Commentary:
It is Time to Retire the Mandated MESP Program

By Christopher R. Musulin and Kimberly Greenfield

It is time to end the Matrimonial Early Settlement Panel (MESP) Program as a mandated Court event in the dissolution of marriage. With the explosion of multiple alternative dispute resolution (ADR) options in family law practice since the MESP Program was introduced in the 1970s, what was once the last stop before a trial date certain has become one of many "check-the-box" events in matrimonial dissolution, adding to the expense and delay common with the FM docket. Additionally, the impact of COVID-19 and the introduction of remote MESP sessions have, in the opinion of the authors, rendered the program even less effective, making mandatory attendance completely indefensible.[1]

Attorneys and litigants should be given the option at the case management stage to select other forms of ADR and opt out of the MESP, or be permitted to schedule the MESP after mediation. Like fax machines, BlackBerry cell phones and floppy disks, the world has changed since the 1970s, and we need to change with it. It is time to make the MESP Program an optional ADR event.

The Dawn of the MESP Program

Until 1971, there were only two grounds for absolute divorce: adultery and desertion for two or more years. Extreme cruelty was only available for a divorce from bed and board. Adultery and desertion were fault grounds, and the process of divorce was very different from what we are familiar with today. Grounds were often contested and fact-finding concerning fault could be used as a consideration or factor in determining the substantive issues. Until the mid-1960s, the divorce rate was relatively low, which most agree was at least partially attributable to the fault-based nature of divorce practice.

The explosion of the divorce rate commencing in the mid-1960s though the early 1970s has been attributed to multiple longitudinal changes. This includes several significant historical events:

- Women entering the industrial workforce for the first time in U.S. history during World War II, which altered perceptions of the traditional roles of husband and wife.
- In 1944, the GI bill was created, which culminated in an explosion of servicemembers entering the housing market, migrating from urban dwellings of tightly knit families to anonymous suburban dwellings as farms were paved over for tract housing.
- There was a demonstrable decline in attending organized religious events which previously served to support the institution of marriage.
- The acceptance of the birth control pill, the development of Rock 'n' Roll and the counterculture movement significantly shifted societal mores toward divorce.

The convergence of all these events dramatically impacted the institution of marriage and ultimately resulted in a massive increase in divorce filings by the mid to late 1960s.

In 1971, New Jersey adopted the Uniform Marriage and Divorce Act. This was the first statutory revision to substantive matrimonial practice since 1907. Grounds for divorce were expanded to include, among other things, 18 months of physical separation which was the first no-fault ground adopted in New Jersey. Additionally, defenses to grounds for divorce including recrimination, condonation and unclean hands were abolished. The adoption of the Uniform Marriage and Divorce Act was an acknowledgment that divorce had become socially acceptable and, as a result, the process needed to be streamlined to facilitate a more efficient method of matrimonial dissolution.

In response to the statutory revision introducing no-fault, the proverbial floodgates opened. In 1970 alone, there were 10,000 divorces filed in New Jersey.[2] By 1972, the amount increased to 15,017 and then skyrocketed to 20,852 by 1981.[3] Annual filings have remained consistent with this number through the present time. This explosion in divorce filings led to a massive backlog in divorce cases.

In 1976, in an effort to resolve the backlog of divorce

cases, attorneys in Morris County, Sheldon "Shelly" Simon, George Johnson, George Sabbath, and particularly Laurence Cutler, the "Father of MESP," began meeting in person at their offices and in the courthouse to assist each other in settling financial issues of divorce cases. These in-person meetings became the birth of what we now know to be the MESP Program. Acknowledging the program's success in Morris County, for which Cutler drafted the initial document used for providing the ESP recommendation, a second program was established thereafter in Union County by Charlie Steven.

As the chair of the Family Law Section of the New Jersey State Bar Association, Cutler had a "built-in" soapbox for the benefits of the MESP. He subsequently traveled to many other counties, most notably Mercer County, hawking the virtues of the MESP. While Cutler did receive resistance from some counties arguing that their respective county was "up to date," he continued to champion the program. The Administrative Office of the Courts even attempted to enter the ring by organizing a meeting at Forsgate Country Club to discuss the AOC's desire to play a significant role in this program. By the late 1970s, over half of the county bar associations in New Jersey began implementing the MESP Program but with greater formality and standards.[4]

As is true with any new program, there were growing pains. For example, there were extreme differences from county to county regarding the composition of the Panel, which included the varying credentials of the serving attorneys, the degree of formality/informality, the requirement and extent of written submissions, and the relevance of the recommendations.[5]

The MESP Program began as a formal pilot program in 1977 with specific standards and guidelines. Subsequently, the Supreme Court Committee on Matrimonial Litigation recognized the value of this program, despite its then present flaws, and reviewed the program. The first report was issued on June 10, 1981, and this report mandated attendance at the MESP on a statewide basis and created uniform procedures and what we know today as Court Rule 5:5-6. The MESP program has remained basically the same since that time.

