 1 is shown below:

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FORM 1. Application for Family Dispute Resolution
(under Family Law Act 1975)

Date:

Applicant's Name:

Applicant's Address:

Applicant's Mobile Number:

Applicant's Email Address:

Respondent's Name:

Respondent's Address:

Respondent's Mobile Number:

Respondent's Email Address:

The Applicant hereby applies for family dispute resolution regarding children's matters or property matters or both.

Applicant's Signature

Question 27 Is there scope to increase the use of arbitration in family disputes? How could this be done?

- 2.1 Yes. There is a good scope to increase the use of arbitration in family law disputes, especially, for property matters. In order to increase the use of arbitration, it is necessary to make it cost-effective and user-friendly to the separating couple, who might already look distressed or emotional due to the family dispute.
- 2.2 In this regard, useful lessons may be drawn from the operation of the Building and Construction Industry Security of Payment Act, (in short, "SOP Act") which has been enacted in all the Australian States and Territories within the past 2 decades. The SOP Act has a fundamental objective; long ago (in the 1990's) several small contractors in the construction industry became insolvent because it took plenty of time (of the order of 1-2 years) to go through the Court processes and get paid for construction work, which is disputed. The SOP Act nominated a group of people called 'adjudicators', with specific qualifications, who may be appointed to deliver decisions on disputed construction work with a month. The adjudicator's decision is interim in nature and it may be affirmed or varied or reversed by the Court. Likewise, it is suggested to amend the Family Law Act in such a way that an adjudicator be appointed to decide a property dispute within a reasonable timeframe, say, 3 months.
- 2.3 Although the purpose of the SOP Act is the same throughout Australia, the provisions of the Act vary slightly between different jurisdictions. In the section below, I have explained how the features of the SOP Act could be adapted for family law purposes. Primarily, I have used the words and phrases from the Western Australian Act, i.e., the *Construction Contracts Act 2004 (WA)*.
- 2.4 If a legislation were to be used widely, it must be user-friendly, cost-effective, convenient, time-saving, and free of legal jargon. A typical set of couples who might use arbitration for deciding property dispute in Australian context may likely own the following pool of assets:
 - (a) one family home;
 - (b) either one or no investment property;
 - (c) one or two cars;
 - (d) some superannuation;
 - (e) some stocks and shares; and,
 - (f) some furniture in the house.Often the family home and the investment property are under mortgage. This means, their total pool of assets does not normally exceed \$750,000 and the disputing couple would like to divide it; this is the objective of 'family law adjudication' or family law arbitration.
- 2.5 Cost-Effectiveness: The fees that may be payable for family law adjudication services must be nominal and must be capped. Note that 'fixed-fee adjudications' are now common in the building industry in Australia and UK; relevant information is available in the web:
 - (a) <http://www.adjudicate.com.au/company/fee-policy>

(b) <https://www.battens.co.uk/news-events/news/fixed-fee-adjudication-what-is-it-and-how-does-it-work>

As an example, in (a), for low-value disputes (in NSW, VIC and SA) in the range of \$25,000 – \$40,000, the fee payable to the adjudicator is fixed at \$3,300.

- 2.6 Note that, the couple who are separating is already in a state of emotional distress. Even if they own assets to the extent of \$750,000, most of it would have been locked up in the form of equity in the house. A big chunk of their monthly earnings often goes into mortgage repayments. Given this scenario, they are often unable to pay huge sums as legal fees. Consequently, they look for low-cost services, which should give them a reliable outcome. For these reasons, it is suggested that the fees that is payable to family law adjudicator must be capped, and the cap may be of the order of 1% of the total value of the asset pool. In other words, for a couple with an asset pool of \$750,000, the fee payable for family law adjudication shall be capped at \$7,500 (which is 1% of \$750,000). As a prudent measure of cost-effectiveness, it is suggested that, the Family Law Act be amended in such a way that it prescribes the fee payable for property adjudication and a cap shall be set.
- 2.7 Who can apply for property adjudication: The first SOP Act was enacted in NSW in 2002; it was followed by other States within the next 10 years (VIC 2002, WA 2004; SA 2009). The operation of the SOP Act is so successful that it has now been widely adapted in UK, Singapore and Malaysia. The principal difference between arbitration and adjudication is as follows:
(a) In order to commence arbitration, a signed arbitration agreement is required; in other words, the consent of both parties is required.
(b) In order to commence adjudication, the willingness of one party to lodge an adjudication application is adequate. The opinion of the opposing party is immaterial.
The SOP Act enabled any party to the building dispute to lodge an application for adjudication. Similarly, it is suggested that the Family Law Act be amended in such a way that either party to the property dispute may lodge an application for adjudication.
- 2.8 The decision of the adjudicator under the SOP Act is interim in nature. Similarly, for property disputes, the decision of the adjudicator under the Family Law Act shall be interim. Either party to the property dispute may apply to the Court to revise, or vary, nullify the decision of the adjudicator. Hence, the legal rights of the parties remain unaltered in the adjudication process.
- 2.9 Who can be a Family Law Arbitrator: Currently, this is prescribed in the Regulations as a Legal Practitioner who is either accredited as a Family Law Specialist recognized as such by the relevant State Law Society or Association or who has practised as a Legal Practitioner for at least 5 years with at least 25% of work done in that time in relation to Family Law.
Who can be a Property Adjudicator: It is suggested that the essential qualifications of a property adjudicator be outlined in the Family Law Act. Three points are important:

