

Living with Agreement: Parent-Adolescent Mediation

WORKSHOP

by

Sue Walden - Family Mediation Centre, Noble Park, Vic.

“There is probably nothing in this book which you did not already know at some level of your experience. What we have tried to do is organise common sense and common experience in a way that provides a useable framework for thinking and acting.”

(Fisher, Ury and Patton, 1992)

Workshop Overview

The focus of the workshop is on what needs to happen in parent-adolescent mediation for families to reach “livable” agreements on issues causing conflict. The premise is that parent-adolescent conflict is fundamentally different from other types of conflicts where mediation can be applied. Some of those differences will be outlined.

Because of these fundamental differences, parent-adolescent conflict demands more than a “pure” mediation approach. However, basic principles of mediation can be adhered to and the basic aim of mediation, to negotiate agreement around the issues in conflict, can be achieved.

Underlying many substantive issues in parent-adolescent conflict are issues around power and control. Almost all parents will agree they want their children to become stable, successful adults. How they achieve that goal is what differs from family to family. At one extreme are authoritarian or over-protective parents. These are the families we tend to see in mediation.

For agreements to be reached, parents may need to give up some of what they see as their powers and rights as parents, and acknowledge the growing autonomy and independence of the adolescent. Parents may need assistance in recognising that the conflict is not merely a power struggle, and in finding ways they can hand over greater responsibility for decision-making to their adolescent without losing face.

At the other extreme of control are “laissez faire” parents: either because the whole family system is too chaotic for consistent boundaries to be set, or because they fear the conflict that inevitably arises when they attempt to set boundaries. These families may come to the attention of agencies such as ours after the children have come to the attention of authorities such as police or protective services.

Where parents are feeling helpless, the adolescent may be exercising more decision-making power than he or she is ready for, and some decisions and behaviours will be self-defeating or outright destructive. The adolescent may need assistance in exploring how this behaviour is affecting relationships with other people, including his or her family and what this means for future goals and aspirations.

If mediators can help family members to re-frame the conflict, the way is set for them to negotiate agreements which address their needs and concerns, develop new ways of behaving towards each other and develop skills for working through future conflict.

1. Differences Between Parent-Adolescent Mediation and Other Kinds of Mediation

- On-going relationship
 - families are “for life”
- Dynamic family system
 - number of parties involved
 - family sub-systems and alignments
 - effects on parenting of parents’ own unresolved issues from adolescence
 - problems in the marital relationship - “scape-goating”
 - parents’ beliefs about parenting
- Development issues
 - tasks of adolescence
 - parallel developmental process for parents
- Power imbalance
 - balancing rights of adolescent with power disparity between parent and child
- Dealing with non-voluntary clients
 - level of engagement can vary for *all* parties
- Need for inter-generational appeal
 - parents’ perception they have “failed”
 - adolescent’s belief that “nothing will change”
- Form, not substance
 - rapid swings in adolescent behaviour
 - differing levels of maturity of adolescents

- Generational differences
- Cultural expectations
 - working with immigrant families
- Ethical and value dilemmas
 - for the mediator or mediators

2. Differences Between Parent-Adolescent Mediation and Other Kinds of Family Intervention

Research into parent-adolescent conflict has consistently reported that at least 20 percent of families with adolescents experience severe, ongoing, anger-laden and unresolved disputes over one or more issues. While issues have not changed much over time, parent-adolescent relationships have, and society's response to such conflict has also altered.

When families work on the symptoms of their conflict and reach agreement around new ways of behaving towards each other, this naturally brings about change in the underlying dynamics of family relationships. When families can demonstrate to themselves they are capable of finding solutions to their problems and that change is possible, underlying "causes" tend to lose a lot of their impact. The current popularity of problem-solving, solution-focussed and brief therapies is testimony to this approach.

The debate around family therapy and mediation is extensive enough to warrant its own two-day conference. We who work at the service-delivery level tend to leave the philosophical debate for quieter moments if they ever occur. Pragmatically, we draw strategies from a number of theoretical orientations, and if they work, we do more of them. It is simpler to define what mediation is **not**, and to draw the boundaries from the outside. We have an ethical obligation to our clients to clarify the limits of our service.

Differences between mediation and other forms of therapeutic intervention include the following:

- It is a relatively short-term intervention. Rarely would we be involved with a client family for more than six months unless factors other than the intervention itself led to delays in contacts, e.g. extended absences, or the family re-contacting with different issues, or to review agreements. This, however, is rare because they tend to learn the process while they are resolving their issues.
- We do not offer individual counselling except for the goal of improving family relationships. We believe it is possible and appropriate to work with family sub-systems to bring about change in the wider family group, e.g. working with parents on parenting issues when the adolescent refuses to attend.

- We do not offer counselling for sexual abuse, drug and alcohol abuse, violent behaviour or severe psychological disturbance. However, these issues do arise in mediation, and the mediation process allows families to discuss options for dealing with such problems.

3. How We Approach Parent-Adolescent Work at the Family Mediation Centre

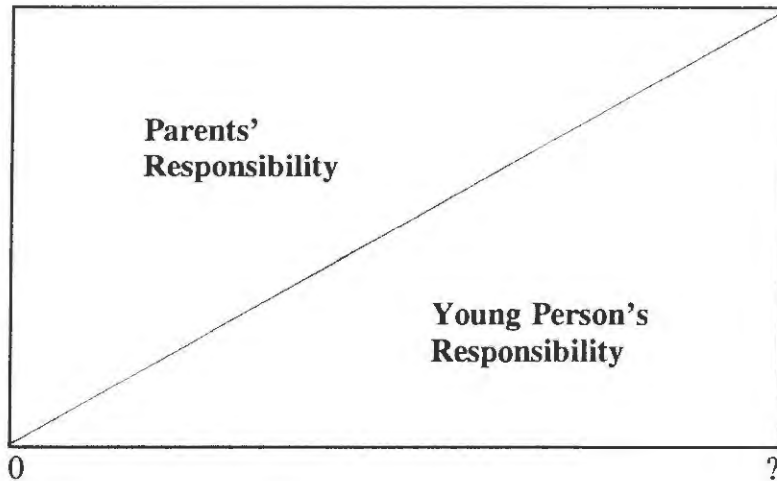
Improve relationships → some issues will be resolved
 Resolve some issues → relationships will improve

