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Improving the Efficiency of the Family Part Mediation Program

How the court might use ADR to relieve some of its burden

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There is one issue that every family court judge and practicing attorney can agree on – the Family Court docket in New Jersey is massively overburdened. According to the Administrative Office of the Courts' (AOC) website, approximately 350,000 cases are handled in the Family Division each year. As reported by the AOC for the time period between July 2014 and February 2015, 40,699 Family Division cases were added to the already-existing docket. Of that, 18,300 represented newly-filed Complaints for Divorce (45%) and 22,399 represented post-judgment motions (55%).

Judges, attorneys and litigants are all paying the price. Judges struggle to give each case the time, attention and responsiveness demanded by the issues involved. Attorneys grow frustrated with the delayed turnaround time and lack of attention given to their cases, work product and clients. Litigants grow dissatisfied with a court system that is procedurally incapable of devoting the necessary attention they feel their case deserves. They sometimes misdirect their dissatisfaction by filing appeals, malpractice suits, ethics grievances and/or refusing to pay their attorneys' outstanding fees –

thus intensifying the burden on the entire system.

The "easy" solution may be to appoint additional judges to the Family Part. However, this would be complicated by political agendas and budgetary constraints. The authors of this article submit that the burden can be eased, if not substantially alleviated, by improving the efficiency of the Family Part's Economic Mediation Program.

Origins of the Economic Mediation Program

Mediation has played an instrumental role in reducing the court's backlog. According to the American Bar Association, 70% to 80% of cases in mediation end in agreement. These agreements generally result in a high rate of compliance. Therefore, not only is the court spared the burden of handling the initial litigation, but it is also relieved from the future burden of post-judgment motions.

The benefits of mediation have already been seen in the application of the Economic Mediation Program in Family Courts. The Pilot Program for the Economic Mediation Program was developed in 1999. The success of the pilot program was remarkable. Of the 1,144 cases reviewed, 52% resulted in an agreement on all of the issues and 14% resulted in an agreement on some of the issues.

In 2005, the Economic Mediation Program was mandated by Court Rule and implemented in all counties. In summary, if divorcing parties are unable to resolve their case after appearing before the Early Settlement Panel (ESP), they are then ordered to participate in the Economic Mediation Program. The Program requires divorcing litigants to participate in two free hours of mediation with a mediator listed on that county's roster. The selected mediator can allot no more than one hour preparing for the mediation, usually by reviewing the parties' Case Information Statements and Early Settlement Panel Statements. The remaining hour is spent in session with the mediator, litigants and their attorneys. If the litigants opt to continue mediation beyond that first hour, they are responsible for paying the mediator's hourly rate. In order to be listed on the roster of court-approved mediators, the mediator must hold the various qualifications set forth in *Rule 1:40-12*.

Sixteen years after the Pilot Program was first introduced, supporters have applauded its success. However, the potential for improvement cannot be ignored.

Improving the Utilization of Economic Mediation in Dissolution Cases

In accordance with *Rule* 1:40-5(b)(2), the Supreme Court Committee on Complementary Dispute Resolution reviews and approves all applications submitted by mediators who wish to be included on the roster of court-approved mediators. The Family Court Programs Subcommittee is then responsible for adding the mediator to the roster. The roster is maintained by the AOC and posted on the Judiciary's website.

Unfortunately, the rosters distributed are inaccurate and antiquated. Attorneys who no longer practice law remain on the list. The mediators' contact information and hourly rates are frequently outdated. Additionally, an untold number of mediators who have recently become court-approved and are willing to volunteer their services have not been added.

Although an online version of the mediator roster is available on the judiciary website, it is both difficult to find and remains inaccurate. For example, a cursory review of one county's mediator roster, which purports to have been updated on January 7, 2015, includes at least one attorney who no longer practices law or serves as a mediator. It also includes two attorneys who became judges several years ago, including the presiding family law judge for that very county.

Our intention is not to place blame, but rather to identify fixable problems that hamper the efficiency of an otherwise well-regarded program. With that in mind, the following suggestions should be considered:

- (1) In order to remain on the roster, all mediators on the current list must annually update their information and confirm their desire to remain on the list. This update can be

prompted by a standard letter/email and attached form sent annually by the AOC.