- (a) Familiarity to the Situation: The stressful situation in the family must be familiar to the property mediator, or he should have handled clients embroiled in family disputes, or he should have mediated family disputes.
- (b) Educational Qualification: The property mediator should have taken at least one course that focuses on property matters in Australian legal context. As an example, currently, Bond University, QLD, offers a two-day course that focuses on property settlements. Information is available in the web: <https://bond.edu.au/about-bond/academia/faculty-law/dispute-resolution-centre/courses-schedules>. There may be equivalent courses in other institutes that focus on property disputes.
- (c) Arbitration Training: The Resolution Institute (formerly, the Institute of Arbitrators and Mediators Australia) keeps a Register of Arbitrators. In order to gain entry into the Register of Arbitrators, the person is expected to complete a course (6-12 month course) on Arbitration Law. Further, the Institute continuously caters to the professional development of the arbitrators, by arranging for seminars, workshops and masterclasses to stay in touch with recent case law from Australian Supreme Courts. Further, the Institute reviews the registration/performance of arbitrators once in 3 years. Accordingly, it is appropriate to conclude that, if a person qualifies to be in the Register of Arbitrators of the Resolution Institute, he/she is reasonably competent to carry out arbitration.

Overall, three requirements are suggested for a property adjudicator:

- (i) A Legal Practitioner in Family Law, or a Family Dispute Resolution Practitioner accredited by the Attorney-General's Department who is holding an FDRP number; and,
- (ii) The person should have completed an appropriate course on property disputes (example, the course at Bond University) in Australian context; and,
- (iii) The person should be on the Register of Arbitrators of the Resolution Institute.

2.10 Who can appoint the property adjudicator: The SOP Act contains a provision by which a handful of 'Authorised Nominating Authorities (ANA)' are established in each State. The application for adjudication is lodged with the ANA; upon receiving the application, the ANA appoints an adjudicator. Typically, the ANA maintains a list of adjudicators who are willing to accept adjudication applications in that geographic area.

Taking guidance from the SOP Act, the Family Law Act shall provide for selected agencies to act as 'Nominating Authorities' in cities and towns. Typically, persons who are embroiled in a family dispute, walk in at a Community Legal Centre or a Family Relationship Centre (FRC) to seek help. So, these two entities are the most appropriate to act as 'Nominating Authorities'. FRC's are funded by the Attorney-General's Department and there are probably 65 FRC's spread across the country. It is not necessary that every FRC automatically becomes a 'Nominating Authority'. Depending upon the manpower & facility available, a selected group of FRC's in each State may act as 'Nominating Authorities'. Further, not-for-profit organisations like, Law Council and the Institute of Arbitrators & Mediators Australia may be willing to act as 'Nominating Authorities'. Their role is to maintain a list of property adjudicators, cater to their training & professional

development from year to year, and assign adjudication applications to those adjudicators.

- 2.11 There are other points which may be quite informative from the operation of the SOP Act. For example, the SOP Act specifies that the adjudicator is qualified to receive his fees for adjudication only if he delivers his decision on time. Similar provision may be adapted for property adjudications. This would put the parties in a secure position; if the adjudicator fails to make a decision on time (say, in 3 months), the parties do not incur any expenses.
- 2.12 Another point which may be important is that, in WA, QLD, VIC and NT, there is a central repository for adjudication decisions under the SOP Act. For example, it is specified the SOP Act that, as soon as the adjudicator gives his written decision to the parties, he shall give a copy of the decision to the Building Commission (WA). Similarly, a central repository may be recognized under the Family Law Act; an adjudicator who makes a decision regarding a property dispute shall deposit his decision in that repository.

Summary:

Specifically, in the context of Family Law Act, it is suggested to introduce the provision of adjudication for property disputes. The framework for adjudication of property disputes shall resemble the framework for adjudication of building disputes. In particular, this will involve specifying the following in the Family Law Act:

- (a) What is a property dispute?
- (b) How & where to apply for property adjudication?
- (c) Who are 'Nominating Authorities'? What is their role?
- (d) Who is a property adjudicator? What are his qualifications?
- (e) What is his fees? What is his timeframe for delivering a decision regarding the dispute?

C Raj C.B.

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