



## MANDATING MEDIATION IN RESOLVING FAMILY DISPUTES IN THE MALAYSIAN CIVIL COURTS

*by*

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### **ABSTRACT**

Family law disputes, unlike a normal civil dispute, are future-focused and addresses very delicate and sensitive issues, namely, divorce, custody of minor children, maintenance of spouses and children, division of matrimonial properties, and matters incidental thereto. The current trend in resolving family disputes under the civil law legal system in Malaysia is *via* litigation, which is very adversarial, time-consuming and traumatic for all parties in the dispute. Although mediation is offered as an option under the civil law legal system and encouraged by the courts to resolve family disputes and Mediation Centres have been established within the civil court premises, namely, at the Kuala Lumpur High Court and Shah Alam High Courts, respectively, statistics reveal that its reception is unsatisfactory. Hence, this paper will address the current mediation proceedings under the civil law legal framework, the reception and shortcomings and advocate mandating mediation in resolving family disputes by proposing amendments to current legal provisions and Practice Direction to achieve a more holistic and family-friendly outcome for the benefit of the disputants and all stakeholders involved in the dispute.

**Keywords:** family law, family disputes, civil court, civil law, mediation

## 1. Introduction

Family disputes, unlike other civil disputes, entail very sensitive, delicate, and contentious issues. The current civil law legal system, which is very adversarial, is not suited for resolving family disputes. Lengthy and protracted litigation and undue delay in resolving disputes affect parties not only mentally and emotionally but also financially. The outcome of the dispute generally reflects one winner and one loser. Hence, a more holistic and family-friendly resolution is needed to be adopted so that parties in dispute achieve a satisfactory outcome and each party to the dispute comes out as the winner. One method this can be achieved is by considering an alternative dispute mechanism, namely, mediation.

## 2. Mediation: An Overview

Mediation, according to Folberg and Taylor,<sup>[1]</sup> ‘is a process when the parties in most instances, together with the assistance of a neutral person or persons, systematically isolate disputed issues to develop options, consider alternatives and reach a consensual settlement to accommodate their needs’. Emery *et al*<sup>[2]</sup> describe mediation as a non-adversarial settlement, a family-friendly intervention method that assists post-separating families to deal with divorce and other conflicting issues. In the Malaysian context, mediation is defined in the Legal Aid Act 1971<sup>[3]</sup> as:<sup>[4]</sup>

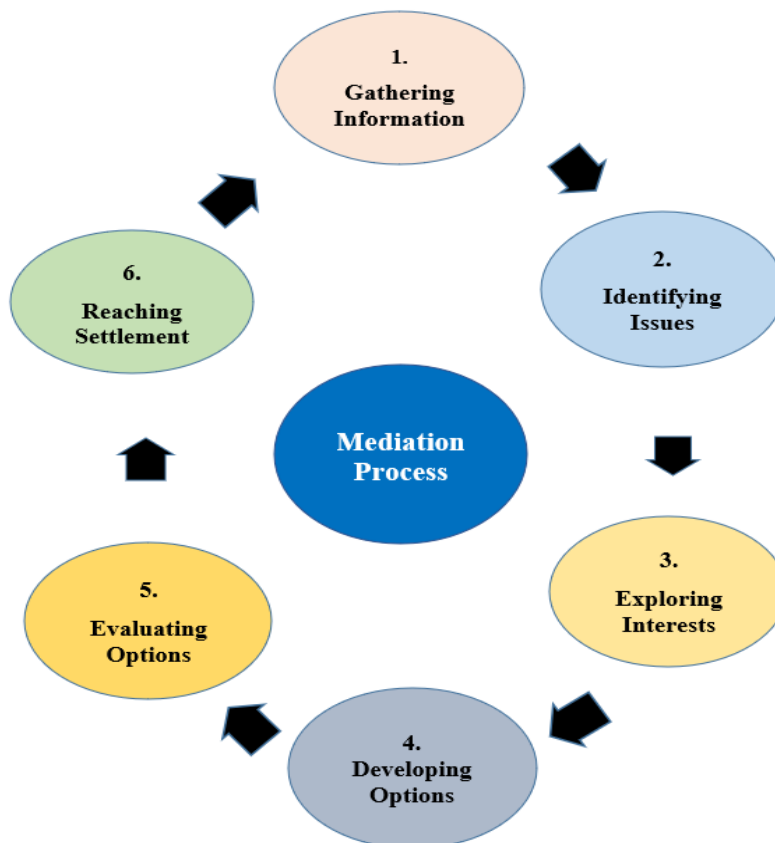
- the undertaking of any activity to promote the discussion and settlement of disputes;
- the bringing together of the parties to any dispute either at the request of one of the parties or on the initiative of the Director-General of Legal Aid; and

- the follow-up of any matter being the subject of discussion or settlement.

In contrast with the adversarial system, mediation is deemed a more humane method than the courts' combative approach, especially in dealing with family disputes. Further, it encourages the parties to resolve their disputes collaboratively.<sup>[5]</sup>

## 2.1 Mediation Proceedings

The normal stages in a mediation process are illustrated in Figure 2.1 below. Generally, a mediation proceeding will involve the following stages:<sup>[6]</sup>



**Figure 2.1: Flow of Mediation Proceedings**  
(Source: Based on researcher's analysis of data)



The mediation proceedings are explained as follows:

- **Step 1: Gathering information** – This is a vital step whereby parties are given an opportunity by the mediation to tell their side of the dispute.
- **Step 2: Identifying issues** – Here, the mediator as the neutral third party facilitates the discussion by assisting the parties to identify the issue(s) in contention.
- **Step 3: Exploring interests** – At this point, the mediator and parties explore the key reasons for the respective positions taken by the parties and their interests in the dispute.
- **Step 4: Developing options** – At this juncture, the mediators and parties build on options that conform to the parties' interests and address the issue(s) in dispute.
- **Step 5: Evaluating options** – Now, parties identify possible areas of agreement by evaluating their options based on an objective criterion.
- **Step 6: Reaching settlement** – Finally, if the parties agree on a settlement, it can be recorded in a Settlement Agreement during the mediation.