The Significant Explosion of ADR Since the MESP Pilot Program of 1977

Economic Mediation

Since 1977, numerous significant ADR options have developed to compete with the MESP Program. The first of these events came in the early 1990s with N.J. Ct. R. 1:40-5(b) which established the economic mediation program. This program has exploded in its utility and most attorneys agree that economic mediation has become a more effective and oftentimes preferred tool to attending MESP. N.J. Ct. R. 1:40-5(b)(1) provides in part:

> (1) Referral to ESP. The CDR program of each vicinage shall include a post- Early Settlement Panel (ESP) program for the mediation of the economic aspects of dissolution actions or for the conduct of a post-ESP alternate Complementary Dispute Resolution (CDR) event consistent with the provisions of this rule a nd R. 5:5-6. No matter shall be referred to mediation if a temporary [or final] restraining order is in effect in the matter pursuant to the Prevention of Domestic Violence Act. (N.J.S.A. 2C:25-17 et seq.).[6]

As provided in the rule, parties first attend MESP before they attend economic mediation. At the present time economic mediation is often not considered a mandatory Court event and Courts will generally not permit referrals into the program without first participating in the MESP. In fact, the requirement to enter into a Case Management Order as prescribed by N.J. Ct. R. 5:5-7 and the Case Management Order form, which can be found at Appendix X, provides that the Court assign the MESP date at the Case Management Conference. No such requirement exists to fix the date for economic mediation at the time of the Case Management Conference.

It is the authors' position that the Court Rule and the Case Management Order form be revised with language that litigants are permitted to either use the MESP Program in an effort to settle their matter or initially bypass MESP and proceed to economic mediation, returning to the MESP if economic mediation fails.

Private Mediation

A second example of a now commonplace ADR option is private mediation. Private mediation has existed in civil litigation for decades, primarily in labor relations. However, private mediation was rarely used in matrimonial litigation and became popular in certain jurisdictions, including New York and California, in the late '70s and early '80s. In New Jersey, since the mid- to late-1980s, private mediation has become firmly entrenched.

Established roughly 30 years ago, the New Jersey Association of Professional Mediators was founded and has dedicated itself to promoting mediation as the preferred method of conflict resolution as well as providing education regarding mediation to the public, government, and other professionals. The New Jersey Association of Professional Mediators (NJAPM) has been instrumental in training mediators and promoting mediation as an alternative to traditional litigation and attendance at the MESP. The bench and bar have all embraced private mediation for all aspects of family law practice.

Presently, when confronted with the deadlines embedded in the Case Management Order, including a scheduled MESP date, few courts will permit litigants or attorneys to reschedule or cancel the MESP if they are participating in private mediation. While the bar remains keenly aware of the pressures related to moving the docket, the courts should absolutely permit litigants and attorneys to liberally reschedule the MESP if they are participating in private mediation. The courts already permit a stay of proceedings with arbitration. The court rules should be amended to permit a stay of proceedings including the MESP, if litigants are in private mediation.

Binding Arbitration

A third example of another alternative dispute resolution procedure that has also exploded in recent years is the use of binding arbitration. In 2009, the Supreme Court in *Fawzy v. Fawzy* addressed whether parties to matrimonial matters may agree to submit questions concerning child custody and parenting time to binding arbitration, and, if so, what standard of review will apply.[7] The Court subsequently held that within the constitutionally protected sphere of parental autonomy is the right of parents to choose the forum in which their disputes over child custody and rearing will be resolved, including arbitration.[8] The Court further held that the award is subject to review under the Arbitration Act, except that judicial review is available if a party establishes that the award threatens harm to the child.[9] Here, the Court resolved the issue left open in *Faherty v. Faherty* ¾ whether child custody and parenting time issues can be resolved by arbitration and provided litigants an opportunity to litigate all issues stemming from their case as opposed to waiting for the Court to conduct a trial.[10]

