

PRACTICE NOTE: HAGUE CONVENTION CASES: MEDIATION PROCESS – REMOVAL, RETENTION AND ACCESS

1 FILING OF APPLICATION

- 1.1 Upon the filing of the application in the Court, it shall be referred without delay to a Judge to consider the issue of mediation.

2 CONSIDERATION OF MEDIATION

- 2.1 Unless the Central Authority has advised the Court that the left behind and taking parents are attempting a resolution by way of mediation, counsel instructed for the Central Authority shall advise the Court at the time of the filing of the application whether or not he or she considers that mediation may be appropriate in the particular case.
- 2.2 If the Court considers that mediation may be appropriate, a letter will be sent to the taking parent outlining the mediation process, its voluntary nature and inviting his or her participation.
- 2.3 If it is determined that mediation is appropriate, counsel to assist shall be appointed to conduct counsel-led mediation. The Registrar shall appoint a lawyer (approved in accordance with the procedure set out below) to conduct the mediation.
- 2.4 It shall be made clear to both the left behind parent and the taking parent that neither shall be compelled to participate in the mediation process. The parties shall be advised that mediation does not in any way dilute the legal process nor is it derogating from either party's right to ask the Court to determine the application. A willingness to mediate is not to be seen as acquiescence on the part of the left behind parent.

3 TIMING OF MEDIATION

- 3.1 Mediation must not delay the Court proceedings and will run parallel to but separate from the Court process.
- 3.2 If mediation is considered appropriate in a particular case, mediation will be scheduled to occur as soon as practicable after receipt of the application. Mediation should occur within seven to 14 days.
- 3.3 Mediation can occur any time after the direction has been made appointing counsel to assist and preferably before the judicial conference.
- 3.4 However, mediation can be revisited at the judicial conference if mediation was for some reason not considered previously and there are indications that it is appropriate. If mediation is agreed to at the judicial conference, it shall be scheduled within two to seven days of the judicial conference.

4 MEDIATION PROCESS

- 4.1 The parties will be provided with information about the mediation process and what to expect.
- 4.2 Mediation will be by way of telephone, skype or other webcam/internet facility. If audio-visual (AVL) is available and the parties agree to fund the use of this facility or it is cost neutral, then AVL may be an option.

- 4.3 Parties will be in separate locations to the mediator to ensure that neither party is disadvantaged. If a party elects to travel to New Zealand to participate in mediation at his or her own cost, then mediation may be conducted at the same location.
- 4.4 If counsel attend the mediation, they are there to observe, to participate if requested or invited to by the mediator and to provide clarification and advice, if sought. It is important that counsel are aware of what has occurred at mediation and are able to facilitate and/or draft an agreement.
- 4.5 All parties are to be given the opportunity and encouraged to access independent legal advice. If counsel are not present at mediation, counsel may be available by telephone, e-mail or to meet with the party before any agreement is signed.
- 4.6 If agreement is reached, the mediation may need to be adjourned to ensure any orders sought are enforceable in both States.
- 4.7 At the conclusion of the mediation, if agreement has been reached the mediator shall provide a report setting out the substance of the agreement and whether any orders are sought from the Court. Counsel for the parties will draft a memorandum for filing in the Court, seeking orders on the terms as agreed.
- 4.8 The fees and expenses incurred in the appointment of counsel to assist under paragraph 2.3 shall be payable in the first instance out of the Crown Account, subject however to the jurisdiction of the Court to order either or both of the taking and left behind parents to make a refund of all or part of those fees and expenses pursuant to s 131(4) of the Care of Children Act 2004.

5 JUDICIAL CONFERENCE

- 5.1 The application will be served and set down for a judicial conference in the usual way. It is anticipated that the judicial conference will be held within 14 to 21 days of the application being filed.
- 5.2 If mediation has not been held or completed by the judicial conference, timetabling directions will be made at the judicial conference to avoid delay in determining the application for return of the child(ren).
- 5.3 If agreement is reached at mediation, at the judicial conference a Judge may:
 - (a) give leave to the applicant to withdraw the application; or
 - (b) make orders by consent if the Court is satisfied that there is jurisdiction to do so.

6 NON-ADMISSIBILITY OF EVIDENCE

- 6.1 Any statement, or admission disclosed or made to a mediator or during the course of mediation is not admissible in any Court, or before any person acting judicially.

7 LAWYER FOR THE CHILD

- 7.1 If the child is of an age or has a level of maturity where it is appropriate to take his or her views into account and/or defences have been indicated that are tenable, the Court may consider the appointment of lawyer for the child, who is to report by memorandum prior to the mediation conference. If a lawyer for the child is appointed, his or her attention must be drawn to the fact that any considerations in Hague Convention cases are not welfare based. Counsel's role is to ensure that the mediator is aware of what the child says and what is important to him or her.

- 7.2 The appointment of lawyer for the child prior to a counsel-led mediation in Hague Convention cases is to be considered in accordance with Practice Note: Lawyer for the child: Selection, appointment and other matters and Practice Note: Hague Convention cases: New Zealand Family Court Guidelines.
- 7.3 It is not anticipated that a child shall attend or be present at mediation. If the lawyer for the child is required to attend, that attendance is to provide information on the child's views but only if the child wishes his or her views to be expressed.

8 HAGUE MEDIATORS

- 8.1 A panel of lawyers will be identified as mediators in Hague Convention cases after agreement between the Central Authority and the Principal Family Court Judge.
- 8.2 All mediators must have a good knowledge and experience of Hague Convention proceedings and principles. The mediator will be expected to have undertaken training and have experience in mediation. Mediators must be appointed in accordance with the Counsel-led mediation guidelines issued by the Ministry of Justice, which relate to the Early Intervention Process in Care of Children Act 2004 cases.
- 8.3 The list of approved mediators will be made available to Judges, who will be encouraged to appoint mediators from the approved list.
- 8.4 Hague Convention mediators will be given a maximum of three hours to set up and prepare for the mediation and up to five hours to conduct the mediation and provide any report to the Court.
- 8.5 Hague Convention mediators are referred to the Counsel-led mediation guidelines setting out what is expected of mediators.

9 RIGHTS OF ACCESS

- 9.1 The foregoing provisions in these Guidelines shall apply to applications to enforce rights of access, with the necessary modifications.

10 DEFINITION

- 10.1 The term "parent" includes:
- (a) any person who is an applicant for the return of a child;
 - (b) any person claiming to have rights of access in respect of a child;
 - (c) any person who opposes the return of a child; and
 - (d) any person who opposes a claim for access to a child.

COMMENCEMENT DATE

This Practice Note is issued on 24 March 2011 and comes into operation on 24 March 2011.



Judge P F Boshier
PRINCIPAL FAMILY COURT JUDGE