The foregoing discussion gives an overview of mediation and its processes.

In mediation, as a neutral third party, the mediator plays a key role in assisting the disputing parties to reach a settlement. Hence, the role of the mediator needs to be considered and will be addressed accordingly.



## 2.2 The Mediator

In mediation, the mediator as a neutral third party plays a pivotal role in assisting disputing parties to settle their disputes in a non-confrontational and combative manner. There are vital pre-requisites to understanding the significance of the role of a mediator.

### *Neutrality*

The mediator is a neutral third party who is a catalyst in the negotiations between the disputants. As such, the mediator must be free from favoritism, bias, or prejudice both in conduct and appearance. The mediator uses a wide range of inter-disciplinary skills involving communicating, listening, observing, analyzing, questioning, drafting, problem-defining and problem-solving. Hence, the mediator must be impartial.<sup>[7]</sup> A mediator, not having coercive power, helps parties reach agreements by identifying issues, exploring possible bases for consensus, encouraging parties to accommodate each other's interests, and uncovering the underlying causes of conflict. Mediators must draw out baseline positions and interests that would be impossible if the parties were constantly looking over their shoulders.

### *Individual responsibility*

Although the mediator demonstrates neutral behavior, the parties to the dispute must also take on individual responsibilities in addressing the dispute in several ways. One of the two ways is where the parties must display a decision to 'stand up for themselves.'<sup>[8]</sup> As such, it is the mediator's duty to make sure that each party stands up for himself or herself. The ultimate decision or agreement reached by the parties is their own responsibility.

The other way is where the parties take individual responsibilities for resolutions in the mediation process. Any final substantive decision or



agreement is the responsibility of the parties. The neutral mediator has no power or authority to force a decision on the parties.<sup>[9]</sup>

### ***Confidentiality***

It is vital that the mediator and all parties to the mediation have a clear understanding of the confidentiality of the mediation proceedings before the mediation begins. Mediation often discloses deep-rooted sentiments on sensitive matters and often necessitates disclosing facts that disputants would never otherwise admit. Confidentiality ensures that parties will voluntarily enter the process and further enable them to participate effectively and successfully.<sup>[10]</sup> Any documents, statements given, evidence tendered, disclosed, or made during mediation by any party will be protected by the ‘*without prejudice privilege*’ and cannot be referred to or used against them subsequently if a settlement between the parties is not achieved.<sup>[11]</sup> However, parties may waive the without prejudice privilege where both parties consent to the waiver.<sup>[12]</sup>

### ***Mutual fairness***

Another essential pre-requisite is for the parties to achieve a common agreement that is deemed fair. Although the neutral mediator facilitates the mediation process to reach this agreement, it is ultimately the parties’ responsibility to agree to what they deem a fair settlement agreement. There are two aspects that influence mutual fairness in the mediation process. Firstly, mutual fairness stresses that self-interests are not the only central point. The needs of the other parties in the conflict must be understood and recognized. Fuller, discussed this when he described the ‘central quality of mediation’:<sup>[13]</sup>

“... its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and

shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”

Secondly, mutual fairness allows the parties to evaluate and weigh societal norms or values in resolving the conflict. Therefore, mutual fairness may be affected by the parties’ perceptions of how an agreement impacts human values. In assessing societal norms and values, the parties decide what is mutually fair. The mediator, being impartial, does not impose his or her advice.<sup>[14]</sup>

### ***Competent in mediating the dispute***

To conduct mediation, a mediator should have adequate knowledge of relevant procedural and substantive issues to be effective. The mediator’s responsibility is to prepare before the mediation session by reviewing any statements or documents submitted by the parties. In addition, the mediator must have a wide range of inter-disciplinary skills involving communication, listening, observing, analyzing, questioning, drafting, problem-defining, and problem-solving skills. It is only ethical for a mediator to refuse to serve or withdraw from the mediation proceedings if the mediator becomes physically or mentally unable to meet the parties’ reasonable expectations.

### **3. Mediation Practice in the Civil Courts in Malaysia**

In Malaysia, the reception of settlement of civil disputes *via* mediation as an alternative method of dispute resolution is not widely practiced, unlike Singapore, India, the United Kingdom, and other jurisdictions where there is a proper legal framework for its incorporation in the justice system.<sup>[15]</sup> Although various stakeholders<sup>[16]</sup> have tried to encourage disputants in civil suits to go through mediation before adjudicating their matter in court, the reception has been unsatisfactory<sup>[17]</sup> as there is no mandatory rule to sanction mediation nor proper legal framework in implementing mediation. As such,

the traditional litigation route in resolving family disputes is the preferred option, and mediation is simply being practiced voluntarily with the prior consent of the disputing parties.

### **3.1 Court-Annexed Mediation in the Civil Courts**

Court-Annexed Mediation refers to mediation services offered by the courts as part of its judicial services where judges and judicial officers act as mediators to help litigating parties after they have commenced their action in court.<sup>[18]</sup> The Malaysian judiciary introduced this method of mediation to clear the backlog of cases back in 2005, wherein the annual report 2005/2006 stated that:

“... the absence of [a] critical provision such as the power of the court to direct parties for Alternative Dispute Resolution (ADR) is another reason [for the delay in disposing of cases].”<sup>[19]</sup>

Presently, there is no primary legislation in Malaysia that expressly provides for litigants to resolve their dispute through court-annexed mediation or contemplate mediation as a mode of resolving a dispute. However, reference to O. 34 r. 2(1A) and (1B) of the Rules of Court 2012<sup>[20]</sup> in relation to mediation can be referred which provides that:

#### **“2. Pre-trial case management when directed by the Court (O. 34 r. 2)**

...