- initial contact - “normalising” problems
- flexible intake and assessment process
- work with sub-systems and individuals in private sessions
- prepare individual clients for negotiation:
 - what are their needs, interests, concerns and fears?
 - how realistic are their needs and concerns? (according to their personal experience and objective criteria)
 - how likely is it they will get what they want?
 - what outcomes would they be happy with?
- use the mediation process to gain agreement on what the issues and problems are
- use the mediation process to explore which issues are concrete and substantive, and able to be negotiated
- use the mediation process to negotiate agreements on those issues
- use the mediation process to recognise those issues not suitable for negotiation
- use the mediation process to explore how the family will deal with non-negotiable issues
- offer private sessions for individuals to examine personal issues which are affecting family relationships
- in private sessions, explore what other supports or services the individual might require

4. Working with Parents in Private Sessions

- Normalise the conflict as much as possible, without belittling their experience

- Ask is this an enmeshed family - authoritarian or over-protective? Do they interpret the conflict as a power struggle? The following diagram is useful:



- Ask parents to think about at what age their child is responsible for his or her own decisions
- How can they best assist their child toward this goal?
- Explore what changes the parents may have to make as the adolescent changes
- What do these changes mean for other family members?
- What do they need from their child right now?
- How might they get their needs met?
- What are their underlying concerns and fears?
- Explore with parents the options available for addressing their concerns
- What do they think the young person needs right now?
- How can they help him or her to meet his or her needs?

5. Working With Adolescents in Private Sessions

Many adolescents are initially reluctant to attend or commit to the mediation process as they believe they have everything to lose and nothing to gain.

Engaging reluctant clients may require considerable patience and suspension of ego on the part of the worker. It also may require more than one session before the adolescent trusts the process enough to open up.

- check out if they have attended voluntarily or under some coercion
- explain the nature of the mediation process, acknowledge if they are there under duress and ask if they are prepared to look at the problems
- when, as typically happens with the reluctant adolescent, he or she claims not to have any problems (“*My parents* have the problems”) check out how the parents’ problems affect the adolescent
- use the diagram to explore where they think they are in taking responsibility for their own decisions and behaviour
- where do their parents think they are?
- use future-focussed questions to explore what plans, options and dreams they have
- how might they set about achieving their desired future?
- how might their current behaviour be influencing the achievement of their goals?
- what are their needs right now?
- what options are available for meeting their needs?
- what are their parents’ needs right now?
- how could they help to meet their parents’ needs?

Providing them with the option of returning to discuss their issues further, without their parent’s present, also allows for exploration of their ability to communicate their needs and to negotiate agreements with their parents.

6. Negotiating Towards “Livable” Agreements

Having spent some time in private sessions encouraging family members to generate options, the worker’s role is now largely to control the process and to ensure that each person’s needs are being heard by all.

The C.U.E. concept is a useful framework for conducting negotiations:

- Communicating one’s own concerns
- Understanding others’ concerns
- Exploring possible solutions

The worker needs to be alert to any possibilities offered to ensure that no suggestions, no matter how extreme or creative they may be, are overlooked as options.

7. Framing Agreements

When agreements are being framed, it is the worker's responsibility to play devil's advocate.

- check out exactly how this agreement will work
- what exceptional circumstances might arise, and how will the agreement accommodate those circumstances?

Ensure that the goals of the agreements are specific, clear to all, and contain objective criteria, e.g. "On school nights I will come home as soon as the street lights come on." c.f. "On school nights I will come home when it gets dark."

- what will happen if someone doesn't honour his or her part in the agreement?

Parents are often surprised at this point that the kinds of consequences young people suggest may in fact be much harsher than the parents would impose.

- test the reality of the suggested consequences. Are they logical? Are the parties willing and able to deliver them? Will they support the agreement?
- invite the family to be its own "devil's advocate"
 - how might they be able to sabotage the agreement?
 - what support can they give each other to ensure the agreement works?

"Family conflict results as often from agreements that a family has made as it does from the failure to reach agreements."

(Gadlin and Quellette, 1987)

- If there is a high level of mistrust in the family, use percentage questions to examine the likelihood of an agreement being kept, e.g.
 - "What percentage of times would Dad keep his part of the agreement?"
 - "Jane, you have agreed that if you're going to be late home you'll phone and let Mum know. Is it okay with Mum if that happens every second time you go out?"

8. Kinds of Agreements

Fisher and Ury (1978) identified several factors which influence the strength of agreements.

Stronger agreements are: substantive
comprehensive
permanent
final
non-conditional
binding

Parent-adolescent agreements are often the weaker kinds of agreements because they need to be flexible enough to change as the adolescent becomes older, and the parent-child relationship continues to move towards an adult-adult relationship.

Weaker agreements are:

Procedural: defining a process by which a decision is to be made

Partial: do not include a resolution of all the issues

Provisional: they may be temporary or trial decisions that are subject to review

In principle: they include general agreements but the details remain to be worked out

Contingent: the conclusion of the dispute is conditional upon additional information or future performance by one or more parties

REFERENCES

Fisher, R. and Ury, W. (1978) *International Mediation: A Working Guide; Ideas for the Practitioner*, London: Hutchinsons Books.

Fisher, R., Ury, W. and Patton, B. (1992) *Getting to Yes* (2nd ed.), London: Century Business.

Gadlin, H. and Quellette, P.A. (1987) Mediation Milanese: An application of systemic family therapy to family mediation, *Mediation Quarterly*, 14, 15.

Heaven, P.C.L. and Callan, V.J. (1990) *Adolescence: An Australian Perspective*, Sydney: Harcourt, Brace, Jovanovich.

Haynes, J.M. (1992) Mediation and therapy: An alternative view, *Mediation Quarterly*, 10, 1, 22-33.

Hudson, A., Bell, W., Hudson, T. and Houndoules, V. (1986) The views of parents and adolescents on the granting of behavioural autonomy: Some normative data, *The Australian Educational and Developmental Psychologist*, 3, 2, 6-11.

