LEGAL AID BOARD
FAMILY LAW CONFERENCE

“THEY ALL COME THROUGH THE ONE DOOR”

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Chairperson
INTRODUCTION

I am delighted to be here today as Chair of the Legal Aid Board for the Annual Family Law Conference. For those of you who do not know me I have been a specialist family law solicitor since qualification in 1977 and more recently a family mediator and collaborative practitioner. My interest in family law came from my time in FLAC. I was Director of the Rialto Centre and Chairperson of FLAC in 1975/1976. This was the time of the Pringle Committee and Report and the inauguration of the Coolock Community Law Centre now Northside Community Law Centre. While professional life may have taken me to private practice in a large law firm, the reality is that all of us practising family law use the same Court system and the emotional dynamics of our work and the needs of children of separating parents are the same whether they come from Finglas or Foxrock.

I would like to say at the outset how much I have learned and being impressed by the work of the Legal Aid Board from all its staff, Chief Executive, the senior management team, solicitors and law centre staff and the legal services and administration personnel as well as all the FMS mediators. As Chair of the Appeals Committee I see the wide variety of problems that present at Law Centres and the need that people have to access legal information, advice and aid. I look forward to working with everybody in the coming years in my term as Chair.

The theme I have chosen for this lecture is “They All Come Through the One Door”. I will explore the “door” concept in a number of ways.

The title comes from a paper given by Mary Anne Noone, Senior Lecturer at the School of Law, La Trobe University Australia on the transformative potential of an integrated service model: a study of the West Heidelberg Community Legal Service.

Since 1978 West Heidelberg Community Legal Service (WHCLS) has provided an integrated service to disadvantaged community in the northern suburbs of Melbourne. From the outset, the legal service and health centre came together to offer an integrated service at the same community centre. The integrated services focussed more on addressing a person’s needs rather than “the needs of the system”. The benefits of this multi-disciplinary approach were:

- A holistic approach to the person’s problems
- Identifying courses of action for the individual to choose from
- Immediate access to other agencies as the research shows the interconnectedness of legal, health, welfare and social problems
- The co-location of all services in the same building
• Greater efficiency and continuity of care
• Court representation for the benefit of the community as well as individuals
• The lawyers involved learned to trust and rely on the expertise of other workers

The paper also identified some challenges in how to measure the benefits of this integrated approach. While workers at WHCLS could provide numerous examples of how the provision of a range of services helped in a preventative way from a problem escalating, however, hard data and potential savings to the Exchequer was difficult to quantify. Ironically, integrated services can mean that one individual may consume more of the limited services available and thus deprive other individuals from getting any service. When resources are limited serving one client holistically may deny several other clients partial service.

THE DOLPHIN HOUSE PROJECT

This is another example of a “one door initiative”. This initiative involves the Court Services, the Family Mediation Service and the Legal Aid Board when the opportunity to co-locate arose with the moving of the District Criminal Courts to the Criminal Courts of Justice in Parkgate Street leaving space available in Dolphin House. The Courts Service statistics show a huge number of District Court applications in family law matters many of which relate to children being guardianship, custody or access. Legal Aid Board statistics show a high number of clients presented to Law Centres with similar family law issues. Statistics from the Family Mediation Service show that parents are able and willing to achieve agreement and make decisions in the best interests of their children.

In brief, what has happened in the Dolphin House project is that any caller to the District Court office is screened for suitability and whether their case comes within the ambit of the scheme. They are immediately given information about mediation and are invited to go straightaway to the 4th Floor to meet with a mediator from FMS who will give them an information session and explain the mediation process. If the caller is interested and the party and case is suitable FMS staff will contact the other party and invite them into a similar information session. If the second party also agrees to mediate the process can be commenced without delay or waiting lists. The Legal Aid Board office provides legal information and advice to clients if required. The scheme has been in operation since March 2011 and the statistics for the first twelve months show that of the parties who enquired about making an application for custody, access or guardianship 1,160 went to an FMS information session. In 741 cases the second party also attended. There were 811 joint sessions and 293 agreements. There were significant financial savings and the feedback from clients, the judiciary, Courts Service staff and FMS staff all very positive. It is hoped to publish the official review shortly.
THE DOOR OF THE COURTHOUSE