(1A) If a judge of the High Court identifies that an issue arising in the action or proceedings between the parties can be resolved by way of mediation, the judge may refer the parties to mediation as prescribed by practice directions issued from time to time.

(1B) All running down cases shall be subject to mediation.”



Reference to mediation is also reflected under the Rules of Court 2012,<sup>[21]</sup> where the Courts can exercise discretion as to costs if parties fail to mediate. The Rules provide that:

“The court ... shall, to such extent, if any, as may be appropriate in the circumstances, take into account-

...

(c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.”

Hence, the provisions in the 2012 Rules confirm that litigants must consider mediation as an alternative to litigation and that it is now rooted in the civil litigation landscape in Malaysia.<sup>[22]</sup> Due to the absence of primary legislation governing court-annexed mediation in Malaysia, judges mainly refer to two primary sources of mediation rules, guidelines, and procedures which is the Practice Direction No. 4 of 2016 (Practice Direction on Mediation) that came into force on 15 July 2016 and the Rules for Court Assisted Mediation introduced in 2011.<sup>[23]</sup>

### **3.2 Practice Direction No. 4 of 2016**

Practice Direction No. 4 revoked the previous Practice Direction No. 5 of 2010 on mediation and came into force on 15 July 2016. According to the Practice Direction, all High Court judges and its Deputy Registrar and all Sessions and Magistrates Court judges and their Registrars may ‘*give such directions that the parties facilitate the settlement of a matter before the court by way of mediation.*’<sup>[24]</sup> The objective of this Practice Direction is to persuade parties to arrive at an amicable settlement without going through or completing a trial or appeal. Lawyers representing litigating parties are

expected to cooperate and assist their clients in reaching an amicable settlement.<sup>[25]</sup> The Practice Direction offers the following modes of referrals to mediation, whereby parties are given the option to select:

- Option A – Judge-led mediation; or
- Option B – By a mediator agreeable to both parties.
- Option C – By Kuala Lumpur Regional Centre of Arbitration (now known as Asian International Arbitration Centre).

In the judge-led mediation, the general rule is not to have the judge hearing the case preside as the mediating judge unless the parties in dispute agree.<sup>[26]</sup> In the event parties disagree, the judge should pass the matter to another judge to mediate the case. During the mediation session, lawyers representing the parties must be present unless they are not represented by any legal counsel. The judge will record a consent judgment on the settlement agreement on the agreed terms, where mediation is successful. However, if the mediation is unsuccessful, the case is reverted to the judge hearing it and the judge shall resume the case until its disposal. To boost court-annexed mediation, the Malaysian judiciary introduced a free court-annexed mediation programme using judges as mediators in August 2011. This pilot project subsequently resulted in the establishment of the Kuala Lumpur Court Mediation Centre (KLMC). The KLMC has since been renamed the Court-Annexed Mediation Centre Kuala Lumpur (CMCKL) situated within the Kuala Lumpur Court Complex. The Centre is equipped with mediation rooms, caucus rooms, and telecommunication services for the benefit of litigants. Hence, mediation is no longer conducted in Judges' Chambers but the CMCKL premises. Under the court-annexed mediation programme, cases must first be filed in court before mediation takes place. Parties must first fill in the consent for mediation form, and subsequently, a date would be fixed for mediation. If

mediation is successful, the parties will execute a settlement agreement, and a consent judgment will be recorded in court. However, if mediation fails, the matter will then proceed for a full trial.<sup>[27]</sup> Apart from the Practice Direction, judges are assisted by the 2011 Rules for Court Assisted Mediation.

### **3.3 The Rules for Court Assisted Mediation**

The Rules for Court Assisted Mediation was introduced in 2011 with the aim to provide comprehensive guidelines on mediation to court officials such as judges and judicial officers acting as mediators. The Rules cover the role and responsibilities of judicial officers acting as mediators, the mediation process, the mediation procedure, the effects of a successful mediation, and guidelines on termination and/or settlement.<sup>[28]</sup> Further, it focuses on the function of a mediator as a facilitator at the beginning stage of the mediation process and as an evaluator at the second stage of the mediation process. This is to uphold the mediator impartiality and neutrality principle, which must be practiced throughout the mediation process, including a duty to discharge with caution, tact, and diplomacy.<sup>[29]</sup> According to Choong, the 2011 Rules are sufficient to provide general guidelines to judges and judicial officers in carrying out court-assisted mediation in the absence of any primary legislation. Compared to the 2010 Practice Direction,<sup>[30]</sup> the 2011 Rules are more comprehensive and widely used by the judges and judicial officers in Sabah and Sarawak than Peninsular Malaysia.<sup>[31]</sup>

### **3.4 Court-Annexed Mediation in Family Disputes**

The reception towards mediation in resolving family disputes has been rather unsatisfactory, and litigation has been the preferred mode of dispute resolution in the civil courts in Malaysia.<sup>[32]</sup> The absence of a proper legal framework mandating mediation has added to its unpopularity. Statistics extracted from the Kuala Lumpur (KL) and Shah Alam (SA) High Court

Mediation Centre, respectively, confirm the lack of usage of mediation in settling family disputes in comparison to the number of registered family cases filed in the High Court of Kuala Lumpur and Shah Alam, from 2014 to February 2018 (see Table 1.1). Table 1.2 and Figure 1.2 show the mediation statistics in family disputes at the Kuala Lumpur Mediation Centre from 2012 to September 2018, respectively. On the other hand, Table 1.3 and Figure 1.3 show Shah Alam High Court Mediation Centre statistics from January to December 2017 and January to September 2018.

