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Judicial unpredictability: why many litigants turn to mediation

PREMIUM OPINION

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Anthony Grant

All lawyers, including those who don't go to court, know that the law is uncertain.

Even though I am a barrister and know from first-hand experience how unpredictable the court process can be, the extent of the unpredictability still surprises me.

The extent can be extraordinary, as is illustrated by a case working its way through the courts.

It involves Ms Zhou and Mr Lassnig. They married and formed a trust. Following their divorce, Lassnig applied to the Family Court under s 182 of the Family Proceedings Act for the court to divide their trust.

The first round of litigation was in the Family Court. There, a judge decided they should each be repaid their loan accounts, that a third-party debt should be paid and that the remaining sum should be divided on a 50:50 basis.

That decision went on appeal to the High Court. There, a judge held that the Family Court judge had misstated the test under s 182 and held that the equity should not be divided on a 50:50 basis but on a 60:40 basis in favour of Zhou.

That decision went on appeal to the Court of Appeal. There, the court held that the High Court judge had made an error and that the net equity should not be divided on a 50:50 basis or even on a 60:40 basis but on an 80:20 basis in favour of Zhou.

So, there you have it. The High Court judge said the Family Court judge had made errors, the Court of Appeal said the High Court judge had made errors and the three courts held on the same facts that the trust's equity should be divided 50:50, 60:40 and 80:20.

To add even more uncertainty to this unsatisfactory story, the case is on its way to a fourth court as the Supreme Court has agreed to hear an appeal from the Court of Appeal's decision. It has done this on the broadest possible basis, saying, "The approved question [for the appeal]is whether the Court of Appeal was correct in its analysis under s 182 of the Family Proceedings Act 1980."

Among the topics that ought to interest the Supreme Court is the question of whether a person who commits an act of domestic violence (as Lassnig

apparently did) should have a financial award reduced. The Court of Appeal said of this subject:

> *"We acknowledge the 2019 Law Commission Report on relationship property and ...its observations that there are strong arguments for giving family violence greater weight in property division on the basis that, by not penalising violence in property division, the law effectively transmits the message that the behaviour has no impact on the contribution to the marriage partnership of either spouse."*

The addition of this topic adds yet another layer of unpredictability to the already extraordinary degree of unpredictability that has suffused the Zhou/Lassnig litigation.

In recent years, s 182 has received a greater level of scrutiny and guidance from the Court of Appeal and the Supreme Court than almost any other statutory provision.

That attempts to apply the section by good judges in all three levels of our legal system should diverge so dramatically is a compelling illustration of the uncertainty of the legal process and possibly an indication that the guidelines that have been given for interpreting s 182 need to be made much simpler and clearer.

But when the law is as unpredictable as this, it is not surprising that the process of mediation is widely regarded as a more satisfactory method of resolving legal disputes.

Anthony Grant is an Auckland barrister and trustee specialising in trusts and estates. He is a member of The Law Association's Trust Law committee