Mallet, S., Downey, L., Sheehan, M. and Metres, R. (1994) *Reaching out for what matters: Mediation and therapy to enhance relationships*, Melbourne: Sutherland Child, Youth and Family Services.

Montemayer, R. (1983) Parents and adolescents in conflict: All families some of the time and some families most of the time, *Journal of Early Adolescence*, 3, 83-103.

Myers, B. (1992) *Parenting Teenagers in the 1990s*, Hawthorn, Vic: A.C.E.R.

Robin, A.L. and Foster, S.L. (1989) *Negotiating Parent-Adolescent Conflict: A behavioural-family systems approach*, New York: Guilford Press.

Selekman, M.D. (1993) *Pathways to Change: Brief therapy solutions with difficult adolescents*. New York: The Guilford Press.

Weinhaus, E., Friedman, K. and Stagoll, B. (1984) *Stop Struggling with Your Teenager*, Melbourne: McPhee Gribble.

Wertheim, E., Love, A. and Peck, C. (1992) *I Win: You Win*, Ringwood, Victoria: Penguin Books.

Wolcott, I. and Weston, R. (1992) Keeping the peace: Resolving conflict between parents and adolescents, *Family and Conciliation Courts Review*, 32, 2, 208-229.

Mediator as Pimpernel: The Relationship Between Mediator Stance, the Process and the Use of Language

WORKSHOP

by

Peter Stallworthy - Mediation Consultant, Auckland, New Zealand

(The presenter is Peter Stallworthy, a professional mediator in Auckland, New Zealand. Peter has been in private practice since 1987 and is the principal of the Mediation Training Centre, an Auckland-based training resource. He is a founding member of the Mediator's Institute of New Zealand and currently national Vice-President. Peter has trained in mediation with John Haynes, Christopher Moore and Mary-Margaret Golten, and Michael Grinder. He is also an accredited panel member of L.E.A.D.R. and a certificated practitioner of N.L.P.)

Beginning

The legendary Scarlet Pimpernel was a British secret agent against the French. He was an elusive figure, a change agent, who caused things to happen to achieve his desired outcomes. I perceive parallels between the Pimpernel and a hypothetical mediator in that the mediator brings about change, influences processes and changes people's thinking in ways that can be difficult to see and elusive to identify. The influence of the mediator on the process is known by the path that the process takes rather than by overtly discernible cause-effect relationships between mediator behaviour and responses to that behaviour by the parties.

Developing the Theme

Over the past eight years, I have worked extensively as a mediator, been involved in many training situations in mediation, communication skills and various therapeutic modalities and, latterly, have been facilitating the learning of others in mediation, conflict resolution and aspects of communication.

These experiences have led to the development of a perspective on mediation and the training of mediators that focusses on the stance and role of the mediator, and the acquisition of specific communication skills. Rather than tyro mediators being equipped with a step-by-step model of a mediation or conflict resolution process, the learners are provided with the sorts of skills, insights and role positions that enable a responsive flexibility to the needs of the disputants.

This approach rests on the usual suppositions about mediation: that it is voluntary, confidential, empowering, facilitated joint problem-solving, and so on, but also acknowledges input from other sources. These sources include aspects of philosophy and

a particular approach to inter-personal communication. Notions such as *rapport*, *pro-active listening* and *map of reality* enter the communication skills repertoire of the mediator. The mediator understands about being *grounded* (“when I walk, I just walk”), is able to respond to bring clarity into the disputants’ thoughts, knows that “*compulsion breeds hatred*” and that it is futile to “*push the river*”.

In the course of facilitating mediation training over the past five years, I have come to understand that people who come to train in mediation bring their “baggage” with them. Many of those coming to mediation are from other professional disciplines such as accountancy, counselling, teaching and law. The training and practice of these professions is to equip practitioners with expertise and impel them to make decisions for their clients and tell the clients what to do. This “baggage” is often extremely difficult to off-load when learning to behave within the role constraints of mediator. Underlying assumptions about the role of mediator include not telling people what to do (at least with substantive issues) and not making decisions for them. Mediators are supposed to enable the parties to become “empowered” and it is hard to do this if you do not let them take responsibility for their own decisions.

Another insight I have gained is the importance of communication in the mediation process. The mediation process floats in a sea of communication comprised of a totality of messages passing between the mediator and the parties. These messages arise from the non-verbal behaviour of all the participants in the interaction as well as the words they use. Paradoxically, although the mediator wields considerable power to facilitate the process, this power is given to the mediator by the parties. The means by which the power is gained and ways it is used derive from the communication skills of the mediator.

In developing thinking on mediator stance and role, I draw on elements of Taoist and Zen thinking.

“The perspective of philosophical Taoism, with its emphasis on openness, awareness of process, gentle provocation or insight, and inherent humanism, offers a unique and valuable resource for the mediator . . . One reason that Taoism seems so unusual as a tool to study mediation is that . . . we are so often used to prescriptive approaches . . . Instead, Taoism is suggestive and provocative rather than specific and directive.”
(Holt and Steingard, 1990)

By avoiding being prescriptive and directive in facilitating the mediation process, the mediator avoids setting up resistances in the minds (or realities) of the parties. This enables the mediator to bring shifts in thinking and movements towards eventual resolution as voluntary and owned responses which are, accordingly, stronger and more lasting.

“Can you mediate emotional issues without taking sides or picking favourites?
Can you breathe freely and remain relaxed even in the presence of passionate fears and desires?
Are your own conflicts clarified? Is your own house clean?
Can you be gentle with all factions and lead the groups without dominating?”

Can you be open and receptive, no matter what issues arise?
Can you know what is emerging, yet keep your peace while others discover for themselves?

Learn to lead in a nourishing manner.
Learn to lead without being possessive.
Learn to be helpful without taking the credit.
Learn to lead without coercion.

You can do this if you remain unbiased, clear and down-to-earth.”