**TABLE 1.1**  
**STATISTICS ON CONTESTED FAMILY CASES AT KUALA LUMPUR (KL) AND SHAH ALAM (SA) HIGH COURTS BETWEEN 2014 UNTIL FEBRUARY 2018**

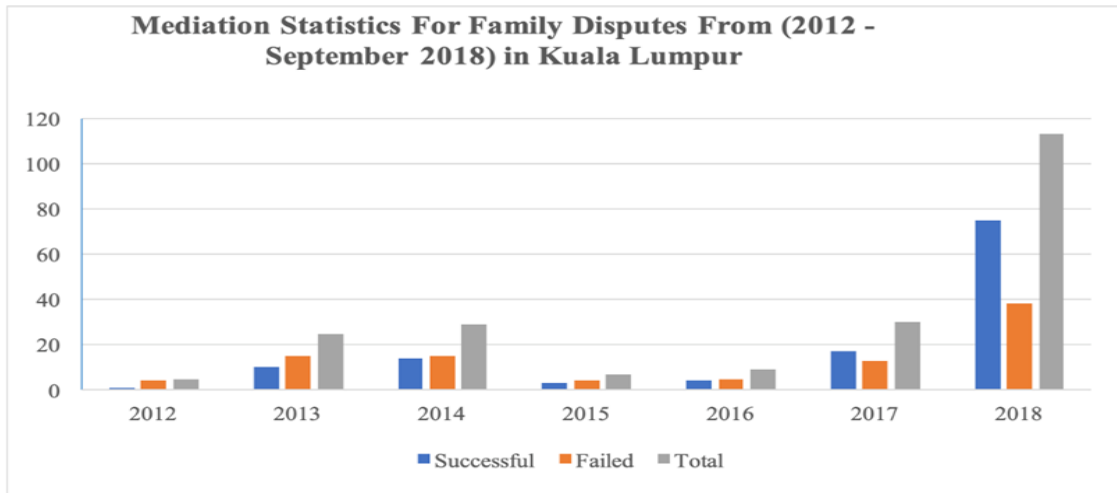
| YEAR         | PREVIOUS    |             | REGISTERED  |             | SETTLED     |             | OUTSTANDING |             |
|--------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
|              | KL          | SA          | KL          | SA          | KL          | SA          | KL          | SA          |
| 2014         | 351         | 259         | 858         | 906         | 737         | 819         | 472         | 346         |
| 2015         | 472         | 346         | 872         | 988         | 1070        | 958         | 274         | 376         |
| 2016         | 274         | 376         | 1050        | 965         | 918         | 975         | 406         | 366         |
| 2017         | 406         | 366         | 998         | 1219        | 868         | 1203        | 536         | 382         |
| Feb<br>2018  | 536         | 382         | 169         | 220         | 217         | 209         | 488         | 393         |
| <b>TOTAL</b> | <b>2039</b> | <b>1729</b> | <b>3947</b> | <b>4078</b> | <b>3810</b> | <b>3955</b> | <b>2176</b> | <b>1863</b> |

(Source: Main Registry of the High Court of Kuala Lumpur and Shah Alam at the Federal Court at Putrajaya)

**TABLE 1.2  
MEDIATION STATISTICS FOR FAMILY DISPUTES AT THE  
KUALA LUMPUR MEDIATION CENTRE FROM 2012 UNTIL  
SEPTEMBER 2018**

| <b>Year</b>  | <b>No of cases<br/>registered for<br/>family mediation</b> | <b>Successful</b> | <b>Fail</b> | <b>Success<br/>Rate<br/>(%)</b> |
|--------------|--|-------------------|-------------|---------------------------------|
| 2012         | 5  | 1                 | 4           | 20                              |
| 2013         | 25   | 10                | 15          | 40                              |
| 2014         | 29   | 14                | 15          | 48.28                           |
| 2015         | 7  | 3                 | 4           | 42.86                           |
| 2016         | 9  | 4                 | 5           | 44.44                           |
| 2017         | 30   | 17                | 13          | 56.67                           |
| 2018         | 113  | 75                | 38          | 66.37                           |
| <b>Total</b> | <b>no of cases</b>   | <b>218</b>        | <b>124</b>  | <b>56.88</b>                    |
|              | <b>Success rate (%)</b>                                    |                   |             |                                 |

Source: Kuala Lumpur High Court Registry)

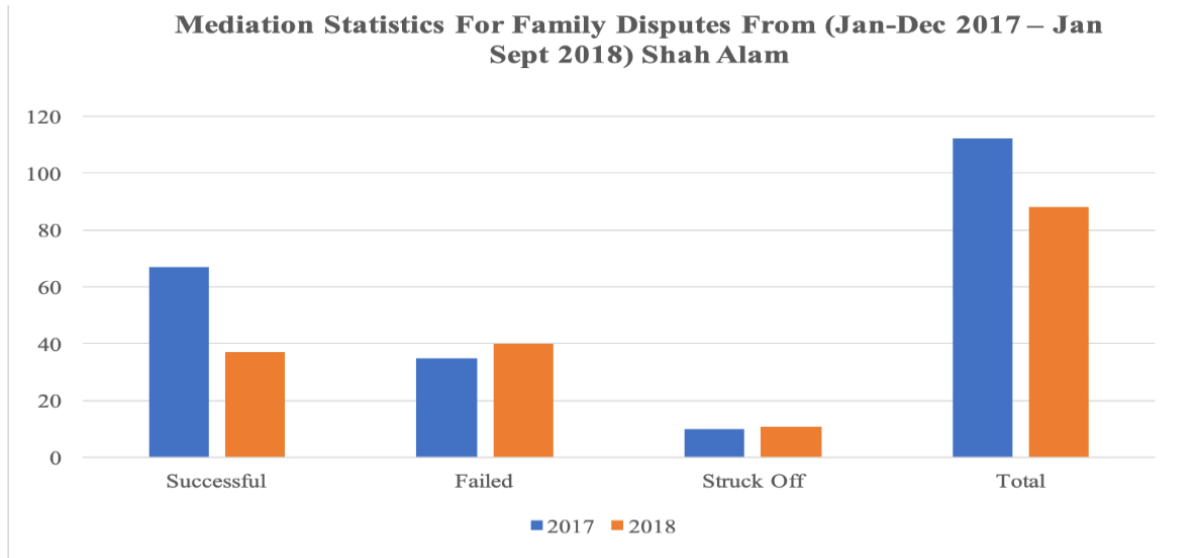


**Figure 1.2: Mediation statistics for family disputes at the Kuala Lumpur Mediation Centre from 2012 until September 2018 (based on researcher’s analysis of data)**

