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Forms of Power in Family Mediation and
Negotiation

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FORMS OF POWER IN FAMILY MEDIATION AND NEGOTIATION

by John H. Wade*

Introduction

The aim of this paper is to demonstrate that the concept of “power” in negotiation or mediation is complex. Breaking down this platitudinous and self-evident proposition will hopefully lead first to a greater willingness to articulate and hypothesise openly concerning sources of power in (family) disputes. The writer is convinced that mediators and negotiators who openly discuss sources of power will be more successful in educating disputants and assisting with constructive decisionmaking.

Secondly, the phrase “inequality of bargaining power” is repeated ad nauseam as a reason for alleging the ethical unsuitability of certain types of negotiations or mediations. An analysis of power suggests that this phrase should not be used blithely. Power imbalances are more complex than first meets the eye, are always present, and are not necessarily adjusted satisfactorily by switching to another procedure. Many lawyers involved in family litigation are well aware of various forms of power imbalance in the sometimes (ironically) idealised court process. The label of “inequality of bargaining power” is fashionably epidemic;¹ but the remedy may often (though not always) be worse than the disease. Nevertheless, concerns about inequality of bargaining power necessarily escalate as mediation becomes increasingly mandatory, and is staffed by under-trained, overworked and underpaid mediators.

A number of outstanding books and articles have been written on the topic of “power” in negotiation and mediation. Particularly notable are the commentaries of Bernie Mayer and Christopher Moore.²

This paper walks in the footprints of those two writers and attempts to underline certain insights described by them.

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1 See H Astor & C Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992) for helpful commentary.

2 B Mayer, “The Dynamics of Power in Mediation and Negotiation” (1987) 16 *Mediation Quarterly* 75 and Christopher Moore, *The Mediation Process* (San Francisco: Jossey Bass 1986).

As far as possible, negotiators should be aware of, and able to describe, the various sources of power which may influence negotiations. The very act of describing a source of power or perceived power (depending upon the manner of description) is a source of power and may assist in developing strategies to respond constructively to that power.

Three anecdotal principles are preferred as a starting point:

- Powers are always operating in negotiations
- Powers are always more complex than first appearances
- With time, powers tend to change

A series of questions arise:

- Generally, what is power?
- By whom is power exercised during mediation?
- What forms does power take during the course of a serious family dispute?
- What forms does power take particularly when exercised by a mediator?
- When is an imbalance of actual or perceived power between parties so marked that the mediator has an ethical duty to terminate the mediation?

What is "power"?

Power can be broadly described as actual or perceived ability of one person to exert influence upon another person's behaviour or thoughts. (Many other descriptions are possible.)

Complex power relationships exist, particularly in family systems³.

Such powers are inevitable and are not in themselves unethical, improper or exploitative.⁴ Obviously the complex web of powers between family members can be used in constructive or destructive ways. That is, the motives, procedures and results associated with the use of power raise important ethical questions. The "is" inevitably raises the "ought".

³ D.D. Breunlin, R.C. Schwartz & B.M. Kune-Karrer, *Metaframeworks: Transcending the Models of Family Therapy* (Jossey-Bass: San Francisco, 1992).

⁴ It may be argued that the dynamics of intimate family life in the nuclear family are "normally" more destructive than in other human relationships, and therefore family power is "normally" destructive - see discussions in B & P Berger, *The War Over the Family: Capturing the Middle Ground* (Harmondsworth : Penguin, 1983).

Sometimes the use of certain power is obvious, sometimes it is hardly visible. Sometimes certain types of power are accepted; sometimes the use of certain powers are deeply resented and resisted.

