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The legislative context

Section 60I of the Family Law Act 1975 (the Act) as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006 provides that all persons who have a dispute about children (under Part VII of the Act) must make a genuine effort to resolve that dispute by family dispute resolution before they can litigate. Family dispute resolution practitioners are responsible for certifying whether or not the parties have made a genuine effort and therefore have a new role involving evaluating the performance of their clients in family dispute resolution.

Initially, family dispute resolution practitioners could grant one of four different types of certificate, but there are now five types. The first simply certifies non-attendance because the other party refused or failed to attend. The second certifies non-attendance because the family dispute resolution practitioner considers that family dispute resolution would not be appropriate. In deciding if a dispute is appropriate, practitioners are to have regard to matters prescribed in the Family Law (Family Dispute Resolution Practitioners) Regulations 2008, at Reg 25. These matters include violence, the safety of the parties, inequalities of bargaining power, the risk of child abuse, and the parties’ health. Such exclusionary factors will usually be identified in an “intake” or pre-mediation process (required by Reg 25). However, it is possible that the risk factors will not be identified until the dispute resolution process is under way. Section 60I(8)(d) was therefore amended to provide for a third type of certificate: that a person begins attending family dispute resolution but the practitioner considers that it is inappropriate to continue.

The final two types of certificate concern genuine effort and require the family dispute resolution practitioner to assess whether a person who attends family dispute resolution has or has not made a genuine effort to resolve the issue or issues. The court may take into account the kind of certificate granted in considering whether or not to make an order referring the case to family dispute resolution and in determining whether to award costs against a party. Consequently, if one party is assessed as not making a genuine effort, they may become liable to pay all or part of the costs of subsequent legal proceedings. Anecdotally, but unsurprisingly, this latter provision has made parties and their lawyers particularly anxious to avoid being given a certificate certifying that they have not made a genuine effort.

There are a limited number of exceptions to the requirement to have a certificate before commencing Part VII proceedings. These are set out in s60I(9) and include: where the application is for a consent order; where it involves child abuse or family violence; in certain situations involving contravention of a recent order under Part VII; and, in cases of urgency or where the circumstances specified in the regulations are satisfied.
Defining genuine effort

Despite the various exceptions, it is intended that most people who have a dispute concerning their children and who cannot resolve it without help will attend family dispute resolution and there make a genuine effort to resolve their dispute without litigating. Making a genuine effort is a gateway through which parents must pass before they can access a court (Kaspiew, 2008). However, what constitutes genuine effort is not defined in the Family Law Act.

Cases decided since these amendments came into force have also not provided any assistance. Cases dealing with the provisions of s60I mainly concern the exceptions to the requirement in subsection nine that the parties must obtain a certificate. In particular, there have been a number of cases where it was argued that the urgency of the application justified the absence of a certificate. No case has so far contributed to a definition of genuine effort.

Clarity about the meaning of genuine effort is important to ensure fair and consistent decision-making and to prevent “forum shopping” between different dispute resolution services (Astor, 2008; Altobelli, 2006). Further, parents and their legal representatives need to know what is expected of them, so that they can prepare for and behave appropriately in family dispute resolution.

Some family dispute resolution practitioners report that where they have issued a certificate that a genuine effort was not made, it is frequently challenged by that party’s lawyer. Practitioners dealing with these challenges need to provide clear information for the parties and lawyers about what behaviour is required for genuine effort and how their client has fallen short of the standard.

The Australian Government Attorney-General’s Department, which trains, funds and accredits family dispute resolution practitioners, has provided some guidance (Attorney-General’s Department, n. d.). The department’s suggestions include that genuine effort involves a real, honest exertion or attempt, realistically directed at resolving issues. The difficulty with this is that assessing what is real or honest or realistic is just as subjective as judging what is genuine. The professional judgements of family dispute resolution practitioners may be informed and reliable, but it is hard to defend such judgements against a client or lawyer arguing their counter opinion. Consequently, elsewhere I have suggested that a definition of genuine effort should be based not on such subjective criteria, but on the behaviour of the parties. It should require that participants in family dispute resolution demonstrate willingness to do three things that are at the core of the essential negotiating behaviours required to resolve disputes involving children under the Act. They should: first, consider options put forward by the other party; second, consider putting forward their own options; third, focus on the interests and needs of the children (Astor, 2008). These three elements of genuine effort still require professional judgements from family dispute resolution practitioners and do not dispose of all the dilemmas that practitioners face in assessing genuine effort. However, they require a focus on the parties’ behaviour rather than what the practitioner thinks was the parties’ state of mind. They should assist the practitioner to give the parties concrete advice about what is expected of them in family dispute resolution.