(Heider, 1985)

Perhaps the main insight for the mediator arising in Zen philosophy is the imperative of the moment. The mediator should be “grounded” in each moment and responsive to his or her environment; that is to say, when the mediator comes to the process with an agenda of his or her own, beyond that of merely facilitating the process, then the process is likely to be constrained. Existing outside the moment such as worrying about what happened last time, or hoping you finish in time to catch the ferry home, is likely to inhibit mediator responsiveness to what is happening within the process at that moment. Particularly when conflict is emerging in the process, Zen thinking allows the mediator to respond flexibly:

“Flow with whatever may happen and let your mind be free: stay centred by accepting whatever you are doing. This is the ultimate.”

(Chuang-Tzu)

Workshop Content

The workshop presents a number of ideas which provide an examination of the stance adopted by the mediator and its relationship to the process being facilitated, as well as a consideration of the ways communication behaviours of the mediator inhibit or enhance process facilitation.

- **Rapport:** the natural process (rooted universally in animal behaviour) whereby animals of the same species “mirror” each other’s behaviour when they become more comfortable in the relationship. To establish greater comfort in the relationship, or communication dynamic, the mediator can “mirror” behaviour, particularly non-verbal behaviour, and enhance *rapport*. Enhanced rapport enables the mediator to communicate while lessening effect of the *filters* or barriers that usually impede or inhibit the messages sent and received. Metaphorically, the mediator can move from being an external to being an internal “voice” with a corresponding increase in his or her ability to influence the listener.
- **Non-verbal behaviour:** the “body language” of popular culture; every aspect of behaviour available to a person which sends messages to others. As a “professional communicator”, the mediator must first *discern* the behaviour, secondly *interpret* the message in the behaviour, and thirdly *check* that “the message sent (either way) is the message received”. The mediator must understand the difference between observation (of non-verbal behaviour) and assumptions about the messages.

- **Mediator stance:** the mediator is the process facilitator - detached from, dispassionate towards, non-partisan for, neutral about, unbiased and independent (pick the term you prefer) in respect of the substantive issues. Every aspect of mediator behaviour should model this even-handedness, including the way the furniture is arranged, the equal attention paid to the respective parties, the non-verbal behaviour of the mediator towards each party and so on.
- **Map of reality:** this central notion is that people carry their own reality in their heads. The “map” is the repository of the cumulative experience of the individual and is characterised by the idiosyncratic *deletions*, *distortions* and *generalisations* that have occurred as the individual has processed his or her experiences. When the individual acts (through his or her behaviour), the deleted, distorted and generalised experiences are expressed.

For example, in a custody and access mediation the man might say, “She’s always turning the kids against me.” [For him, the reality is just that.] The woman may rejoin, “He never brings them home on time.” [For her this is the reality.] The onus falls on the mediator to facilitate both parties adjusting their respective realities to accommodate the other. In this context, each party has a “reality” in his or her head and any “objective reality” is an artificial construct the parties might consider in the process of accommodating each other.

- **Language and process:** all the language, non-verbal and verbal, of the mediator must reflect the stance and proper role of the mediator. Care is needed in the responses that the mediator makes to avoid polluting the “processing” that each party is undertaking in each’s “map of reality”. The mediator must avoid bringing about resistance by the parties to the process.

For example, the mediator says, “John, I think you should let Mary finish what she is trying to say”, and each party gets a message. John thinks, “I knew she was on her side. I don’t even get a chance to have a say” while Mary thinks, “Yeah . . . I’m going to win. She’s on my side”

- **Applied communication skills:** the mediator uses many non-verbal communication skills to send messages. Process-maintaining and controlling behaviours are often non-verbal. Rapport is built and messages conveyed by changes in voice tone, gestures, eye contacts, minor muscle movements, body shifts and the like. Verbal language is chosen carefully to encourage responses from the “maps of reality” rather than responses which are adaptive to the wish of the mediator as perceived by the party.

For example, if the mediator says:

- (i) “tell me about the dispute” - there is a supposition a dispute exists and issues are framed accordingly
- (ii) “why do you say that?” - a defensive and self-justificatory mind-set is established

- (iii) "okay, so there is that option or that option" - suggests (in the minds of the parties) that there are only two options
- (iv) "alright, since you can't decide who should start, Mary, you go first" - tells the parties that the mediator will step in and make decisions for them if they can't.

There is a sophistication and elegance in the use of questioning available to the mediator. Questions can be phrased along a "hard/soft" dimension, specific questions may elicit clarifying responses, other questions might take the respondent to different levels of cognitive processing, questions can be open and closed. The notion of elegance, when applied to questioning behaviour, refers to the skilled and artful use of various types of questions in conjunction to "move" the respondent in the direction desired by the mediator to reach his or her outcome.

Conclusions

The confluence of stance, role, process and communication skills leads to a view of the mediator being a skilled and flexible person, facilitating change processes in the heads of the parties, rather than someone facilitating a step-by-step dispute resolution process. Lacking the security of the rigid "formula" approach, the mediator develops a strong, self-reliant responsive approach to the challenges of being a mediator.

The workshop explicates the notion that within the mediation process, the mediator should be difficult to perceive in terms of the things done in facilitating the process. Rather, the mediator's influence over the process should be subtle to the extent that an observer can know a mediation process is happening by the way it flows, without readily seeing the direct influence of the mediator. The mediator does not push a party through a door but enables the party to move through the door by creating the situation wherein going through the door is the appropriate move to make.

People could know what the Pimpernel had done but not know why, when or how it was accomplished.

REFERENCES

- | | |
|--|---|
| <p>Crum, Thomas (1987) <i>The Magic of Conflict</i>, Simon & Schuster.</p> <p>Folger, Ed. Joseph P. and Jones, Tricia S. (1994) <i>New Directions in Mediation</i>, Sage Publications Inc.</p> <p>Heider, John (1985) <i>The Tao of Leadership</i>, Bantam Books.</p> <p>Holt, G. Richard and Steingard, David (1990) "The Merely Known Mediator: Taoism and the Metaphoric Analysis of Mediator Behaviour in Divorce and Custody Mediation", <i>Mediation Quarterly</i>, Vol.7, No.5.</p> | <p>Hyams, Joe (1979) <i>Zen in the Martial Arts</i>, J.P. Tarcher Inc.</p> <p>Laborde, Genie Z. (1987) <i>Influencing with Integrity</i>, Syntony Publishing.</p> <p>Wing, R.L. (trans.) (1986) <i>The Tao of Power</i>, Doubleday.</p> |
|--|---|

Changes to the Family Law Act: What Will They Mean For Mediators?

