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FOREIGN EXPERIENCE OF MANDATORY MEDIATION IN FAMILY LAW DISPUTES

The new Civil Code introduced the possibility of mandatory mediation in some family law related disputes in Hungary. Under the new regulation entered into force on 15 March 2014 courts may refer the parties to mandatory mediation in child custody cases (including visitation rights). Although courts had the possibility to suggest the parties to make use of mediation services for a long time, referral to mandatory mediation is a novelty in Hungary; however this is only a possibility and not an obligation to the judge.

Because of the recent introduction of court referred mandatory mediation, there are several open questions needing to be answered and the regulation itself is also incomplete. In my opinion more procedural rules should be implemented parallel to the setting up of a mediation service system which is able to satisfy the needs of disputing families to promote (mandatory) mediation as a real alternative to court procedures. Otherwise this instrument will only remain a theoretical possibility. There is also great need for researching mediation theory as well as the legal framework and practical experience of other countries, where mandatory mediation is already operating well. Such a research would help to identify the open questions and possible shortcomings of the Hungarian regulation, and would provide guidance and solutions on how to deal with the issue.

For this purpose I examined the legal framework in California and Australia and reviewed the accompanying research and follow-up studies on client satisfaction, case characteristics etc. Due to the limited scope of this study I present only the Australian legal regulation and study results and as a conclusion I try to pinpoint some hot topics needing to be addressed and considered in Hungary.

In 2006 a well prepared and extensive family law reform[1] has been introduced in Australia. As part of the reform (a) 65 Family Relationship Centres ("FRC") have been founded to provide family dispute resolution services, furthermore the new regime introduced (b) mandatory mediation in connection with child related disputes, (c) new rules regarding shared parental responsibility, (d) protection of children from exposure to family violence and child abuse and (e) less adversarial court procedural rules in children's matters. In the followings I summarize the family dispute resolution rules with special emphasis on mandatory mediation in parenting issues. Lastly I deal with

[1]Family Law Amendment (Shared Parental Responsibility) Act 2006, Act No. 46 of 2006

the meaningful results of the study "*Evaluation of the 2006 Family Law Reforms*"[2] from December 2009.

1. Legal Framework of Mandatory Mediation in Australia

Before the 2006 reform Australia had a traditionally widespread alternative dispute resolution system, in which several kinds of community based and non-profit organisations provided assistance, counselling or hotline services in family disputes. As part of the Family Relationship Service Program several already existing services have been expanded and many others have been newly introduced. The most important was the establishment of the aforementioned Family Relationship Centres. Their aim is to provide assistance for families in all relationship stages. They are staffed by independent professionals who offer impartial referral, advice and information aimed at strengthening family relationships in a welcoming, safe and confidential environment. They provide the core service for the provision of family dispute resolution.[3]Beside these they offer also a wide range of auxiliary services (e.g. general information and group sessions) to families with all kind of difficulties.

The Family Law Act of 1975[4] ("**Family Law Act**"), as modernised by the aforementioned 2006 reform, puts great emphasis on dispute resolution methods in family disputes and regulates several procedures, like family counselling, family dispute resolution, arbitration (only for property, spouse maintenance or financial issues) and family consultants. The law requires the parties to make genuine effort to resolve the dispute by family dispute resolution before applying for a parenting order.[5] According to the definition of family dispute resolution, it is a process in which a family dispute resolution practitioner helps people affected, or likely affected, by separation or divorce to resolve some or all of their disputes with each other, and in which the practitioner is independent to all parties involved in the process.[6] Besides neutrality another important issue of family dispute resolution and in general, of alternative dispute resolution is the question of confidentiality. The Australian Family Law Act contains detailed provisions regarding this subject, which I will also describe here in detail, since this question has relevance in light of the Hungarian regulation as well.

According to the Family Law Act a family dispute resolution procedure is confidential and the practitioner must not disclose any communication made to him/her while conducting family dispute resolution.