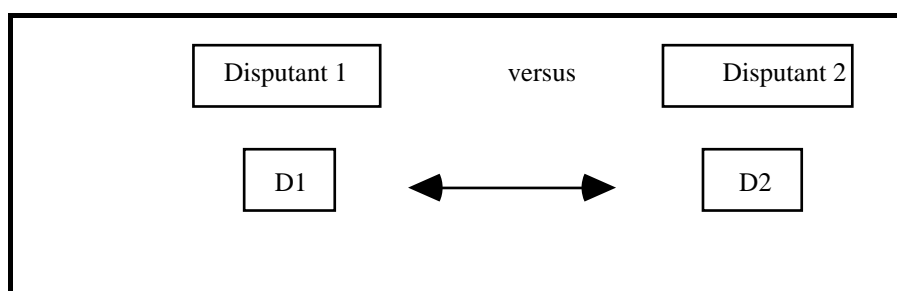
Broadly speaking, literature on negotiation and mediation has identified two types of negotiation or conflict management - namely positional "win-lose" as compared to interest based bargaining. Different forms of power are important in **both** types of bargaining.

By Whom is Power Exercised During Mediation and Negotiation?

A standard question asked by mediators (and negotiators) when preparing for a mediation is, "who are the influential people in this family dispute?" Failure to ask and answer this question frequently will probably lead to the negotiations and settlement being "destabilised" by vague or unpredicted forces. A common answer to the basic question usually identifies the husband, wife and various family relations, particularly grandparents, parents-in-law and new de facto spouses. However, there are normally a number of other powerful players whose roles need to be considered. They include solicitors, barristers, valuers, accountants and the judicial officer who may eventually be requested to approve the form of settlement.

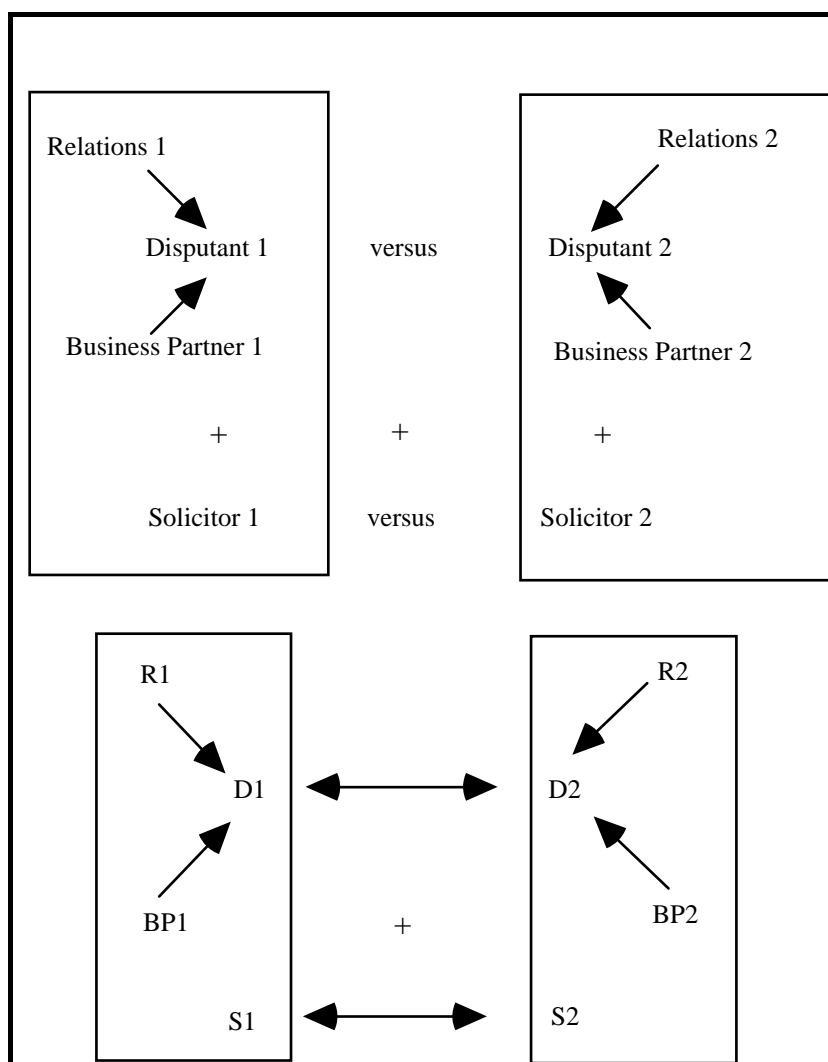
Diagrammatically, some simple conflicts consist of:

Diagram 1



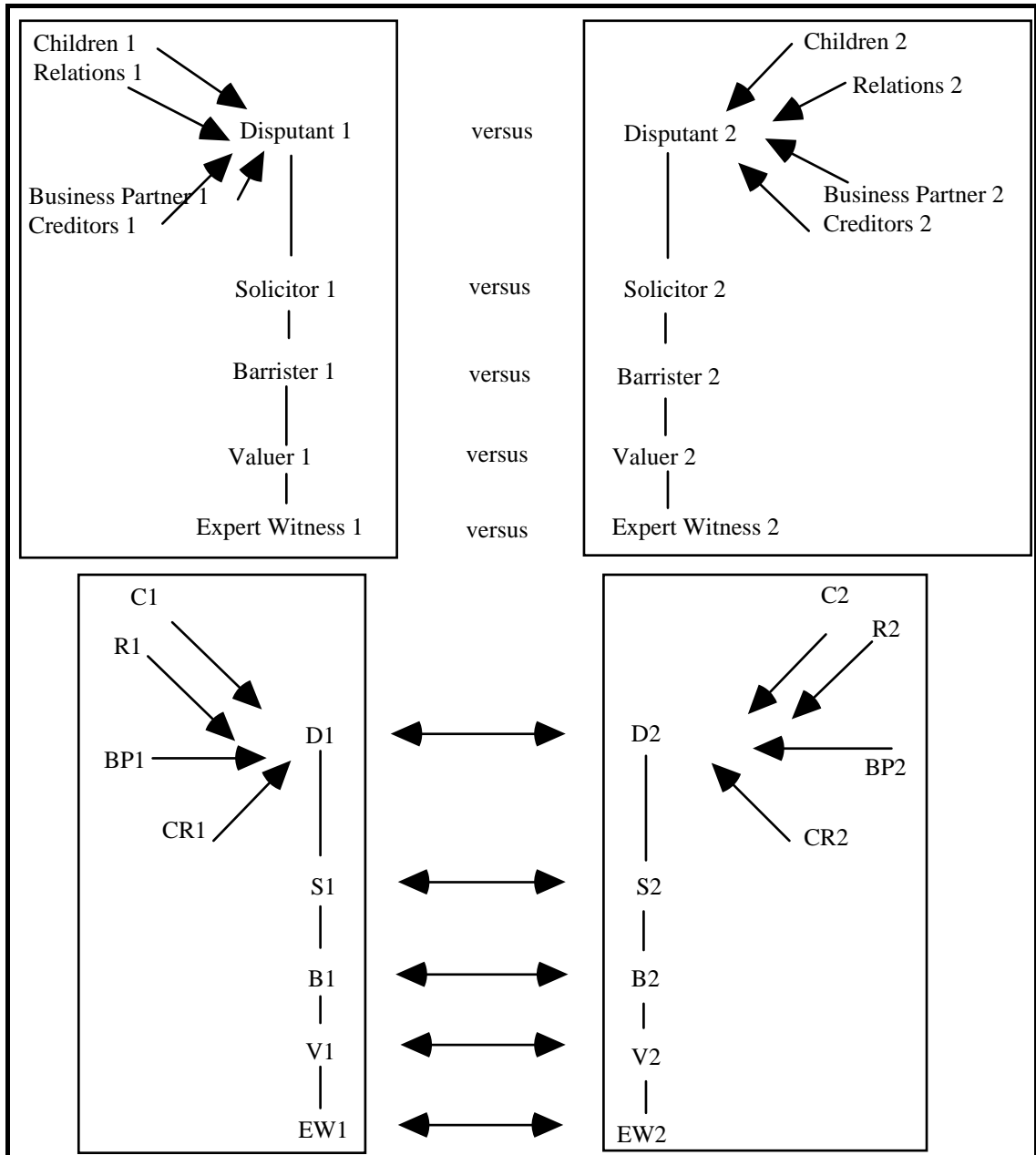
More frequently the conflicts which enter a lawyer's office have an increased number of parties:

Diagram 2



In some cases, the number of influential parties escalate to the following:

Diagram 3



Obviously, these above permutations and diagrams are not exhaustive. Many more examples of external influence can be given. For example, a lawyer may be under pressure from her/his legal partners to settle a case quickly in order to improve the cash flow in the legal firm. An expert witness may be under threat of suspension from his/her professional association for expressing unorthodox views. A child welfare department may have made initial inquiries about the well being of a child.

Moreover, the lines of power and conflict are not necessarily horizontal and parallel as the diagrams indicate. For example, the lines of conflict and power are often vertical - running between members who are outwardly on the same team. For example, conflict and power relationships exist between a disputant and his/her solicitor and barrister particularly as a dispute moves towards the door of a court. Conflict may escalate on the same team due to rising costs, disappointed expectations about "winning", relationship and personality clashes, disappointed expectations of client or professional about the other's support and behaviour. A valuer or barrister may be perceived to have curried favour for future employment by giving an initially favourable opinion.

- "Once you are inside court, the barrister is in control"
- "I cannot pay the valuer's fees"
- "My solicitor has not subpoenaed the bank records"
- "My client is not a impressive witness; she is over confident"
- "My barrister has changed his mind at the last minute on my chances of success."

Solicitors are often accused by opposing solicitors of "losing control of his/her client." The implication apparently being that lawyers are expected to control any erratic emotions of their clients and educate them in an orderly fashion towards a door-of-the-court settlement.

Lines of conflict and power may be horizontal at unexpected levels. For example:

- two solicitors may be carrying on unfinished emotional business from a previous case
- two barristers may have a personality conflict
- two valuers may be attempting to show aggressively that each should be employed in future cases
- two psychologists may have professional credibility at stake on the methods used to evaluate a child's wishes.

Additionally, lines of conflict and power may be diagonal. For example:

- a husband may believe that the solicitor for the wife is aggressive, and a fee scrounger. Thus the common tactic of solicitors to organise a round table conference in order to establish their own reasonableness face to face with "opposing" clients; or alternatively, to circumvent a lawyer who is part of the conflict problem, rather than part of the solution.

- a business partner of the husband's may harbour a special dislike for the wife and want to add fuel to the conflict
- a barrister may have an old score to settle with an expert witness from a previous encounter in court.

Each extra relationship on the same team provides an additional potential source of power, and thereby an additional potential sub-conflict. Ancillary conflicts are in themselves a form of aggravation power.

- "I'm worn out by the conflict with my teenage children"
- "My business partner says that I must settle because he's not going into any court"
- "My solicitor says that I don't have much hope, so I suppose I'll have to take her advice".

One of the potential benefits of mediation is that in the confidential intake or separate meetings with each disputant, the additional sources of power and sub-conflict can be identified. These are sometimes labelled as part of the "hidden agendas" of the disputants. Once identified, a range of possible responses can be explored. While power and sub-conflict remain vague or unidentified, the negotiations inevitably stagger unnecessarily.

What Forms does Power take during the Course of a Serious Family Dispute?

Legal practitioners, counsellors and mediators can anecdotally identify many common forms of power and influence exercised during negotiations.

Mayer has helpfully categorised some of these forms of power into ten categories⁵

Mayer states

"[t]here are many sources of power, but for the most part they can be divided into the following ten categories:

1. *Formal authority.* The power that derives from a formal position within a structure that confers certain decision-making prerogatives. This is the power of a judge, an elected official, a CEO, a parent, or a school principal.
2. *Expert/information power.* The power that is derived from having expertise in a particular area of information about a particular matter.
3. *Associational power (or referent power).* The power that is derived from association with other people with power.