PANEL DISCUSSION

(reported by Susan Bennett, Legal Aid and Family Services
Commonwealth Attorney General's Department)

John Pollard (Chair) - Solicitor/Mediator, Sydney, New South Wales

David Gorrie - Family Mediation Centre, Noble Park, Victoria

Margaret Ross - Solicitor/Mediator, Adelaide, South Australia

Dale Bagshaw - School of Social Work & Social Policy, University of South Australia

Amendments to the Family Law Act have been under active consideration since the Joint Select Committee of the Federal Parliament was established in 1991. The Committee reported to Federal Parliament in November, 1992. It made 120 recommendations for change, including recommendations on family mediation (such as mediator education, community education and the development of alternative dispute resolution as a real alternative to the adversarial system). In December, 1993, Mr Lavarch tabled the Government's response, accepting in principle the Committee's view that A.D.R. and mediation processes should be advanced at a greater rate. Since that time, Mr Lavarch and his Parliamentary Secretary Mr Peter Duncan have been endeavouring to deliver satisfactory legislation.

Two Reform Bills have been prepared. The first deals with children's issues and A.D.R. The second deals mainly with property and financial issues. Both have been controversial as any changes to family law in Australia have always been.

The Bill dealing with children's issues and A.D.R. will shortly be re-introduced to Parliament and is likely to be passed as it has the support of the Opposition and minority parties. However, some sections of the property provisions are still causing controversy and there may be some doubt whether those provisions will be passed in the life of this Parliament. Therefore, our comments today are still comments on the last Bills, and there might still be further changes.

1. Children's matters: emphasis on parental responsibility and changes in terminology

Currently, the Family Law Act recognises three bundles of rights:

- (i) guardianship (which does not include daily care and control);
- (ii) custody (which is the right to daily care and control);
- (iii) access (or the right to ongoing communication with children).

Currently, both parents are guardians in the absence of a court order. Under the proposed amendments, these categories will cease to exist and will be replaced by a new concept of "parental responsibility" which covers all the duties, rights and responsibilities that parents have in regard to children. The proposed reforms will impose obligations on parents to make decisions as to the child; previously this was nominated as the responsibility of the Court.

There are now more specific provisions regarding children witnessing abuse. The reforms will also emphasise the need to determine each child's best interests in light of his or her individuality.

There is a heavier emphasis on, and expectation of, parents agreeing on matters. The Bill provides for parenting plans which will be written documents between parents dealing with specific matters. Parenting orders will be orders made by the Court covering the same matters as can be covered in parenting plans.

There will be four types of orders the Court can make: (i) residence orders; (ii) contact orders (covers the old access orders issues); (iii) child maintenance orders; and (iv) special purpose orders (which may cover "any other matter related to the child"). An example given in the Bill is "responsibility for the long term care, welfare and development of the child".

In practice, for mediators who look at the substance of what is to be agreed and then at the practical working of the agreement, the advice is: don't panic - it is not so complex.

2. Legally-binding Agreements: parenting plans, consent orders and financial agreements

Parenting Plans are to replace the current child agreements, and the Relationships Australia (N.S.W.) Parenting Plan booklet provides a model of a parenting plan.

The specifications for the parenting plan raise the question: if the parties can complete a plan, do they take it to the Court and register it? How formal are we going to be?

The Court will be able to set aside parenting plans if their development involved fraud, duress or undue influence, if the parties want it set aside or if it is in the best interest of the child to do so. It will be important that mediation clearly not involve fraud, duress, undue influence, and if there is any, there is the question as to whether the confidentiality provisions will apply.

In **financial** matters, there is encouragement they should be settled by agreement, and the process kept simple and low-cost. **Registered financial agreements** (in writing, signed and witnessed) will be taken to be binding. The witnessing can be waived.

Pre-nuptial agreements will not be binding in that the Court will be able to consider them. However, once a pre-nuptial agreement is signed, the items specified are expected not to be included in a Family Court of Australia settlement.

The grounds for setting aside a pre-nuptial agreement will include fraud, duress, the parties desire to set it aside, a significant change in circumstances or if the Court considers it involves a serious injustice. Matters to be considered would also include whether the parties had legal advice, their age, mental capacity, educational background and literacy.

It is difficult to generalise about **co-habitation agreements**, since some states have legislation covering those.

Overall, there is a question whether **mediation agreements** can be registered with the Court. This would be a major shift. There is no requirement for legal advice before mediation agreements are registered, however these agreements could be over-turned if there were no legal advice. The Family Law Section of the Law Council of Australia is opposed to the possibility of registration of mediation agreements.

3. Increased use of A.D.R. and issues for mediators

The changes proposed in the Family Law Reform Bill relevant to family mediation and counselling include the amendments to Part II "Counselling Organisations and Mediation Organisations". The changes will expand opportunities for mediation organisations and will extend the secrecy and immunity provisions that have applied to Court mediators to all family mediators.

The Family Services Council is hoping to have an impact on the development of the rules and regulations. These, it is our understanding, have not yet been developed, though it is also our understanding that they are to specify where mediation is not appropriate (such as in cases of domestic violence or where there is a power imbalance).

The two submissions made by the Family Services Council to the Senate Committee on Legal and Constitutional Legislation in its consideration of the Family Law Reform Bill:

- (i) supported the emphasis on mediation;
- (ii) expressed concern at the possibility of mediators who were unskilled and unprofessional being able to operate with immunity suit; and
- (iii) stated that the Family Services Council is aware of some private practitioners with little training or experience. This is a special concern where there is risk of domestic violence as they may not be able to ensure the safety of parties.

The Bill provides protection for all mediators by giving the same immunity from suit as has a Family Court judge, and makes inadmissible as evidence anything that was part of the mediation. The question is: why should mediators be protected if they can't ensure the safety of the parties?