[2] KASPIEW et al. 2009a („AIFS report")
[3] AIFS report 2009 4.
[4] Act No. 53 of 1975
[5] Sec. 60I (1) Family Law Act
[6] Sec. 10F Family Law Act

There are exceptions to the general rule of confidentiality, where the practitioner may disclose a communication if he or she reasonably believes that it is necessary due to the following reasons:[7]

- protecting a child from risk of harm;
- serious or imminent threat to life, health or property of a person;
- reporting or preventing an act of violence, a threat of violence or an offence involving intentional damage or threat of damage to property;
- assisting a lawyer representing independently the child's interests.

Although the practitioner is charged by reporting requirements, this does not mean that the information provided by the practitioner to any authority is admissible as evidence. The rule is that anything said or any admissions made by or in the presence of the family dispute resolution practitioner shall not be admissible in any court or in any proceedings before a person authorised to hear evidence.[8] There are only two narrow exceptions in connection with child abuse.

The discussed confidentiality rules could be also a model for the Hungarian legislature; it helps to establish a friendly atmosphere, which is necessary for the parties to feel comfortable in the mediation procedure and, on the other hand it provides sufficient protection for any possible victim.

There are no regulations regarding the minimum duration of the family dispute resolution which the parties are required to attend before applying for a parenting order. According to the guidelines of the Australian Government[9] one hour of the joint dispute resolution session is free of charge, the second and third hours are also free of charge to clients who earn less than $50,000 gross annual income or receive Commonwealth health and social security benefits. For those who earn more than $50,000 a year, the second and third hour of the session are provided for a $30 fee per hour. Generally a dispute resolution session lasts two or three hours, but in case of need, subsequent sessions may also be scheduled. For subsequent sessions a fee is imposed, but the centres take into account the parties' financial situation and fees may even be waived.[10]

If the parties can work out an agreement regarding the child related issues in the course of the dispute resolution session, then such an agreement may be recorded in a parenting plan. If the parties would like to make their agreement legally binding, they may apply to the court for a consent order.

If the family dispute resolution process remains unsuccessful, the parties may apply to the court for a parenting order. At the end of the dispute resolution procedure the practitioner issues a certificate. This certificate is required for the court to hear the case.

The certificate may state one of the followings:

- both parties attended and made a genuine effort to resolve the dispute;

[7] 10H (4) Family Law Act
[8] Sec 10J Family Law Act
[9] http://www.familyrelationships.gov.au/Pages/default.aspx
[10] http://www.familyrelationships.gov.au/Services/FRC/Pages/MoreFRCInformation1.aspx

- both parties attended but one or both of the parties did not make a genuine effort;
- the other party did not attend;
- the FDR practitioner decided that the case was not appropriate for FDR; or
- the FDR practitioner decided it was not appropriate to continue the FDR process.[11]

The Family Law Act includes exceptions, which render the above rules inapplicable and thus a certificate is not required for filing an application with the court. These exceptions are:

- application for a consent order;
- responding to an application;
- urgency;
- one party or the parties are unable to participate effectively in the dispute resolution proceeding;
- there are reasonable grounds to believe that there has been or is a risk of child abuse or family violence;
- application in connection with a former parenting order because of a contravention of the other party.[12]

Despite of the fore mentioned exceptions from the mandatory participation in the family dispute resolution procedure, the court can still consider ordering the parties to attend mediation. Even if there has been a history of child abuse or domestic violence in the family, the court is barred to hear the case unless the applicant has indicated in writing that he or she received information from a family counsellor or family dispute resolution practitioner about the services and options available in case of abuse or violence.[13] Should there be a risk of imminent child abuse or family violence this rule is also inapplicable. These provisions show how committed is the Australian government towards mediation, but on the other hand it gives rise to some criticism as well.

2. Follow-up Research on the 2006 Reform of the Family Law System of Australia

In 2009 a wide scale research has been published (*Evaluation of the 2006 Family Law Reforms*) by the Australian Institute of Family Studies to evaluate the impact of the 2006 reform ("**AIFS report**"). Before beginning with the presentation of the study results it should be noted that only a small minority of cases needed actual judicial intervention. Most divorce and separation cases involving children are arranged by the parents without any outside help or after seeking legal advice or some kind of voluntary counselling or alternative dispute resolution services. Only in 5-10% of the cases was judicial intervention necessary. Mandatory mediation is relevant only in these cases.