Then, in 2015, the Rules of Court were amended to create procedures and guidelines governing those family law cases wherein parties agreed to submit to arbitration, including the creation of an "arbitration track" for those who choose arbitration to resolve issues related to their divorce proceedings as opposed to continuing to pursue litigation in the court.[11] The decision in *Fawzy v. Fawzy* was effectively codified in the Rules of Court.[12] Perhaps even more importantly, this amendment furthered the public policy that has evolved, encouraging the use of alternative dispute resolution proceedings as a means to assist parties to settle cases and/or divert cases from an overburdened judicial system. Especially now, where the judicial vacancies have created a crisis such that in many instances cases are not scheduled for trial for years, it has become far more commonplace for attorneys to use private divorce arbitration to resolve matrimonial differences.

Collaborative Law Divorce

Collaborative law represents another form of alternative dispute resolution. Since Sept. 10, 2014, when Gov. Chris Christie signed into law the New Jersey Collaborative Law Act, New Jersey has also experienced the rise in collaborative law divorces. The intent of this act is to provide uniformity in collaborative law throughout New Jersey in family law disputes. Collaborative law is another means in which parties can resolve family law disputes without intervention of the courts. While relatively new as compared to the MESP, this form of alternative dispute resolution has, like arbitration, created another avenue of resolution providing individuals with the freedom to choose the path in which they prefer to resolve their matter.

Conclusion

We have come a long way since 1977 when the MESP program was first piloted. In 1977, Jimmy Carter was in the White House, a gallon of gas was 62 cents, and a brand-new BMW was $7,900. The average price of a house was $54,200.[13] The first personal computer was introduced by Apple and Elvis Presley died. A great deal has changed not only in the world but in the practice of family law since that time.

The authors are of the opinion that the MESP no longer serves the purpose for which it was originally created. Once the only tool to resolve cases and alleviate the Court's docket, the program has now often become an unnecessary but mandated "check-the-box" event. In its place, we have seen the emergence of the above-mentioned processes of alternative dispute resolution which are proving to be much more effective in resolv-

ing cases. The family law community needs to get with the times and recognize that what was once the last stop before trial has become, to many, an expensive and often ineffectual event.

MESP should no longer be mandated but rather an option. While the authors are not suggesting the elimination of the MESP program, it is time to acknowledge that there is no one-size-fits-all approach to matrimonial dissolution. Additionally, perhaps the New Jersey State Bar Association Family Law Executive Committee or the New Jersey Supreme Court Family Practice Committee should create an MESP task force to study not only the possibility of making the MESP discretionary, but addressing other important concerns with the program including the qualifications of panelists, remote versus in-person meetings, ongoing difficulty with providing timely submissions, a rule amendment permitting a stay of proceedings if the parties are attending mediation, and permitting attorneys to satisfy their Madden or CLE requirements by voluntarily serving as panelists.

The MESP is the best possible expression of a bench-bar collaboration. It still maintains significant utility as a tool to assist the courts, attorneys and litigants in resolving matrimonial disputes. Given the significant ADR options that now exist, the MESP program should not be a required event in every case, but rather one of several options to assist litigants in resolving their differences. ■

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Endnotes

1. Brian Schwartz & Christopher R. Musulin, *Get Dressed and Get Back to Court*, 40, No. 6 N.J. Family Lawyer 9, 9-11 (2022).
2. N.J. State Dep't of Health Planning & Res. Dev. Health Data Servs., 1981 Marriage and Divorce, VS30-8201.
3. *Id.*
4. The authors would like to thank Laurence Cutler, Esquire and Frank Louis, Esquire for taking the time to speak with them and provide critical firsthand knowledge and background.
5. Professor Paul Tractenberg, Rutgers School of Law, Newark, quoting Supreme Court Committee on Complementary Dispute Resolution, Subcommittee on Vicinage Comprehensive Justice Programs, *Master Plan for Vicinage Comprehensive Justice Programs* (May 22, 1991).
6. N.J. Ct. R. 1:40-5(b)(1).
7. *Fawzy v. Fawzy*, 199 N.J. 456 (N.J. 2009).
8. *Id.* at 461-62.
9. *Id.* at 462.
10. *Faherty v. Faherty*, 97 N.J. 99 (N.J. 1984).
11. *See* N.J. Ct. R. 5:1-5.
12. *Fawzy*, 199 N.J. 456.
13. huduser.gov/periodicals/ushmc/winter2001/histdat08.htm