We have been given the argument that provisions will be made in the Regulations to ensure the safety of parties where there is domestic violence. We are concerned that immunity from suit as an absolute protection should not be given in any circumstances, and certainly not to private practitioners unless there is some form of accreditation.

We understand the planned Regulations will require written information be given to clients on available remedies but we don't think this is sufficient protection.

4. Property and Financial Provisions under the Family Law Reform Bill No. 2

While the intention is to simplify family law proceedings and reduce costs, many commentators (including the Family Law Section of the Law Council of Australia) believe it will increase costs because it will dramatically change sections of the Act in an unsatisfactory way. This will lead to uncertainty until the new law is clarified by appeals, and may encourage clients to litigate and not settle.

The Law Council also believes women particularly will be disadvantaged because the community may well think that equality is not only the starting point but also the finishing point. Women who have custody of children and less opportunity to work than their husbands would normally receive 60 to 65 percent of the matrimonial home under the present Act. Many of them (or their husbands) might think they are only entitled to 50 percent under the new law and agree to accept 50 percent without consulting a lawyer. That would be a real concern for mediators.

The Government appears to have decided that the matter of superannuation is too difficult, and it does not appear to have been dealt with adequately.

The Government apparently believes that the most common criticism of the present Act is that the Judge hearing the case has too much discretion and that outcomes are too unpredictable. The thinking then is that this unpredictability encourages clients to go to Court and that if there were more predictability, people would be better off. The Bill, however, is in practice unlikely to result in greater predictability than at present.

Some of the clauses in the Bill are not clearly drawn. If they were to be clearly drafted, then it would appear the law will not change very much at all under the new Bill. In most cases which will come to you as mediators, the "just and equitable" range of outcomes should be much the same.

5. Comparison of Property Settlement Factors

Existing Act	Proposed Bill
1. Court must make orders which are “just and equitable”.	1. The Order must deal with disputed property in a “just and equitable way”.
2. Judge or Judicial Registrar has wide discretion.	2. Judge or Judicial Registrar has wide discretion.
<p>3. Court must undertake a 3 step approach:</p> <p>3.1 Identify the parties assets and value them.</p> <p>3.2 Evaluate the contribution factors to the acquisition, conservation and improvement of those assets and form a preliminary view on their division.</p> <p>3.3 Look at the “future needs” factors under S.75(2) to see if a further allowance for those factors should be made to arrive at a “just and equitable” order.</p>	<p>3. Court must follow these steps:</p> <p>3.1 Identify the disputed property and value it. (But this excludes property referred to in a pre-nuptial agreement.)</p> <p>3.2 The court must start from the assumption that justice and equity requires the disputed property to be divided in proportion to the parties’ respective contributions to the marriage as a whole.</p> <p>3.3 The court is to assume that the contributions are equal unless the Court is satisfied that they are not equal.</p> <p>3.4 In deciding if the contributions are equal, the Court must look at:</p> <p>3.4.1 history of the marriage including its duration.</p> <p>3.4.2 financial and non-financial contributions to the acquisition, conservation or improvement of property.</p> <p>3.4.3 contributions (financial or non-financial) to the welfare of the family including contributions as home maker or parent.</p> <p>3.4.4 Any other factor the Court thinks relevant.</p>
<p>4. Contribution matters to be looked at are:</p> <p>4.1 Direct and indirect financial contributions.</p> <p>4.2 Non-financial contributions.</p> <p>4.3 Contributions to the welfare of the family including contributions as home-maker or parent.</p>	<p>4. The Court must regard financial contributions and non-financial contributions as being of intrinsically equal significance.</p>

Existing Act	Proposed Bill
<p>5. S.75(2) "future needs" factor include:</p> <ul style="list-style-type: none"> • Age and health of parties • Income, property and financial resources and the physical and mental capacity to earn income • Whether either party has the care of children under 18 years • Commitments to support self or others • Responsibilities to support others • Eligibility for pension or superannuation • Reasonable standard of living • Need to protect role of parent • Financial circumstances of any new cohabitation • Terms of spousal maintenance order • Amount of child support being paid • Any fact or circumstances which the justice of the case requires to be taken into account 	<p>5. The "future needs" factors which must be taken into account to determine if the result is just and equitable are:</p> <ul style="list-style-type: none"> • Age and health of parties • Income, property and financial resources (including property to which a pre-nuptial agreement relates) • Physical and mental capacity to earn income • Whether either party is responsible for care of a child or children under 18 years • Commitments to support self or others • Responsibilities to support others • Eligibility for pension or superannuation • Reasonable standard of living • Need to protect role of parent • Financial circumstances of any new cohabitation • Terms of spousal maintenance order • Amount of child support being paid • Any fact or circumstances which the justice of the case requires to be taken into account
<p>The "future needs" factors are therefore almost identical and should give the Court the same broad discretion as it now has.</p>	
<p>6. The Court must take into account the effect of any proposed Order upon the earning capacity of either party.</p>	<p>6. If a party requests the Court to make an Order so that a business asset or farm is retained as a functional unit, the Court must do so if it can.</p>

Summary of Financial Provisions

1. The law is probably not going to change very much, except that pre-nuptial (pre-marriage) agreements will be recognised more than before (with exceptions, e.g. fraud, duress, inadequate disclosure).
2. There will be scope for legal arguments about several phrases in various sections.
3. As always, it will be essential for parties to obtain independent legal advice on their legal rights before and usually after mediation.
4. Mediators will need to be re-educated about the new Act once it is passed so they can effectively test the reality of agreements made by parties at mediation.