[11] http://www.familyrelationships.gov.au/Documents/family_dispute_resolution_brochure_0.pdf
[12] 60I (9) Family Law Act
[13] 60J (1) Family Law Act

Out of these about 40%[14] ended with an agreement. Considering the fact, that these are mostly high-conflict cases, this success rate is impressive.

Main pathways to reach a parenting agreement

Table 1[15] shows the answers of parents – who had reached parenting arrangements – about their main pathway of reaching an agreement.

Main family law pathway used to reach agreement	Pre-reform	Post-reform
Counselling, mediation or FDR	**6%**	**7.3%**
Lawyer	**10.6%**	**5.8%**
Courts	**7.8%**	**2.8%**
Discussions	**54.1%**	**65.8%**
Nothing special, it just happened	**16.8%**	**15.6%**

There is a rather significant increase in the number of parents, who indicated discussions with the other parent as the main pathway of arranging a parenting agreement, and also a slight increase of those parents whose answer was counselling, mediation or family dispute resolution. On the other hand, there has been a 5% drop in the number of cases which were sorted out with the help of lawyers and courts, out of which court cases have fallen below 3%.

The data in the above table might be however somewhat misleading; the real picture is more complex. The reason is that other findings of the AIFS research show that 38% from those parents who answered resolving matters mainly through discussions also reported to have used counselling, mediation or FDR services and 31% consulted lawyers.[16] It is beyond doubt that even if the parties reached a parenting agreement on their own, attending counselling or mediation services or obtaining legal advice could have played a significant role in reaching a parenting agreement.

Parent satisfaction

[14] AIFS report E2
[15] Based on the AIFS report 66.
[16] AIFS report 67.

Table 2[17] displays parents' post-reform satisfaction with the process of reaching parenting agreements. The original table indicated the answers of fathers and mothers separately, but for a better understanding this table contains only aggregate data.

	Discussions	**Counselling, mediation, FDR**	**Lawyer**	**Courts**
The process worked for you.	**87.8%**	**73.1%**	**62.7%**	**50%**
The process worked for the other parent.	**88.6%**	**73%***	**70.5%**	**56%**
The process worked for the child.	**88.7%**	**76.5%**	**63.1%****	**54.9%**
The result was what I expected.	**86.5%**	**68.9%**	**65.9%**	**56.2%**
I had adequate opportunity to put my side forward.	**86.3%**	**83.5%**	**66.3%**	**57.3%**
The other parent had adequate opportunity to put her/his side forward.	**95.3%**	**95.2%**	**89%**	**84.8%**
The child's needs were adequately considered.	**93.2%**	**86.3%**	**67.9%*****	**60.8%**

The data clearly present that parents who reached parenting arrangements via discussions have a very high satisfaction rate, which is of course understandable, since this indicates that these separated parents can work together rather easily and they have most probably a friendly relationship after separation. Parents who made use of counselling, mediation and family dispute resolution services also gave quite high rates, especially to the questions regarding adequate opportunity to put forward his/her own and the other parent's side and that the child's needs were adequately considered. Lawyers were rated considerably lower, especially in connection with child related questions. Courts got the least favourable rates, for most questions only between 50-60%.

It has to be noted that the aggregate data fail to show that in the case of some questions there was a significant difference between the satisfaction of fathers and mothers. Between parents resorting to counselling, mediation and FDR services there was a significant difference (almost 16%) between fathers (80.9%) and mothers (65.1%) to the question "the process worked for the other parent". This indicates that both sides

[17] Based on the AIFS report 82.
*Significant difference between answers of fathers (80.9%) and mothers (65.1%)
** Significant difference between answers of fathers (56.2%) and mothers (70.8%)
*** Significant difference between answers of fathers (60.6%) and mothers (75.2%)

felt that the outcome of the parenting arrangements was more favourable to the mothers. Concerning lawyers there was also a 15% gap in connection with both child related questions, with fathers giving less positive ratings than mothers. Attention should be paid to such differences between the satisfaction rates of the parents, as this is an indicator that parenting arrangements might not always mean a real win-win solution and this can lead to new disputes.

Challenges and issues for family relationships

Table 3[18] shows the answers of fathers and mothers separately to questions whether they have experienced family violence and if mental health problems, alcohol or drug use were relevant to their relationship.