Commentary on genuine effort

Since the genuine effort provisions came into operation, there has been some concern that the requirement to certify whether a genuine effort has or has not been made alters the role of family dispute resolution practitioners. The traditional role of practitioners was described by Cooper and Brandon (2008) as being “an independent role as facilitators with their primary goals being to assist parents to work towards arrangements in their children’s best interests and to provide a voice for children in their parents’ discussions” (p. 109). Now, however, practitioners have a role as “assessors” in deciding whether the parties have made a genuine effort, and as “gatekeepers” between...
the parties and the court (Cooper & Brandon, 2008, pp. 109, 113; see also Polak, 2009). Some family dispute resolution practitioners are content with this new role, and are sanguine that they can use the genuine effort requirements to remind parents of their obligations to take family dispute resolution seriously. However, others are uncomfortable with their changed role and argue that it compromises their independence and can change their relationship to the parties (Cooper & Brandon, 2008; Fisher & Brandon, 2009). The issue of how genuine effort certificates are handled is thus situated within an emerging discussion of the changing role of family dispute resolution practitioners (e.g., see Bickerdike, 2007).

The private, unregulated and subjective nature of judgements about genuine effort make family dispute resolution practitioners vulnerable to criticisms that their judgements may be biased. Critiques have already been made concerning the possible bias of practitioners. Field (2006) has argued that women may be disadvantaged in family dispute resolution, for instance, where post-separation stress and trauma make it difficult for a woman to appear to be reasonable, consensus-orientated and cooperative; thus they may fail to satisfy the practitioner that they are making a genuine effort. She has argued that gendered assumptions about appropriate behaviour may also affect judgements about genuine effort; for example, there may be a tendency to judge strong, assertive or angry behaviour by women more harshly than the same behaviour by men (Field, 2006). When family dispute resolution practitioners make judgements about genuine effort that are affected by their values or opinions, they do so in a private, confidential environment. This makes it harder for parents to challenge those judgements and for family dispute resolution practitioners to defend them and thereby fortifies the arguments for a clearer definition of genuine effort.

Conversations with family dispute resolution practitioners

There is presently no research or other data about how the genuine effort provisions are working. What follows is anecdotal and arises from discussions with practitioners, including their responses to conference presentations about genuine effort. Practitioners are conscious of the difficulty of making assessments about genuine effort. Many report that they have never given a certificate of “no genuine effort”. Reasons include that some clients are struggling with very complex and difficult situations in their lives and have general problems of capacity, so that any attempt, even simply to attend family dispute resolution, constitutes a genuine effort. Others point out that evaluating genuine effort involves assessing the intra-psycho processes of individuals, and that this is an impossible task: a parent may appear to be making little effort, but it can be very hard to judge if they could do more or if they are genuinely doing all that they can in the circumstances. Family dispute resolution is no longer solely a forum for those who value consensual decision-making and have chosen to be there, but a gateway through which all who wish to go to court must pass. Parents may therefore be struggling with grief, anger, depression, mental ill health, addictions or other factors. A certificate that family dispute resolution is not appropriate may not be called for, but it may become apparent in a session that the parties do not have much to give to the process. The argument that the genuine effort provisions of the Act are unworkable and should be removed has been put to the author by a number of practitioners.

Nevertheless, other practitioners (impressionistically a minority) report that they have assessed some people as not making a genuine effort and that such an assessment is appropriate in some cases. However, some also report that a “no genuine effort” certificate frequently results in strong protests from that party or their lawyer, coupled with demands that the manager of the service reconsider the certificate. Also reported is pressure from some clients to certify that their ex-partner has not made a genuine effort, where that conflicts with the practitioner’s assessment that a genuine effort was made.

Conclusion

While it is early to make any firm judgement, the indications are that the genuine effort provisions of the Act are posing some difficulties in practice, that they may not yet be working effectively, and that some further attention to the meaning of genuine effort is called for.

Endnotes

1 Section 60I(1).
2 Section 60I(8).
3 Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2009 (Cth) added paragraph (d) to 60I(8).
4 The Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 26(1) provide that the party or their lawyer must be contacted at least twice, including in writing, giving a reasonable choice of days and times to attend family dispute resolution and warning of the possible consequences of failure to attend.
5 Section 60I(8)(b) and (c).
6 Section 13C.
7 Section 117.
8 See Reg 25.

References


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