**TABLE 1.3  
STATISTICS FROM SHAH ALAM HIGH COURT MEDIATION CENTRE  
(JAN-DEC 2017 & JAN-SEPT 2018)**

| Year                           | No of cases registered for mediation | Successful | Failed | Struck Off | Success (%) |
|--------------------------------|--------------------------------------|------------|--------|------------|-------------|
| Jan-Dec 2017                   | 112                                  | 67         | 35     | 10         | 59.82       |
| Jan-Sept 2018                  | 88                                   | 37         | 40     | 11         | 42.04       |
| Total no of cases/Success rate | 200                                  | 104        | 75     | 21         | 52.00       |

(Source: Shah Alam High Court Registry)



**Figure 1.3**

**Mediation statistics for family disputes at the Shah Alam Mediation Centre from of Jan-Dec 2017 and Jan-Sept 2018 ( based on researcher’s analysis of data)**

The statistics reveal that the reception towards mediation in the family court division of the High Courts in Kuala Lumpur and Shah Alam is unsatisfactory compared to the number of cases registered, as illustrated in Table 1.1. A total of 3947 family cases were registered at the Kuala Lumpur High Court Registry from 2014 until February 2018. However, only 188 cases were mediated. Similarly, statistics from the Shah Alam High Court Registry from January 2017 until February 2018 indicate a total of 1,439 family cases registered. Conversely, only 200 cases were mediated. This accounts for 4.76% at the Kuala Lumpur High Court and 13.9% at the Shah Alam High Court. Interestingly, the family disputes mediated in both the Kuala Lumpur and Shah Alam High Court Mediation Centre have recorded a 50% success rate. This encouraging feedback suggests, if disputing parties are given a chance to explore mediation, settlement *via* mediation is possible.



#### **4. Advantages of Mediation**

The main objective of family mediation is to assist couples entangled in family disputes to settle their conflicts collaboratively. The procedure and outcome of mediation have been established as advantageous to the disputing parties, mainly in cases of minor children.<sup>[33]</sup> Hence, in family disputes, mediation has innumerable advantages as opposed to court adjudication, where a third party, the judge, enforces a judgment on the parties. It is undeniable that court proceedings result in a win-lose situation, whereas mediation delivers a win-win outcome. Legal scholars, academics, and judges have conceded that litigation proceeding does not guarantee natural justice and the prolonged litigation process may result in unwarranted impediments.<sup>[34]</sup> Further, hostile behavior may be obstructive to family relationships, particularly where children are involved. As such, the adversarial system is no longer considered the proper channel in determining familial disputes.<sup>[35]</sup>

The advantage of mediation is manifold. Firstly, it is very beneficial in settling disputes as it is faster, and conflicts can be resolved speedily. In addition, it is lower in costs as parties share the mediator's costs. Further, the proceedings are informal instead of strict rules of procedure and proceedings in a court of law. The confidentiality of the proceedings is an added advantage, and parties need not worry about undue publicity. As parties are in control of the proceedings, the focus is on settling the dispute and restoring, preserving, and building relationships between the parties. Mediation also offers a great platform for direct communication and sharing important issues in conflict amongst the disputing parties. The issues raised can be beneficial in addressing the strong emotional problems associated with divorce and parenting conflicts and resolving and formulating parenting agreements.<sup>[36]</sup> The informality and flexibility of mediation allow parties to address matters that might otherwise not be raised in a more adversarial or narrowly focused



process. Unlike court proceedings, in mediation, there is no winner or loser; parties are in a win-win position. As mediation is consensual, the settlement agreement reached can be implemented without delay.

A study<sup>[37]</sup> conducted by Nor Fadzlina Nawi<sup>[38]</sup> in relation to ‘Mandating Mediation in Family Conflict in Malaysia: Exploring Judges and Lawyers Perspectives’ received favorable results where the key informants comprising of High Court Judges and family law lawyers were receptive to mandatory mediation as it is considered more human than the combative method practiced in the adversarial system.

Mediation is particularly fitting in family and child-related disputes because it boosts collaborative problem-solving by the parties and offers a chance to promote the principles of the children’s best interests. There is no compulsion to negotiate a settlement against the wishes of the parties. As it is consensual and party-centered, parties have total control of the proceedings and their outcome.<sup>[39]</sup> The flexibility and informality of the mediation process make it desirable to parties. Parties have autonomy and are directed to participate actively by discussing their needs and interest and convey them to the mediator directly without fear that it may be used against them in a court of law should the mediation be unsuccessful. The mediator plays a neutral and impartial role and guides the parties to achieve a plausible solution. The mediator does not have decision-making powers, and the main role of the transformative mediator is to promote constructive communication between the parties by encouraging them to listen to each other, acknowledge and appropriately convey their needs and concerns. The mediator also assists parties by exploring avenues for an amicable settlement and reach a formalized settlement agreement.<sup>[40]</sup> Due to the high success rate in resolving disputes in many jurisdictions, it is high time to consider implementing mandatory mediation in resolving family disputes in Malaysia.