- (2) Once the list is updated, the AOC should publish the updated roster on www.njcourts.com and e-mail it to all applicable family court staff.

Also, the timing of the list's distribution should be reconsidered. Currently, litigants and attorneys are expected to select a mediator immediately after participating in an unsuccessful ESP. They are not permitted to leave the courthouse without scheduling mediation and completing an "Order of Referral to the Post-MESP Mediation Program" signed by the judge assigned to their case. This Order must identify the mediator, allocation of mediation fees that may be incurred, and date/time of the scheduled session. Every family law attorney can relate to the resulting scene, where the tired and distressed litigants are leaning against a wall on opposite ends of the hallway. Both attorneys are sharing the one (inaccurate) list provided by the court staff in an attempt to agree upon a mediator on the spot. The attorneys then make multiple calls on their personal cell phones to compare their calendars and assess the potential mediator's availability. During this mayhem, the attorneys are also assessing their clients' availability and the clients in turn are consulting their work and childcare schedules. Eventually, the mediation session is scheduled.

To avoid this confusion, the county's updated roster should be appended to all ESP Notices. In the least, the Notice should direct litigants to the updated roster on the judiciary website. This will give litigants and attorneys the opportunity to mutually agree upon a mediator and assess everyone's availability prior to the ESP. While some may believe that attorneys should already implement this practice, this is difficult to do without an updated roster. Furthermore, self-represented

litigants and attorneys new to the Family Part do not have the forethought.

Implementing the Use of Economic Mediation in Post-Judgment Cases

Considering the fact that almost half of the dissolution docket is comprised of post-judgment motions, perhaps the court-sponsored mediation practice should be extended to post-judgment motion practice.

The implementation of a similar program in the Appellate Division provides guidance. The Civil Appeals Settlement Program (CASP) has achieved significant success in relieving congestion in the Appellate Division. Parties involved in certain civil appeals are given the opportunity to participate in mediation with a retired Appellate Division Judge prior to the case being completely placed in the hands of the Appellate Division. As part of an appeal, parties must complete an Appellate Division Civil Case Information Statement, which asks the parties whether they believe the case would benefit from a CASP conference. Approximately one-third of the appeals conferred have been disposed of by settlement, withdrawal or dismissal.

Similar to CASP, litigants filing motions would be required to set forth in the Notice of Motion or Cross Motion whether they believe their case would benefit from court-sponsored mediation. Unlike dissolution matters, participation in the program would not be compulsory. By volunteering to engage in post-judgment court-sponsored mediation, the parties would essentially be consenting to at least a one-cycle (two week) adjournment of their motions to allow for the scheduling and participation of mediation.

Taking it a step further, parties whose matrimonial settlement agreements include mandatory mediation clauses (requiring them to

attempt mediation before filing motions) should be permitted to first avail themselves of the Economic Mediation Program. This could be accomplished by the parties submitting an administrative request form accompanied by a copy of the applicable provision of their divorce agreement. The benefits of this are clear. Litigants can resolve the issues without first incurring attorneys' fees or consuming the court's time. Furthermore, litigants may be more inclined to include mandatory mediation clauses in their divorce agreement if they know a system is in place to help them fulfill the mediation requirement.

Of course, there are administrative efforts and costs associated with implementing these suggestions. However, as realized by the program's predecessors, the benefits outweigh the costs. If one-third of post-judgment matters are resolved by mediation (which has been the success rate experienced by CASP), the burden presently placed on our Family Part judges would be substantially alleviated. Applying this data to the post-judgment motions filed between July 2014 and February 2015, the Family Part would have been forced to address 7,466 fewer post-judgment motions. Even a reduction of just ten percent (2,240) is significant.

Conclusion

Family Law does not always lend itself to statistics. However, the success of Alternate Dispute Resolution methods in family law is undeniable. We should enhance that success by expanding the efficiency of the Family Court's Economic Mediation Program. The suggestions made in this article would certainly require some effort by everyone involved as well as minimal financial expenditures on the administrative level. However, this pales in comparison to the benefits that would be realized by the bench, bar, court staff, and most importantly, the families we serve.

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