Thirty years ago if someone said their marriage was in trouble a friend would say “Talk to your Priest”. Twenty years ago if someone said their marriage was in trouble a friend would say “Talk to a Counsellor”. For the past ten/fifteen years if someone said their marriage was in trouble a friend would say “Get a good Solicitor”. In the vast majority of these situations the solicitor brought the client through the door of the courthouse. Now, fifteen years after the advent of divorce the courthouse has become the default setting in family law cases.

All those cases that I have been involved in and despite my efforts to explain to clients exactly what was involved in the Court process I still question whether clients make a full, free and informed decision about whether they want their case to end up in Court. As practitioners we are familiar with the Courts, the building, the court room itself, the lay out, the procedures, the language, the rules of evidence. Do our clients really understand what happens in Court? Do they really think that any individual Judge doing his or her very best with the facts as outlined can make the best decision? Do we tell clients and do we tell them often enough that a Court determination is a blunt instrument? For those who do try to explain the Court system to clients in a realistic way do we give the same amount of care and attention to explaining the alternatives to Court to our clients? Some of you may remember the courtroom scene in the movie Kramer v Kramer

Perhaps the courtroom is not as bruising as that today but it can be. As practitioners we pride ourselves in settling many of our cases but this is done on the steps of the Court where there has been a huge cost emotionally to the parties not the mention the financial cost and not the mention the huge damage done to the “relational estate” of those two parties who may be parents and will have to continue to work together in the best interests of their children.

Professor Jim Sheehan last year gave a presentation to the Association of Collaborative Practitioners about parenting after separation/divorce. He said that 30% of parents could work together in a shared and cooperative way. These parents would do well in mediation. They would seek and need legal advice but it would be carefully deployed. They would have a low level of inter-professional collaboration and would sparingly use physiotherapy or counselling. He said that 50% of parents would parent in parallel to each other. These parents may be worried about surrendering control. They would reach agreement and settlement through the legal process. There was often a low level of communications but also a low level of conflict. They would reach an agreement and stick to it but with little contact or input from the other spouse. They cope. In the final category of 20%, there were highly conflictual parents. 13% were very high conflict and 7% were very intense and often these people had underlying mental health issues. This group invariably had taken an adversarial
approach and gravitate towards the Courts. They use and employ their lawyers as army generals.

We must use different processes for different clients. There will always be a need for litigation for the Courts to determine those cases which cannot be settled or resolved. The Courts must also through their judgements give guidance to practitioners to allow us advise our clients on the interpretation of legislation. There will always be serial litigators who cannot pass the courthouse door without popping in to make an application.

**SHOULD THERE BE A DOOR TO A FAMILY COURTHOUSE?**

I recently reviewed the Law Reform Commission Report on family courts delivered in March 1996 as I was a member of the expert group. Although that is sixteen years ago many of the recommendations are interesting to review and still pertinent. A summary of the recommendations were:

- A reformed family court structure
- A number of regional family court centres
- A unified jurisdiction
- Diversion and family court information centres
- Pre-trial procedures and case management
- Representing the rights, interests and wishes of children
- Judicial studies and training of lawyers
- Research and statistics

The Family Justice Review 2011 in England and Wales noted that “a single family Court, with a single point of entry, should replace the current three tiers of Court”.

The Report and Consultation Paper also commented on the System’s Negative Ethos. The following quotation is worth citing in full:

“Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, it is argued, is one which encourages the responsible resolution and management of disputes wherever possible by members of the family themselves. Judicial intervention is of course necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of
inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment.”

Perhaps as lawyers we have taken over from our clients and disempowered them.