## 5. Disadvantages of Mediation

Although the advantages of mediation are immeasurable, there are also some disadvantages. However, it is submitted, the disadvantages can be refuted and that the advantages outweigh the disadvantages. One of the criticisms is that mediation lacks the principal benefit of checks and balances which the adversary system offers. According to past literature, making mediation mandatory can be contentious and problematic as it may affect one side inequitably in cases where there is an imbalance of power between the parties; and that the more informal and the less ‘legalistic’ a dispute resolution process is, such as in mediation, the more it would fail to safeguard the weaker party from being unduly influenced into accepting an unfair agreement.<sup>[41]</sup> Hence, justice is perceived not to be done. However, this belief rests on the basis that the courts yield just results, which is doubtful in many cases, and disputants generally are not concerned that justice is not seen to be done if they are satisfied with the result achieved through mediation which produces an amicable settlement of the dispute which is justice.<sup>[42]</sup>

Secondly, unlike legal proceedings, the doctrine of precedent does not operate in mediation. Hence, it is difficult to predict the success and outcome of a particular dispute. Disputants usually would want to know the chances of winning a case. Unlike normal civil disputes, it is submitted that family disputes are unique as they involve children, property, maintenance, and other sensitive matters where each case is confined to its own facts. Further, each case must be determined based on individual needs and agreement of the parties in dispute; namely the spouses in dispute, the parental responsibility that they should shoulder and the needs of the children, considering what is in the best interest of the child in the event a custody tussle is involved and other sensitive issues. Hence, the lack of precedent does not defeat the reliability of mediation as the final settlement agreement rests with the parties

themselves and not in the hands of a third party, the judge, based on precedent.

Thirdly, the emphasis given to mediation as an alternative to litigation may result in the parties being directed to a form of second-class justice: inexpensive, expeditious and informal dispute resolution of a dispute which is undoubtedly not necessarily synonymous with fair and just dispute resolution.<sup>[43]</sup> This can be refuted as parties are in total control of the mediation proceedings and only if parties agree will the mediator draw up the settlement agreement. As such, parties are both winners in the dispute. On the contrary, in litigation, there is always a winner and a loser. Ultimately, parties who are unable to compromise and reach a settlement agreement have a second chance to resolve the dispute *via* litigation. Hence, justice is done.

## **6. Resistance Towards Mediation in Family Disputes in Malaysia**

The current resistance in mandating mediation in family disputes in civil cases is due to various drawbacks under the current legal system. According to Foo,<sup>[44]</sup> the resistance to mediation is firstly, due to the absence of proper legal framework and procedures mandating mediation in family disputes.<sup>[45]</sup> Secondly, as family disputes deal with delicate and sensitive issues, there is a shortage of trained judicial officers as mediators specializing in mediating family matters. As such, without proper training, they are incapable of handling family disputes effectively and efficiently. Thirdly, lawyers representing disputing parties are themselves not familiar and trained in mediation. Even if lawyers refer the dispute for mediation with the agreement of the respective parties,<sup>[46]</sup> in the absence of a proper framework mandating mediation in family matters, lawyers and the courts are not empowered under the law to compel parties to mediate their disputes. Hence, parties resort to litigation, which is the traditional approach to resolve their conflicts instead of mediation. Maziah Joary<sup>[47]</sup> too concurred with Foo and stated that positive

steps need to be taken to encourage parties to use mediation, mainly in family disputes. Presently, Shah Alam High Court has spearheaded several initiatives to promote mediation and change the mindset of litigants. Some of the steps taken to create awareness amongst the public include distributing pamphlets at the court premises to encourage mediation, carrying out roadshows and setting up booths in shopping complexes in the Klang Valley to create awareness amongst the public on the availability of mediation as an alternative dispute mechanism.<sup>[48]</sup> It is noteworthy that any change inevitably will take time.

## **7. Recommendation in introducing mandatory mediation in family disputes**

To head start mandatory mediation, some urgent steps need consideration.

### ***Practice Direction No. 4 of 2016***

Presently, under O. 34 r. 2(1A) and (1B) Rules of Court 2012,<sup>[49]</sup> if a judge of the High Court identifies that an issue arising between the parties can be resolved *via* mediation, the judge may refer the parties to mediation as prescribed by the practice directions issued from time to time. Hence, judges may encourage parties to settle their disputes at the pre-trial stage or any stage before or even after a trial has commenced. Matrimonial disputes are also listed under the Practice Direction. However, based on the statistics in Figure 1.2 and Figure 1.3, the reception is unsatisfactory. It is proposed in family disputes, mediation be mandated at the pre-litigation stage. It is recommended that the Practice Direction be reviewed to incorporate a provision mandating mediation in all family disputes.

***Section 106 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA')***

Section 106 of the LRA sets out the requirement of reference to a conciliatory body before petitioning for divorce.<sup>[50]</sup> In contested divorce matters, parties are encouraged to undergo reconciliation at the Marriage Tribunal. Research has indicated that the officers and staff at the National Registration Department who oversee this process are unable to handle the reconciliation procedure expeditiously or efficiently. This is due to a lack of knowledge in the due processes as they are not adequately trained.<sup>[51]</sup> Further, parties are said to appear before the Marriage Tribunal as a step towards divorce and not to achieve reconciliation as they cannot agree on all the terms of ancillary relief.<sup>[52]</sup> Any delay in the reconciliation process will have a negative impact on the disposal of the dispute. As such, it is recommended that the officers in the Marriage Tribunal be given appropriate mediation training and relocated to the Mediation Centre (Court-Annexed) at the Kuala Lumpur and Shah Alam Mediation Centers, respectively, as an initial project. In all contested family-related matters, these officers can be trained to conduct mandatory mediation sessions. As such, the court-annexed mediation centres will have a substantial pool of mediators who are trained and equipped with sufficient knowledge in mediation to conduct family mediation effectively. In situations where domestic violence, child abuse and other offences are committed, the mediation should be dispensed as it is deemed unsuitable. Where parties fail to attend mediation as directed, the court has the power to impose cost sanctions, contempt of court proceedings and other related orders deemed fit. In the event parties are unable to settle their disputes, the evidence adduced during the mediation proceedings cannot be adduced in court. Hence, the confidentiality of the mediation proceedings is maintained. As such, a review of this provision under section 106 of the LRA is recommended.