⁵ Mayer *supra* note 2 at 78.

4. *Resource power.* The control over valued resources (money, materials, labor, or other goods or services). The negative version of this power is the ability to deny needed resources or to force others to expend them.
5. *Procedural power.* The control over the procedures by which decisions are made, separate from the control over those decisions themselves (for instance, the power of a judge in a jury trial).
6. *Sanction power.* The ability (or perceived ability) to inflict harm or to interfere with a party's ability to realize his or her interests.
7. *Nuisance power.* The ability to cause discomfort to a party, falling short of the ability to apply direct sanctions.
8. *Habitual power.* The power of the status quo that rests on the premise that it is normally easier to maintain a particular arrangement or course of action than to change it.
9. *Moral power.* The power that comes from an appeal to widely held values. Related to this is the power that results from the conviction that one is right.
10. *Personal power.* The power that derives from a variety of personal attributes that magnify other sources of power, including self-assurance, the ability to articulate one's thoughts and understand one's situation, one's determination and endurance, and so forth."

What follows will elaborate upon Mayer's categories particularly in the context of family negotiation and mediation. Particular illustrations of power fall into more than one of the inevitably overlapping categories.

Formal Authority

In mediation, there is a common belief that a judge or former judge will have particular control over both process and substantive result because of his or her judicial status. This will particularly be true if the judge is perceived to have any input into a subsequent judicial proceeding. For example, in the New Zealand, the *Family Proceedings Act 1980* states:

SECTION 13 - MEDIATION CONFERENCE

13(1) Where an application has been made in a Family Court-

- (a) By a husband or wife against the other spouse for a separation order or a maintenance order (including a maintenance order in respect of a child); or
- (b) By one parent of a child against the other parent for an order for the custody of, or access to, the child- either party to the proceedings or a Family Court Judge may ask the Registrar of the Court to arrange for a mediation conference to be convened."

“SECTION 14 - PROCEDURE AT MEDIATION CONFERENCE

14(1) At each mediation conference a Family Court Judge shall be the Chairman.”

Such a judge in New Zealand has both formal and sanction power.

Even without subsequent sanction power, a judicial mediator tends to command respect (at least for an initial period) based upon the importance some people still give to “officials”.

In some cultural groups, there is a commonly expressed wish that the mediator be someone with a degree of formal authority - such as a priest, elder or ex-judge. This presence may add an air of dignity or seriousness to the meeting - or may facilitate one or both parties’ wish for an actual or foreshadowed arbitrated result.

One of the disputants may exercise a position of formal power outside of the family such as a politician, union boss or manager. However, that position rarely confers formal authority once that family member leaves the office. Inability to discard the formal power habits on the home front may itself be a major source of conflict.

A parent may also have a degree of formal power over children. At least for a time, children in some families or cultures may be prepared to obey parents purely because of the admonitions “I’m the parent and you’re the child” or “Because I say so, that’s why”.

Expert/Information Power

One party to a family negotiation or mediation often possesses more information than another in relation to normal patterns of behaviour of children, negotiation strategies, location of assets, methods of valuing assets, normal patterns of litigation, stamp duty and capital gains tax, normal grieving patterns, and what factual allegations are “relevant” to a judge. Such knowledge often enables the knowledgeable person to be confident and persistent in the course of negotiations. This partly explains the major role of legal representatives as fact-gatherers and as educators of clients before negotiations begin

Expertise multiplies information power. Thus the expert family lawyer knows when to talk and when to issue court proceedings; what evidence will weigh heavily with a decision-maker; the expert valuer knows which range of values or method of valuation is most likely to impress a decision-maker; the expert

mediator knows what styles of behaviour will promote communication, and what will create roadblocks.

Some writers have speculated that the repetitive control which women tend to exercise over parenting by nature or nurture gives profound information, habitual and structural power over males in the realm of decisions about children's schedules⁶. Some males are devastated by the apparent inevitability of dominant child time being "won" by the female parent.

