

What's Confidential?

The Family Law Act outlines what is confidential with regards to matters discussed during family counselling and family dispute resolution.

The Court recently had to consider whether the "file notes" of a family dispute resolution practitioner (mediator) taken during a session with the Mother, were subject to subpoena or not.

The case involved a parenting dispute where the parties had attended a final hearing, but following that the Court had made interim orders and listed the matter for a further interim hearing and required each party to file further affidavit material.

In the mother's affidavit, she mentioned having "*engaged with Dr P, a psychologist...to assist with focussing on the children and their needs.*"

The father issued a subpoena to Dr P seeking all documents in relation to the mother. Dr P objected on the basis that she was a registered 'mediator' and 'family dispute resolution practitioner' and that meant her notes were not admissible and not subject to subpoena.

The father argued that the confidentiality did not apply because Dr P was not conducting 'family dispute resolution' with the mother. Both the mother and Dr P argued that the purpose of the mother attending on Dr P was for family dispute resolution.

The Court found that it was "more likely than not" that the mother attended on Dr P for counselling and not for family dispute resolution. However, the Court found that the view and intention of the family dispute resolution practitioner had strong relevance and it was clear that Dr P considered that she was engaging in family dispute resolution. Therefore, because Dr P did not consent to the disclosing of the communications the "file notes" were not produced under subpoena.

It should be noted that, if Dr P had been an "*accredited family counsellor*" as defined by the Family Law Act, the "file notes" would have been "confidential" unless the mother had given consent and Dr P chose to disclose the notes. Because this was not the case here, it was necessary for the Court to find that the Mother and Dr P were engaged in *family dispute resolution* prior to making a finding that the notes were confidential.