**THE DOOR OF THE LAW CENTRE**

Whether it is the door of a law centre or a solicitor’s office separation/divorce/relationship breakdown has legal dimensions but not exclusively. There are other dimensions, the emotional upheaval often overwhelming, grappling with financial information that is unfamiliar, coping with the inevitable change that separation brings, trying to protect the children.

What do people need at this critical stage of their lives? They need information. They need the knowledge of their choices and options. They need information on the services available to help them and their families. They need legal advice when they are at this crucial crossroads.

As solicitors we have for over twenty years had a responsibility to tell our clients of the other “Doors” that are open to them.

**COUNSELLING**

Many say that by the time a client sees a solicitor it is too late for counselling. That is not true. Even if a client believes that their relationship is over, one or two counselling sessions can give them a safe space to say that to their spouse/partner. It creates a safe space for the other party to hear what is said, for them both to acknowledge that the relationship is in fact over. It creates a calmer, more accepting atmosphere, it helps communication and all of this can help the legal process. We all know both parties are rarely at the same stage emotionally. One party has been out of the marriage for months or years, while the other is at the grieving stage of the cycle. I cannot over-emphasise the importance for counselling either couple counselling or personal counselling. ACCORD and Relationship Ireland are partly funded by the Family Support Agency and provide an excellent and cost effective service. Even suggesting to clients that they visit the websites and read booklets prepared by these organisations can help people. We are obliged under statute to do this we should do so with greater energy and commitment.
MEDIATION

Likewise since 1989 solicitors have had a statutory duty to discuss with our clients and give them the names and addresses of suitably qualified mediators. Why then is the uptake on mediation so low? There is now an acceptance that resolving family disputes outside the courtroom is the way to go but still there is only a small percentage using mediation. Looking at the papers delivered at the Legal Aid Board 30th Annual Conference all of the key note speakers the former President Mary Aleese, the then Chief Justice John Murray and the then Minister for Justice Dermot Ahern all encouraged mediation but still it is only a trickle. Why?

“Doing the same thing over and over again and expecting different results” is Albert Einstein’s definition of insanity. So we need to do things differently.

If you ask different questions you will get different answers. A different response.

1. Asking Traditional Questions
   - Who owns the family home?
   - Who paid for it?
   - How much is the mortgage?
   - What do you earn?
   - What assets do you own?
   - Have you got a pension?
   - Why are you separating?
   - Who is driving the separation?
   - What are my rights?

2. Asking Different Questions:
   - Tell me about yourself
   - Tell me about your husband/wife/partner
   - How are you coping with the reality of separation
   - What do you want in your new life
   - What can you offer your spouse
   - What do they need
   - What do you need from your lawyers

Believe me. Try it.
The Dolphin House initiative has demonstrated that if people are given information on mediation, particularly if the mediators themselves are available on site to explain the process a far greater number of people will take that path. So in my view, it is good practice not only to comply with the statutory duty we have but to give people real information about the mediation process. To urge them to speak to a mediator or to go to an information session. I know some of you have suggested that your FMS colleague could do one evening a week information session at your law centre and that seems like an excellent idea.

The less convinced will say that mediation is not a panacea and it doesn’t always work and that is true. However, the Dolphin House initiative has also shown (albeit in small numbers) that those who attended mediation information sessions or one or two mediation sessions themselves ultimately did not pursue a Court application or the number of times they appeared in Court diminished.

The reality is lawyers and mediators must work hand in hand. There must be mutual respect. The fact that FMS is now under the umbrella of the Legal Aid Board gives great scope to build and develop those relationships. Forging professional relationships is key. An experienced mediator while working with a couple would prefer if both had a consultation with an experienced family law solicitor (who understood the mediation process) before the mediation started. It is ideal if the parties can have a further consultation with their solicitor by phone or otherwise during the process to check on any issues that might need legal advice and finally, the lawyers then work cooperatively with each other to translate the Memorandum of Understanding arrived at through mediation into a legally binding framework or either a Separation Agreement or a Consent Judicial Separation/Divorce. This is the dream team. The lawyer is using his/her legal training and skill to advise and draft the settlement in a legally acceptable framework. The mediator is using his/her skills with the couple to help them to arrive at a solution that suits them and their family.