It is also recommended that a proper legal framework for mandatory mediation and a mandatory family mediation Act be explored for future research in this area.

## **8. CONCLUSION**

Research has indicated that voluntary mediation is available for resolving family disputes under the Court-Annexed Mediation Centre Kuala Lumpur and at the Shah Alam High Court Mediation Centre. However, the participation and reception to voluntary mediation are unsatisfactory, as illustrated in the statistics in Table 1.2 and Table 1.3, respectively. Parties still prefer the traditional adversarial legal process in determining family disputes. As concurred by the interviewees,<sup>[53]</sup> some of the problems which have resulted in the resistance to mediation in family disputes are:

- lack of a legal framework mandating mediation;
- public awareness on the availability of mediation; and
- insufficient exposure and training of both lawyers and judicial officers in family mediation.

As such, litigation is the preferred option in resolving family disputes.

It is an assertion of this research that based on the analysis of the current operations of the family division of the civil High Courts in Kuala Lumpur and Shah Alam, as well as the unfavorable conduct of family proceedings and the unsatisfactory reception towards mediation, affects the disputants not only mentally, emotionally, and psychologically but also drains the disputants financially. Many scholars worldwide, both from the legal and mental health professions, agree that legal proceedings' adversarial nature is unsuitable in family and child-related conflicts.<sup>[54]</sup>

Hence, it is submitted, if the mediation process is well-structured and legislated, and proper mediation training is accorded to the appointed mediators, mandatory mediation is the way forward in resolving family disputes under the current civil law legal system in Malaysia.

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**Note: This article is extracted and forms part of the researcher's PhD thesis.**

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**Endnotes:**

[<sup>1</sup>] Folberg, Jay, and Alison Taylor (1984), 'Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation,' (San Francisco: Josey-Bass Publisher).

[<sup>2</sup>] Emery, Robert E., David Sbarra, and Tara Grover (2005), 'Divorce Mediation: Research and Reflections,' *Family Court Review* 43(1):22–37.

[<sup>3</sup>] Pursuant to sections 29B, 29C, 29D, 29E, 31B and Third Schedule of the Legal Aid Act 1971 and the Legal Aid (Mediation) Regulations 2006, the Legal Aid Bureau primarily provides mediation services for Muslims as well as non-Muslims family matters.

[<sup>4</sup>] Section 2 of the Legal Aid Act 1971.

[<sup>5</sup>] Pearson, Jessica and Thoennes, Nancy (1989), 'Mediation Research: The Process and Effectiveness of Third-Party Intervention,' pp. 9–30 at <http://courtdr.org/library/view.php?ID=2112> (retrieved on 6 September 2017).

[<sup>6</sup>] WIPO Guide on Alternative Dispute Resolution Options for Intellectual Property Offices and Courts, July 2015, 1–72, p. 24 at <http://www.wipo.int/export/sites/www/amc/en/docs/adrguidejuly2015.pdf> (retrieved on 23 September 2017).

[<sup>7</sup>] Christina SS Ooi (25 August 2005), ‘The Role of Lawyers in Mediation: What the Future Holds,’ *The Malaysian Bar Newsletter* at [http://www.malaysianbar.org.my/adr\\_arbitration\\_mediation/the\\_role\\_of\\_lawyers\\_in\\_mediation\\_what\\_the\\_future\\_holds.html](http://www.malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html) (retrieved on 18 January 2018).

[<sup>8</sup>] *Ibid.*

[<sup>9</sup>] *Ibid.*

[<sup>10</sup>] Lawrence R. Freedman and Michael L. Prigoffs, ‘Confidentiality in Mediation: The Need for Protection,’ *Journal on Dispute Resolution*, Vol. 2, No. 1 (1986), 37–45 at p. 37.

[<sup>11</sup>] See *Rush & Tompkins Ltd v. GLC* [1988] 3 All ER 737.

[<sup>12</sup>] *Ibid.*

[<sup>13</sup>] L. Fuller (1971), ‘Mediation, Its Form and Functions,’ 44 *S. Cal. L. Rev.* 305. This is a similar concept to the problem-solving approach to negotiation referred to in R. Fisher & W. Ury (1981), ‘Getting to Yes’ and C. Menkel-Meadow (1984), ‘Toward Another View of Legal Negotiation: The Structure of Problem Solving,’ 31, *UCLA Law Review*, p. 754.

[<sup>14</sup>] Christina SS Ooi (25 August 2005), ‘The Role of Lawyers in Mediation: What the Future Holds,’ *The Malaysian Bar Newsletter* at [http://www.malaysianbar.org.my/adr\\_arbitration\\_mediation/the\\_role\\_of\\_lawyers\\_in\\_mediation\\_what\\_the\\_future\\_holds.html](http://www.malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html) (retrieved on 18 January 2018).



[15] Norman Zakiyy Chow Jen-T'Chiang (2010), 'Court-Annexed Mediation in Resolving Disputes Relating to Family in Malaysia: What We Need to Know Before We Go Forward,' *Malaysian Journal of Syariah and Law*, Vol. 2, 135–151 at p. 136.

[16] "A-G: Try mediation first," *The Sunday Star*, 20 January 2005 at p. 16.

[17] "CJ out to clear backlog," *New Straits Times*, 6 August 2004 at p. 1.

[18] Gunavathi Subramaniam (2010), 'Mediation and the Courts: The Right Approach,' a paper presented at the 15th Malaysian Law Conference, Kuala Lumpur at p. 4.

[19] Choy, C. Y., Hee, T. F. and Siang, C. O. (2016), 'Court-Annexed Mediation Practice in Malaysia: What the Future Holds,' *U. Bologna L. Rev.*, 1, 271–307 at p. 273.

[20] The Order relates to pre-trial case management of cases.

[21] See O. 59 r. 8(c) of the Rules of Court 2012.