Conversely, the repetitive control by males in families of finances and income earning ability usually gives males a well documented information and structural power over females in the area of property and income distribution.⁷

Associational Power

This form of influence sometimes appears in subtle forms in formal family disputes either for the parties in dispute or an assisting person. For example, Registrars of the Family Court conduct conciliation conferences under Order 24 of the *Family Law Act*. They may be thought to be powerful as they are perceived to have the ear of judges, despite the confidential nature of conciliation conferences. Therefore their views may be accorded a degree of deference.

Lawyers sometimes attempt to impress clients and the "opposition" by letting information slip out about their association with certain judges at committee meetings, conferences, university or golf clubs.

One family member will sometimes create a "coalition" with other family members, particularly with children, to make the other feel isolated. For example:

- . "The children and I think that you should help us."
- . "Your family thinks that your behaviour is unforgivable."
- . "The children have confided in me."
- . "Your business partner has told me a lot about you."

Resource Power

This is a very common form of actual or perceived power in family conflicts. One party may have more time, money, legal advice, support from relatives, paid help around the home. Resource power may be used to destroy assets via a scorched

⁶ L Weitzman, *The Divorce Revolution* (New York: Free Press, 1985).

⁷ P McDonald (ed) *Settling Up* (Sydney: Prentice Hall, 1986); K Funder, M Harrison & R Weston, *Settling Down - Pathways of Parents After Divorce* (Melbourne: AIFS, 1993).

earth policy; or to try to force another party to spend limited resources on searching for hidden assets or kidnapped children, valuing complex businesses, defending lengthy litigation, answering prolix questionnaires, reading massive affidavits, responding to interlocutory court applications, and defending appeals.

Of course, there is a limited range of responses to the blatant use of resource power, including legal aid, costs orders, appointment of a separate legal representation for a child, and interim maintenance orders.⁸

Procedural Power

In negotiations within a family in conflict, there is usually a substantial absence of procedural power. Negotiations are random and unstructured. Unfortunately, many lawyers exacerbate conflict by plunging into negotiations before discussing what procedures might be helpful. The only real power over procedure during negotiations emerges by mutual agreement, or by assertions that "in my experience, this procedure is most helpful.....".

Some lawyers attempt clumsily to exercise procedural power by statements such as:

- . "You make the first offer".
- . "The documents are all in my office if you want to come around and inspect them".
- . "I will draft the opening letter first - it will be on your desk next week".

Often these attempts to control procedure are also attempts to ensure that the "opposition" spends more time, money and inconvenience in a war of attrition. The opposition is well aware of the ploy, identifies it and refuses to co-operate.

However in mediation, a skilled mediator has considerable influence due to his/her control of procedure. The disputants have submitted by signed contract and habit to the mediator's directions concerning procedure. Thus the mediator has control over venue, seating, parties present and not present, who speaks first, how language can be reframed, length of time in problem defining, use of visuals, breaks, homework, wording of offers, linking of offers, timing of adjournments.

Such control over procedure can profoundly affect the dynamics of conflict and the substantive outcome. (Thereby the procedure-substance dichotomy is artificial but a nevertheless helpful starting point).

⁸ Eg *Hogan & Hogan* (1988) FLC 91-704.

Sanction Power

Attempts to influence the outcome of negotiations by express or implied threats of harm are common. "If we can't reach a settlement by 1 March," or "If you fail to behave properly then....". The threats or actual imposition of harm include the cessation of spousal or child maintenance; the notification of taxation, immigration, police, social security or child welfare authorities about alleged illegal behaviour; the cessation of children's visits; the termination of employment and entry into voluntary bankruptcy; reporting certain behaviour to a law society, professional association or the media; subpoenaing valued customers employers or business partners to attend at court bringing with them "sensitive" documents; various forms of physical violence or harassment.