5. In cases where wives previously received 60 percent or more of the assets, they should still be receiving about the same. Cases like *Ferraro* where the wife received 37.5 percent of the marital assets of about \$10 million after a 30 year marriage are likely to be decided in much the same way.
6. Superannuation is still in the "too hard basket". No decision has yet been made as to any standard approaches to superannuation being set out in the Act. So, Judge and lawyers will continue to use their standard approaches.
7. The law in relation to spousal maintenance remains virtually the same.
8. Where parties enter into pre-marital agreements, those assets will commonly be quarantined.
9. There is still controversy on how financial agreements (both pre-marital and post-marital) should be handled. It seems that provisions similar to those operating under the New South Wales De Facto Relationships Act should apply and it should be necessary for both parties to receive independent legal advice before signing the agreement, but having done so, it should be binding unless that would cause substantial hardship to the other party.
10. Financial settlements will be in put into effect by:
 - Consent Orders
 - Pre-Nuptial (Pre-Marriage Agreements)
 - Post-Marriage Financial Agreements - but there may be no equivalent of a Deed approved under S.87. (A S.87 Deed requires a Judge's approval in open Court - in contrast to Consent Orders approved by a Registrar in Chambers - and is closely scrutinised as to fairness. In most but not all cases, it enables the finalisation of spousal maintenance rights as well as property settlement on a once and for all basis.)

Closing Remarks

The fate of this legislation is unknown. The law may not change very much, but there may be mass confusion unless the Government makes a genuine attempt to re-educate the public as to the changes. The Government has promised to do that. Mediators, lawyers and journalists particularly need accurate information. Besides the change in the law, the Family Court has been holding off the introduction to the new law. The Court will not wait beyond January 1996 to start the simplified procedures, and we therefore have to be prepared to accept that change.

Domestic Violence and Child Abuse Issues: Strategies and Reporting Obligations for Mediators

PANEL DISCUSSION

(reported by David Rollinson, President of the
Australian Dispute Resolution Association)

Dale Bagshaw (Chair) - University of South Australia
Clive Price - Director, Unifam, Sydney, New South Wales
Nihal Danis - Legal Aid Commission of New South Wales
Mary Pekin - Co-ordinator, Canberra Mediation Service, A.C.T.

Clive Price (Director, Unifam Sydney) noted his family therapist background and commented that systems models tend to be problematic when dealing with domestic violence due to the circularity of the model and the danger of blurring identification and responsibilities. Feminist critiques are an influence, but do therapists really take these on board? It cannot be assumed that the practices of family therapy and mediation are free from potential influence by domestic violence and child abuse settings, yet Clive queried who will deal with these issues (and will they do it as well) if mediators and therapists do not.

Nihal Danis (Legal Aid Commission, New South Wales) identified the violence assessment and intake procedures of the Family Conferencing Scheme which includes review of the (often extensive) L.A.C. file and discussions with parties' lawyers to try to find out the extent of any violence of which the lawyer may be aware and (with agreement) directly with each party. The aim is to be clear whether the conference process is suited: if it seems so, a more extensive checklist interview follows. Specific directions to conference chairs may result and shuttle negotiation is common. The parties attend with their legal advisers to give support and generally to assist parties reach agreement.

Mary Pekin (Co-ordinator, Canberra Mediation Service) noted that parties are told early when, through detailed intake, joint sessions or mediation itself is not appropriate. Recommendations may then be made as to other options. In all cases any Apprehended Violence Orders are examined to check terms and conditions. Parties are reminded that reporting requirements will have an impact on confidentiality: monumental disclosures necessitate re-examination of mediation suitability in any event. (*See Appendix 1, Canberra Mediation Service*).

From questions to the panel and general discussion, the following issues arise:

- changes to the Family Law Act need to address domestic violence and child abuse directly and clearly

- with 50 per cent of families presenting at mediation having some history of domestic violence or abuse, what can reasonably be offered: perhaps more use of shuttle mediation? This would necessitate more specific skills training, including in violence issues. What are the alternatives? If nothing is offered, are the parties left unaided?
- if mediators have improved in the way they deal with violence from what was done, say five years ago, is there still a dilemma where the mediator sees a strong need to facilitate negotiation in what is a violent family setting?
- violence between parents and their adolescent children is seen as a mounting problem, and training is needed to focus on the difference

NOTE:

In 1991, A.D.R.A. convened a special one-day conference on mediation and domestic violence. Many of the issues concerning assessment of suitability, intake, screening and process variation have been documented in the 1994 Policy and Procedures Handbook. The **Conference Papers** (\$25.00) and **Handbook** (\$5.00) are available from Australian Dispute Resolution Association, (A.D.R.A), P.O. Box A2468, Sydney South 2000.

APPENDIX 1: *Domestic Violence Guidelines: Canberra Mediation Service*

(Mary Pekin, Co-ordinator)

Our guidelines are informed by:

- the fact that domestic violence is a crime;
- our primary concern for the safety of all parties to the mediation, including absent potential victims; and
- valuing a principle of flexibility, or dealing with each situation as it arises.

Where there is current violence, no mediation will occur.

Information about violence may arise only in the context of a separate interview. An implication of this is that people need to be informed at telephone contact to expect a separate session, and to flag with them the idea that a joint session is not automatically granted. We will decide, with them, whether a joint session will best meet their needs.

Where possible, information regarding violence should be ascertained at the phone contact, otherwise in the separate session. Whether on the phone or in separate session, the following are checked:

- existing or past domestic violence order - check it allows for mediation;
- the woman's fears for her safety - "yes" does not augur well for a joint session;
- should the mediator be concerned for anyone's safety e.g. children, family;
- level of intimidation - is the woman able to speak openly, disagree, be critical of the man. "No" to any of these would not augur well for a joint session;
- the man's position - how does he think he will handle being disagreed with, hearing hard things, negotiating down or up from his preferred position? If the man is openly antagonistic to the mediators when we are doing our best to be empathic and caring, this does not augur well for the joint session;
- the woman's resources, ability, willingness to use self-protective behaviours;
- details of violence - check the individual accounts;
- patterns of violence - "one-off" around separation or a longer history? The man's denial or different account (minimising) from the woman's account augurs badly.

All the above checking is done from a position of sharing our dilemmas around these issues with the clients. If we can share our dilemmas, this helps a mutual decision to be made by the clients not to proceed with a joint session. Our aim is that the clients will come to the conclusion themselves that the circumstances of their relationship stand in the way of balanced negotiations in mediation, and that other processes - shuttle mediation, telephone mediation, counselling, Court and/or legal processes - will better resolve their issues.

The mediator will then refer the man and the woman to any of the above, and follow this referral to ensure neither party is left high and dry with no support.