	Fathers	**Mothers**
Physical hurt	**16.8%**	**26%**
Emotional abuse alone	**36.4%**	**39%**
No violence reported	**46.8%**	**39%**
Mental health problems	**22.7%**	**29.1%**
Alcohol or other drug use	**20.1%**	**36.5%**
No mental health problems and addiction issues reported	**64.7%**	**49.8%**

The data indicate "*that family violence affects a substantial proportion of separated parents. Such families are the predominant users of both the family relationship services system and the legal and court systems*".[19] Nearly two-thirds of mothers and half of the fathers reported experiencing emotional abuse or getting physically hurt by the other parent; every fourth mother indicated to have been physically hurt. These are somewhat alarming numbers, especially in the light of the fact that 72% of mothers and 63% of fathers indicated that the children were witnessing abuse or violence.[20]

The data[21] on mental health issues and especially the high rate of alcohol and drug use also give reason for concern. Mothers seem to be much more anxious about these issues, half of them expressing concerns about at least one such issue. Furthermore, the problems of family violence and mental health issues or alcohol/drug use are unfortunately not isolated problems, just the opposite, they are usually linked together; both mental health issues and alcohol or drug use increase the risk of family violence.

[18] Based on AIFS report 26., 29.
[19] AIFS report 23.
[20] AIFS report 26.
[21] The data do not represent which parent exhibited such problems.

Education of parents

The review of the educational background of separated parents is a really interesting topic, especially in comparison with the usage of early intervention services, which I discuss in the following paragraph. The AIFS report indicates that the educational level of separated parents was lower than of those who are living together.[22] Among separated parents the proportion of parents with no post-secondary education was a little above 50% and those who had a degree or higher qualification only 13.45%. This of course should not mean that smarter or more educated people will separate with less likelihood; it may only indicate that clients who are referred to mandatory mediation are probably less educated people. This should be taken into account in the training of counsellors, mediators, family dispute resolution practitioners in order to communicate and understand more effectively the needs of these people.

Usage of early intervention services

In Australia the usage of early intervention services seems to be quite common. 27% of the answering parents declared that at some stage they considered their relationship to be in real trouble; out of these parents 50% said they resorted to some kind of relationship services. Around 13% out of those parents who did not think their relationship was ever in real trouble said that they nonetheless sought help to 'support their relationship'.[23]

Table 4[24] includes the most frequently used services to resolve relationship problems (relationship was/is in real trouble) or to support the relationship (relationship was/is not in real trouble).

Had sought help with relationship issues	Resolve problems	Support relationship
Family relationship centres	**21.2%**	**12.8%**
Marriage and relationship counsellor	**62.6%**	**43.1%**
GP or other health professional	**37.7%**	**30.9%**
Religious leader/elder	**13.5%**	**28.3%**

In the educational background of those who used early intervention services a reverse tendency may be observed in contrast to separated parents. Between parents using early intervention services 47.2% had a degree or higher qualification, 30.4% other post-secondary education and only 22.5%was without post-secondary education.

[22] AIFS report 24.
[23] AIFS report 44.
[24] AIFS report 45.

Criticism

After the presentation of the Australian experience I would like to come up with some criticism and concerns about the mandatory mediation system of Australia.

The AIFS research found that one area needing improvement is the referral system itself, which should guarantee that families access the right services in proper time. There are still families with child abuse or family violence issues who are circling between relationship services, lawyers, courts, state-based child protection and the family violence systems; better communication and cooperation between the aforementioned services is necessary to solve this problem.[25] According to the AIFS report a significant number of family dispute resolution practitioners (about 20%) thought that FDR was not appropriate for 25% of the families, who attended FDR, because of family violence or child abuse issues.[26] This shows that even in Australia a better monitoring system has to be developed to filter out cases with family violence or child abuse issues and the exceptions should be applied in order these cases can proceed directly to court.The total exclusion of families reporting family violence or child abuse issues from the FDR services however seems also undesirable.

