

Family law and arbitration

Unfamiliar bedfellows?

One relationship likely to become stronger in 2016 is that of family law and arbitration. **Rebekah Bassano** explains how.



Mediation, as a form of alternative dispute resolution (ADR), is usually the first step in attempting to resolve family law matters.

However, in a family law financial matter,¹ parties also have the opportunity to engage with another ADR method – arbitration.²

While arbitration is used regularly in other areas of law, in family law it is not the ‘go to’ ADR process. While there are some practitioners who practise and use arbitration processes regularly, I would suggest the vast majority of clients and practitioners do not realise that arbitration is a possibility, let alone that it can be ordered by the court.³

Legislation

The *Family Law Act 1975* (the Act),⁴ *Family Law Rules 2004*⁵ and *Family Law Regulations 1984*⁶ provide for arbitration as a “non-court based family service”. Section 10L of the Act provides a definition of arbitration and sections 10M through to 10P provide for the definition of the arbitrator, their ability to charge for arbitration and the immunity of the arbitrator in such proceedings. Practitioners are also required to make parties aware of arbitration (as an ADR process), and it is included in the Family Court/Federal Circuit Court brochure, ‘Marriage, Families and Separation’, which must be provided to clients and the other party.

The Family Court and the Federal Circuit Court can also order parties to attend arbitration.⁷ On application to the court by a party, s13E of the Act allows – on the provision that the parties consent to arbitration – for the court to make an order referring the proceedings [family law financial proceedings] or any part of them, or any matter arising in them, to an arbitrator for arbitration.

Additionally, “a court that has jurisdiction under this Act [*Family Law Act*] may, on application by a party to relevant property or financial arbitration, make orders the Court thinks appropriate to facilitate the effective conduct of the arbitration”.⁸

So why use arbitration?

So many family law proceedings are protracted. It could be likened to a war

in which “...in truth, everything which was to constitute moral depravity and human turpitude was to be found in it. It was pregnant with misery of every kind.”⁹

Litigation does not allow the parties to take ownership of the process, and while mediation can assist in reducing part of the conflict, arbitration in my view is a form of dispute resolution that allows the parties more control and ownership of the process.

The parties and their respective legal representatives together with the decision-maker (the arbitrator) can agree to a number of matters including the date, time and place of the arbitration, timetables for material to be provided, how the arbitration is to be conducted (hearing or on the papers) and other matters relating to the arbitration agreement.¹⁰

While it sounds like the court process, it can be done within a specific time period, including when the award and the arbitrator’s reasons for making the award are to be delivered. Additionally, the award can be registered with the court,¹¹ providing finalisation with respect to the issues requiring an award.

Additionally, some practitioners using arbitration also utilise it in conjunction with mediation, in either a med/arb or arb/med model. For example when parties cannot agree at mediation on an issue (or the entire matter), they can elect to arbitrate on the issue (or the entire financial matter) provided it is not within the exception of Family Law Regulation 67C – Matters that may not be arbitrated.

These practices are evolving and will require considerable thought as to what information is to be considered, or if there should be one mediator and one arbitrator, so that mediation discussions do not contaminate the arbitration process.

The year of family law arbitration?

So, in 2016 what direction do practitioners want to see the family law arena move toward? My view is that, if the parties have an ability to design the process in consultation with the arbitrator, then some turmoil could be reduced. Most parties become more focused once they are invested in the process and consulted.

The opportunity to have arbitration provides earlier certainty for parties and I would suggest

that it would certainly assist their emotional and financial wellbeing, as well as the wellbeing of family law practitioners. The burden borne by practitioners in constant litigation and drawn-out argument (which is not their own), from an anecdotal perspective, is significant. This process should be viewed as complementing the court system by supporting parties wishing to resolve financial disputes within an agreed timeframe¹² together with, at the least, a timely and cost-effective resolution.

The reality of the current court process is that financial matters are not afforded priority and parties are often left for a substantial time waiting for their ‘day in court’. Maybe with arbitration (or a combination of mediation, litigation and arbitration) more parties will have their matters resolved in a more timely manner and legal practitioners will be able to “pronounce that the kingdom is undone”.¹³

Editor’s note: On 15 December 2015 the Family Court issued the Family Law Amendment (Arbitration and Other Measures) Rules 2015, which provide more certainty for practitioners utilising arbitration in family law.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Rebekah Bassano is principal of Bassano Law, Cairns.

Notes

¹ See Reg.67C of the *Family Law Regulations 1984* for matters that may not be arbitrated.

² An arbitrator – see Reg. 67B of the *Family Law Regulations 1984* for the prescribed requirements for being an arbitrator. The Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) also has a list of family law arbitrators.

³ Arbitration in family law proceedings can only occur for financial matters.

⁴ Part II – Non-court based Family Services Division4 – Arbitration.

⁵ Part 10.3 – Summary Orders and Separate Decisions, Rule 10.14 (e).

⁶ Part 5.

⁷ *Family Law Act* Part IIIB – Court’s powers in relation to court and non-court based family services, Division 4 – Court’s role in relation to arbitration of disputes Section 13E.

⁸ *Ibid*, Section 13F.

⁹ William Pitt the Younger, 12 June 1781.

¹⁰ Regulation 67F of the *Family Law Regulations 1984*.

¹¹ Regulation 67Q of the *Family Law Regulations 1984*.

¹² Legal Aid Queensland does have an arbitration program and AIFLAM provides information regarding names of qualified arbitrators.

¹³ William Pitt, 1st Earl of Chatham, 20 January 1775.