A decision by the mediator may be made not to proceed with a joint session if:

- we cannot share our dilemmas with both clients;
- problems are uncovered in the checking process above;
- mediators' fears cannot be allayed, for example the mediator has the sense that both parties are minimising violence and denying fears for safety, though non-verbally demonstrating otherwise

The mediator then needs to be cautious about the feedback given to the couple as to why and how the decision not to proceed with a joint session is made, so as to avoid blaming the woman for a "no mediation" message. For example, "I am concerned about the level of conflict or tension between you and am not convinced about the wisdom of us all being together around the negotiating table."

If we go ahead with the joint session, the following guidelines or framework applies:

- co-mediation should occur when possible (male and female);
- supervisor is to be made aware of issues and mediators given all support possible - they should not have to deal with these issues alone;
- mediator has the responsibility for ongoing monitoring of safety issues;
- mediator ensures that the file records all contact, details of violence and sighting of domestic violence orders. If the case ever does go to Court, it could be an advantage if this information is recorded;
- explain confidentiality rules, check understanding, sign the agreement to mediate;
- ensure reception is informed of any departure, arrival or special arrangements.

The Canberra Mediation Service has responsibility to mediators to ensure:

- their safety;
- that they are not physically left alone to see these clients;
- that mediators are familiar with policy;
- that mediators have ongoing training in this area;
- that mediators are provided with supervision and rapport;
- that facilities are adequate - separate waiting rooms and session rooms, two exits.

Concerns

My concerns are around what happens "in session" when we conduct joint sessions.

I am left with a sense that sometimes we do not grapple helpfully with the power imbalance, and manage the conflict rather than address or resolve it. It is not clear enough to me how we work with emotional or psychological abuse issues.

Mediator Management: Models of Supervision

PANEL DISCUSSION

(reported by Jane Chart, School of Law, Canterbury University,
Christchurch, New Zealand)

Linda Fisher (Chair) - Relationships Australia, New South Wales
Dianne Gibson - Mediation Consultant, Sydney, New South Wales
Susan Gribben - Relationships Australia, Victoria
Bernadette Rogers - Law Society of Queensland

Susan Gribben (Relationships Australia, Victoria, referred to as R.A.V.) opened this session by describing supervision in the R.A.V. program as "case consultation", a process in which mediator and consultant work with the goal of helping the mediator to identify and address his or her needs. The question is "what is the mediator wanting from the session?" Resources (of time and pay) allocated to consultation give the message it is highly valued.

For case consultation to have real benefits, it is important to have selected as mediators people who have a high desire and capacity for learning.

Case consultation occurs in an overall context in which, as far as possible, mediators and cases are matched and co-mediators are also matched, e.g. in terms of ease of working together. Mediators have some say about involvement in different kinds of cases, levels of complexity and so on. Briefing and debriefing are also essential aspects of quality assurance/mediator development.

Case consultation may involve one-on-one discussion or a group with a more experienced consultant. It may involve snapshots of a case, tracking a case from end to end or writing up a case. There is an emphasis on demonstrating what is happening, what has happened rather than merely describing it: "don't just tell me - show me", and: "how is what the mediator is doing affecting *the client*?" The central focus of case consultation is always to produce better practice for *clients*. (The Relationships Australia (Victoria) Family Mediation Service model of supervision is outlined at Appendix 1).

Diane Gibson (founding Director of the Family Court of Australia Mediation Service) spoke of supervision as it related to the co-mediation model in the Family Court. She spoke of "hot" debriefing immediately after mediation sessions; of regular consultancy sessions, peer discussion meetings and review of video materials. Videotaping of mediation sessions permitted evaluation of various co-mediation combinations.

In the Family Court system, a further level of accountability is provided by performance agreements negotiated between each mediator and the Director. These agreements cover such matters as casework, training, record keeping and community education, and there is a system of six monthly appraisal of each mediator.

In this appraisal system, the Director observes the co-mediation team during mediation sessions, taking systematic notes of observations made. This is followed by joint debriefing immediately after the session, and by individual consultation with each mediator. The system helps develop appropriate plans for future training.

Linda Fisher described supervision as an ongoing process, essential for clients, mediators, funders and the organisation itself. The Relationships Australia (N.S.W.) Couple and Family Mediation Service uses a five-pronged approach to supervision.

Firstly, the program uses co-mediation with gender balance and tries to match mediators to the parties, based on their knowledge of the mediators, their particular skills and experiences, and their ability to work well together.

The second aspect is debriefing, which provides a very effective method of self-supervision. Debriefing involves both mediators in discussion, and the joint completion of a comprehensive report at the end of each session, focussing on: the parties' attitudes to the mediators and the process; the parties' abilities to negotiate; power imbalances and what the mediators did to redress them; the agenda; any referrals; the mediators' satisfaction with their own performances; and with aspects of teamwork. Debriefing also allows the mediators to plan strategies for the next session, and may take between 45 and 60 minutes.

The third aspect of supervision is the oversight of all written material (case notes, debriefing reports and so on) by the co-ordinator. For example, all agreements and memoranda of mediation are vetted to check for inconsistencies, waffle, etc. Mediators are expected to redraft "defective" agreements.

Formalised supervision (or case consultation) sessions are held regularly (four to six weekly), mediators meeting with their supervisor (the Director of Mediation) in groups of four: mediators choose which session to attend, with whom and the activities which would be most useful for them.

The diagnostic approach taken to clinical supervision stems from a counselling framework (adapted from work done by Dr Daphne Hewson at Macquarie University in Sydney in 1993) which conceptualises supervision as being:

- (i) relationship-centred (focussing on the interactions);
- (ii) mediator-centred (focussing on the mediator's reactions and problems); and
- (iii) party-centred (focussing on the technical issues of case management).

This model is helpful for diagnosing, for example, where blocks in the process in fact lie: with the management of the parties or the conceptualisation of the case, within the relationships (between the parties, between the parties and the mediators, or between the mediators), or with the mediators (the skills and knowledge or professional conduct). The model also helps planning for subsequent sessions, helping mediators conceptualise the case and pinpoint what they want or need to talk about.