Other critics say that the emphasis is on reaching a parenting arrangement in the FDR system with no proper guaranties to ensure that children are heard and their interests are taken into account. For court procedures these issues are regulated in detail.[27]

3. Considerations for Hungary

Personally, I am a real supporter of mediation and also mandatory mediation in family law disputes. I think that here in Hungary most people are not used to the methods of dealing with conflicts in general and many lack the responsibility or empowerment to resolve their own disputes; therefore they seek the decision of a third party, usually a judge. I firmly believe that many parents, if the opportunity and support is given, could agree on parenting arrangements and solve any other family dispute without the intervention of the judicial system.

The government made some attempts to promote mediation in the field of family and labour disputes and also in criminal cases in the recent years. In spite of these the potential of mediation remains unexploited. The introduction of court referred mediation may be a good way to direct parents to use a procedure more suited for the resolution of their disputes (mediation in this case). For court referred mediation to reach its goals however several aspects and questions need to be considered and dealt with.

[25] KASPIEW et al. 2009b 10.
[26] AIFS report 106.
[27] MACLEAN et al. 2011 323.

First of all, an appropriate and accessible mediation service system has to be established, with enough resources and qualified mediators to deal with an increased case load. Not only the numbers are differing from the cases handled before the introduction of mandatory mediation, but more complex and difficult situations are expected to arise. This means that proper operational conditions (facilities, mediation rooms, child care staff etc.) should be provided and the mediation facilities should be made easily accessible in every part of the country. Accessibility in this context means two things, physical accessibility but even more importantly proper information on the available possibilities. My personal opinion is that these conditions are still pending in Hungary.

The second issue relates also to one aspect of accessibility, namely charges. As we could see in Australia mediation services are free or low fees are applicable. Under Hungarian circumstances it would be essential for mandatory mediation services to be free of charge, since many people are affected by poverty. Independent mediators usually charge fees for their services, since they do not receive governmental subsidies. Since 2012 there is a possibility of court mediation (which is mostly conducted by court clerks) which is free of charge. It may be argued that a court based/connected or an independent mediation system would be desirable. I personally consider that an independent mediation service system would be the most adequate, but a well organised court-based system can also be effective. The preparedness and efficiency of the current court-based mediation system in Hungary is highly questionable. Court clerks receive insufficient training in mediation and are part of the judicial system, which demands a different kind of approach from them. The current court-based mediation system can only be regarded as an interim solution needing a full review on the long run.

Now we arrive to the third question, namely the education, training and preparedness of mediators. As we could see on the usage of (voluntary) early intervention services in Australia, those services were mainly used by more educated people, who realised that they need help to resolve relationship problems or to make divorce arrangements. In these cases communication is still present between the parties along with the intention to solve problems together. This may be most probably the case in Hungary as well. In a mandatory mediation system however there are many challenges mediators face, which they did not experience before. More clients from different educational and cultural background will be referred to mediation, who require a different attitude. Most importantly however, more high-conflict cases, where parents ceased communication with each other or where domestic violence or alcohol or drug abuse is an issue may end up in mediation. The whole service system has to be prepared to deal with such difficult issues, therefore in my opinion much more empirical research is necessary and pilot projects should be initiated to see where the current regulation is incomplete and should be refined further. Furthermore, the mediators' training system should be globally reviewed to adjust to the new requirements that mandatory mediation brings along.

The last and most important question is however, whether courts will make use of mandatory mediation. As mentioned in the introduction, the referral to mandatory mediation is only a possibility and not an obligation of the courts. Courts although

having the opportunity, have not often referred parties to voluntary mediation in family disputes. The commentary to the new Civil Code says that courts should refer child related cases to mandatory mediation, if the judge considers that there is a good chance that the parties may agree on parenting arrangements in frame of the mediation procedure.[28] I gather that the reason for the government introducing a mere possibility of referral was that they also recognised that the conditions for mandatory mediation are yet to be met. The government should nonetheless encourage judges to refer more difficult cases to mediation. A good way for this would be the launching of pilot projects, in which most cases would be referred to mediation. If the rather sceptical approach of judges towards mediation does not change, the intention of solving child related disputes in a less adversarial and more solution oriented way will remain fruitless. In this context mandatory mediation does not seem like that much mandatory anymore.

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[28] PETRIK et. al. 2013. 279.