A threat of physical violence can be a devastating form of power - usually of certain males over females; or of certain parents over children. A previous threat, or single incident of violence, or particularly a pattern of violence in a family may cause the violated to experience a range of responses - fear, self-loathing, self-blame, helplessness, exhaustion or despair.⁹ These are situations where a range of methods to protect the violated must be considered and employed¹⁰

Nuisance Power

Nuisance power obviously overlaps substantially with the preceding category of sanction power. Power may sometimes cause conflict; conversely, conflict is often a source of power. The continued emotional aggravation of conflict tends to wear most people out. Therefore a disputant will often be prepared to pay a price to end the contact, and hopefully thereby the emotional roller-coaster, thus being able to "get on with my life". There are some disputants who are enmeshed in "negative intimacy" with the conflict ("conflict junkies") for whom both the giving and receiving of nuisance is the elixir of life¹¹.

Family conflict is commonly a powerful nuisance because it occupies the thoughts of the disputants; distracts from work; is a painful reminder of past failures; causes embarrassment on social occasions; occurs at times and places when one disputant is least able to "manage" the conflict. The "nuisance" events may be regular phone calls; unexpected attendances at children's schools or lawyers'

⁹ See H Astor & C Chinkin *Dispute Resolution in Australia* (Sydney: Butterworths, 1992); H Astor, "Position Paper on Mediation", National Committee on Violence Against Women, Commonwealth of Australia, December 1991; "Guidelines for Use if Mediating in Cases Involving Violence Against Women", National Committee on Violence Against Women, May 1992.

¹⁰ *Ibid.*

¹¹ I Ricci, *Mum's House, Dad's House* (New York: Macmillan, 1980) at p 83.

offices; angry or tense exchanges at places of employment or schools; time consuming collection of financial evidence.

Habitual Power

The status quo in relation to accommodation, children's schedules, and finances is itself influential in negotiation because change is expensive, energy-sapping and unpredictable. Change usually requires courage and persistence.¹² Conversely, even an awkwardly functioning status quo has the merits of habit and a degree of success. Lawyers understand this influence well. It is reflected in the pithy orthodox advice given in early client interviews - "Don't move out of the house"; "don't give up your role as predominant carer of the children".

The power of the status quo in relation to the negotiated and arbitrated outcomes of property and custody disputes has been affirmed frequently by case law and statistical studies¹³.

Similarly, the habitual power of females over relationships with children and the emotional realm tends to persist through and beyond family conflict; that of males over job security, income and superannuation persists through and beyond family conflict¹⁴.

Moral Power

In family conflicts, it is very common for one or several disputants to take "the high moral ground". That is, an assertion is made that a price should be paid by the allegedly unrighteous to the allegedly righteous. Assertions of relative degrees of righteousness are made for many complex psychological reasons during the grieving process associated with any loss¹⁵

However, these assertions also have an influence upon negotiations. Generally, the power of these assertions wanes with the passage of time as each party "moves on" and mentally rewrites the history of his or her marriage¹⁶.

Time also tends to promote moral counter assertions ("she's hopelessly lost in the past") which blur the effectiveness of the initial righteousness graph. Moreover,

¹² Scott Peck, *The Road Less Travelled* (Rider: London, 1978).

¹³ P McDonald (ed) *Settling Up: Property and Income Distribution in Divorce in Australia* (Prentice-Hall: Sydney, 1986).

¹⁴ *Ibid* McDonald; also K Funder, M Harrison & G Weston, *Settling Down: Pathways of Parents After Divorce* (AIFS, Australia, 1993).

¹⁵ K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (New York: Basic Books, 1985); D Vaughan, *Uncoupling* (London: Methuen, 1978); R Weiss, *Marital Breakdown Separation* (Basic Books: New York, 1975).