[22] *Ibid.*

[23] These rules on mediation are used by the current judges in the courts in East Malaysia and are posted on the official website of the High Court of Sabah and Sarawak and can be referred by all judges and judicial officers who act as mediators, including those in Peninsular Malaysia.

[24] See para. 1.1 of the Practice Direction No. 4 of 2016.

[25] *Ibid* para. 2.3.

[26] *Ibid* para. 1.1.

[27] Information extracted from the Kuala Lumpur Court Mediation Centre brochure.

[28] Choy, C. Y., Hee, T. F. and Siang, C. O. (2016), 'Court-Annexed Mediation Practice in Malaysia: What the Future Holds,' *U. Bologna L. Rev.*, 1, 271–307.

[29] Para. 4 of the Rules for Court Assisted Mediation 2011.

[30] Referring to the Practice Direction No. 5 of 2010.

[31] Choy, C. Y., Hee, T. F. and Siang, C. O. (2016), 'Court-Annexed Mediation Practice in Malaysia: What the Future Holds,' *U. Bologna L. Rev.*, 1, 271–307 at p. 285.

[32] Wan Fadilah, Registrar of Family Court at Kuala Lumpur, personal interview (12 October 2018).

[33] Roberts, M. (1997), 'Mediation in Family Disputes: Principles of Practice,' 2nd edition, (Aldershot: Ashgate Publishing) at p. 139.

[34] Houzhi, T. (2009), 'Mediation is developing around the world,' *Asia Pacific Law Review* 17, 31–37 at p. 33.

[35] Holtring, N. (2007), 'Mandatory Mediation in Australian Family Law' at <http://www.leadr.com.au/articles/Mandatory%20Family%20Disput%20Resolution.pdf> (retrieved on 7 September 2017).

[36] Nor Fadzlina Nawli (July 2011), 'Mandating Mediation in Family Law Conflict in Malaysia: Exploring Judges and Lawyers Perspectives,' a paper presented at the 24th Annual International Association of Conflict Management Conference Istanbul, Turkey at p. 4.

[37] The study was conducted solely in Kuala Lumpur, Malaysia and there were 31 key informants comprising judges and family law lawyers.

[38] Nor Fadzlina Nawli (July 2011), 'Mandating Mediation in Family Law Conflict in Malaysia: Exploring Judges and Lawyer Perspective,' a paper presented at the 24th Annual International Association of Conflict Management Conference, Istanbul, Turkey, 1–30 at p. 5.

[39] Gunavathi Subramaniam (July 2010), ‘Mediation and the Courts: The Right Approach,’ a paper presented at the 15th Malaysian Law Conference.

[40] *Ibid.*

[41] Bryan, P.E. (1992); Fiss, O.M. (1984); Grillo, T. (1991) cited in Nor Fadzlina Nawi (October 2011), ‘Family Mediation in Malaysian Muslim Society: Some Lessons for the Civil Family Law in Malaysia’ in Conference Booklet, East Asian Law and Society Conference.

[42] Clarke, Gay R. and Davies, Iyla T. (1991), ‘ADR — Argument for and Against Use of the Mediation Process Particularly in Family and Neighborhood Disputes,’ *Queensland University of Technology Law Journal*, v. 7, p. 81 at [assic.austlii.edu.au/au/journals/QUTLawJl/1991/6.html](http://assic.austlii.edu.au/au/journals/QUTLawJl/1991/6.html) (retrieved on 21 October 2017).

[43] HT Edwards (1986), ‘Commentary — Alternative Dispute Resolution: Panacea or Anathema?,’ Vol. 99, *Harvard Law Review* at p. 676.

[44] Foo Nget Ngo, Family Law Practitioner, personal interview (13 September 2018).

[45] In Singapore, all family disputes, especially involving children, must attend mandatory mediation before any court proceedings are initiated. Likewise, in the United Kingdom, parties must attend MIAM before court proceedings begin.

[46] Norman Zakiyy Chow Jen-T’Chiang (2010), ‘Court-Annexed Mediation in Resolving Disputes Relating to Family in Malaysia: What We Need to Know Before We Go Forward,’ *Malaysian Journal of Syariah and Law*, Vol. 2, p. 139.

[47] Registrar and Certified Mediator of the Shah Alam Mediation Centre, personal interview (26 October 2018).

[48] *Ibid.*

[49] Pursuant to the Practice Direction No. 4 of 2016.

<sup>[50]</sup> Section 55 of the Law Reform (Marriage and Divorce) Act 1976 introduces compulsory reference to the Marriage Tribunal or reconciliatory body prior to filing a divorce petition (except when one party to the civil marriage converts to Islam – see section 51 of the LRA and the duly amended section 51(1) of the LRA) or parties file a joint petition (see section 52 of the LRA).

<sup>[51]</sup> Ravi Nekoo & Ors, ‘Concept Paper: Reform in the Family Justice System,’ presented at a workshop conducted by the Bar Council Legal Aid Centre (Kuala Lumpur), LAC (KL) Research & Reform Programme on 16 November 2017.

<sup>[52]</sup> See the commentary under the Introduction to the Law Reform (Marriage and Divorce) Act 1976 [Act 164] at p. 1.

<sup>[53]</sup> Maziah Joary, Registrar and Mediator at the Shah Alam High Court; Haleez Hasnan, Deputy Registrar Kuala Lumpur High Court; Gunavathi Subramaniam and Foo Nget Ngo, Lawyer and Mediator, personal interviews on 26 October 2018, 12 October 2018, 26 September 2018 and 13 September 2018, respectively.

<sup>[54]</sup> Folberg, Jay, and Alison Taylor (1984), ‘Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation,’ (San Francisco: Josey-Bass Publisher) at p. 7; Saposnek, Donald T. (2004), ‘The Future of the History of Family Mediation Research,’ *Conflict Resolution Quarterly*, Vol. 22 (1–2):37–53.

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Legal Aid (Mediation) Regulations 2006

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“CJ out to clear backlog,” *New Straits Times*, 6 August 2004.

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