The essential role that lawyers play in giving couples a realistic and grounded understanding of what resorting to Court can and cannot achieve is essential. When doing my mediation training with Resolution we were told that a couple should be encouraged to take legal advice if a critical issue arose and to also suggest to the client to ask the solicitor to guarantee if the outcome they advise can be achieved.

For example, a wife wants to remain living in the family home with her young children. The husband wants the property sold as there is only a small mortgage and they could both have a very good start if the house was sold and the proceeds divided. He is even willing to give her 60%.

The wife tells her solicitor that she wants to stay in the family home and the solicitor advises that
there are several very good reasons why the Court might do this, she needs security in her home, the children are very young, the house is close to schools, the mortgage is modest and the wife can pay it each month etc. etc. If the wife asks her solicitor can that result be **guaranteed**, the solicitor is likely to give the arguments on the other side; that the Court will want the husband to have a home for himself and the children, the mortgage is small and if the house was sold both parties could make a fresh start and that the Court might be impressed with the husband’s proposal that the wife gets 60% of the proceeds etc. etc.

Solicitors inevitably see things more clearly from their client’s perspective. It is often only when the case is heard in Court that they truly listen to the perspective of the other side and what important points they may have to sway the Judge.

As a Downton Abbey fan I love the quote from the Dowager Countess (Maggie Smith) on Mr Bates predicament:

> “Lawyers are always confident before the verdict, it is only afterwards they share their doubts”.

**SEPARATION AGREEMENTS**

I believe that the third plank of the statutory safeguards is often ignored. That is the statutory duty to discuss with the parties the possibility (where appropriate) of effecting a separation/divorce by means of a deed or agreement in writing, signed and made by the parties providing for their separation/divorce. Working with your client from the outset to see what the solutions (in broad terms are) are in the case is good practice. Certainly once the financial documents have been exchanged it is essential. Litigating the case will not increase the value of the house, reduce the mortgage, make the clients income any greater, his or her bills less expensive.

So asking the client where they think the solutions lie in their case is critical for them and it will maximise the chance of getting a resolution if that is possible.

**THE COURT SYSTEM**

While this is not really the paper to discuss the Courts system the reality is that it is not the system that we would devise if we had a blank page. Are its procedures straightforward? Are the Court documents easy to understand? Do the Courts actively manage cases and intervene (at all or enough) to encourage litigants to address their family’s needs through alternative models? In the Northern
circuit in England the Judges have prepared an information sheet entitled “What the Courts expect of you” and it is given to all litigants in family law cases. In LA, California the Superior Judge writes to every family law litigant directly asking them to consider mediation or collaborative practice. But these are all questions for another day.

THE LAW

We have had huge advances in family law legislation in the past 20 years with the latest being the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. In February this year it was the 15th anniversary of the introduction of divorce. Perhaps it is time to look at the 4 year living apart rule as it forces people to live with unresolved status for a long time and often has people within the legal process for 5 years or more.

CHILDREN

Although only getting a brief mention at the end of this paper, it is essential that parents are told of their responsibility towards their children during the separation process no matter how upset or angry they may be themselves. There is now a wealth of books, DVD’s, pamphlets and information on the Internet. Barnardos and the Family Support Agency have published a series of booklets on Parenting Positively and one is for separating parents. John Sharry, and others have published a book by Veritas called “When Parents Separate: helping your children cope”. This is excellent. We all know that a case can go “off the rails” if there are serious difficulties about the children. Clients must know and understand what is expected of them from the outset.

CONCLUSION

I believe that in 5/10 years time if someone tells a friend that their marriage is in trouble that friend will say “Go to an experienced mediator” and the prospect of a contested court case over a separation will be a rare occurrence. Saying that, I do not diminish the role of lawyers but see their role as advisory and using their knowledge of the law and their skills as draftsmen to produce settlements that are binding and durable and give certainty to the parties and their children.

Muriel Walls
Chairperson