¹⁶ See K Funder, "His and Her Divorce", ch 12 of P McDonald (ed) *Settling Up*, *supra* note 7.

the asserter of the moral high ground and the recipient of guilt are progressively “educated” by lawyers that most concepts of moral fault are distracting irrelevancies to affidavits and judicial decisionmakers. In practice, some judges of the Family Court habitually reprimand **both** parties publicly in court - both the “winning” and “losing” parties - for their past behaviour. This enables the “losing” party to avoid total alienation from the legal system, but naturally leaves neither feeling morally vindicated. Nevertheless, asserting relative righteousness may remain a powerful tool if the accused is influenced by conscience or a valued peer group.

Common examples of moral assertions are:

- “He can’t do this to me; I gave him the best years of my life and now he’s trying to leave me with nothing”
- “She is irresponsible and promiscuous”
- “He is just going through a mid-life crisis and is trying to recapture his youth”
- “She can hurt me, but why do this to our children?”
- “His primary interest has always been money and his interfering relatives”
- “She has been unduly influenced by university and her feminist friends”.

In private, a mediator can sometimes explore whether the use of moral power is inflammatory or helpful. The accuser can be encouraged to change forms of language; and/or the accused may be prepared to frame conditional offers which include statements about past behaviour (along a spectrum of meaning of “apologies”) or requests for a public declaration of appreciation by the accuser. For example “If I increased the amount of child support, would you be prepared to acknowledge in the written preamble of the settlement that I have almost always paid on time, and that this payment is more generous than is required by the child support formula?”

Personal Power

There are many personal characteristics of disputants which can profoundly affect the process and outcome of family negotiations. Characteristics include motivations, skills, knowledge, gender, ethnicity and literacy. Some illustrations are as follows:

1 Memory for detail

One party to a family dispute sometimes has a vivid and relatively accurate memory for details. The more forgetful party feels embarrassed that (s)he might

be seen as stupid or as a liar. The vivid recollector may attempt to label the other as incompetent or deceitful - either in private, or before a mediator or judge.

2 Denial or fear of the emotional realm

Personal power balances shift according to each person's **ability** and **experience** in dealing with the importance of feelings. A person who at least partly understands the grieving process may have an advantage over a person who is (temporarily) "out of control" because of an overwhelming sense of loss. Conversely, the "out of control" person may have a wild intransigence which gives them power in negotiation because (s)he is "impossible to handle". Such a person may need the formal decision-making process of a courtroom.

"It has often been suggested that Australians and Australian males in particular have special difficulty in:

- (a) acknowledging the existence of an emotional dimension of their own existence;
- (b) discussing the emotional dimension of their own existence;
- (c) responding constructively to their own or others' emotions and feelings¹⁷.

These disabilities may once have been assets in a male-dominated pioneering or convict culture. However, these disabilities provide a serious handicap to reaching or stabilizing family settlements. One or both parties are bleeding from a wound which is not acknowledged, is actually scorned and denied, and for which they have no resources or skills to heal.

Professional assistance to "get in touch with one's feelings" is further hampered by ignorance, macho self-sufficiency, stereotypes of counsellors, and the feminization of the counselling profession."¹⁸

3 Charisma and attractiveness

One family member may exert considerable influence over a mediator, judge, his/her own lawyer and the "opposition" lawyer due to attractive personality or attractive appearance. The other disputant will usually be well aware of this potential influence from their history of living together.

¹⁷ R Conway, *The Great Australian Stupor*, (Melbourne: Sun Books, 1971); *Land of the Long Weekend* (Melbourne: Sun Books, 1978); *The End of the Stupor* (Melbourne: Sun Books, 1984); P Jordan *The Effects of Marital Separation on Men* (Family Court of Australia, Brisbane 1985).

¹⁸ J H Wade, "Deals Which Come Unstuck: Reasons for the Breakdown of Family Settlements" (1993) 8 *Australian Family Lawyer* 14 at 16.

During mediation intake sessions, the writer has frequently heard concerns expressed to the (male) mediator about the inevitable influence of the other party over the mediator.

- “Oh she will bat her eyelashes and wrap you around her little finger.”
- “He’s a real charmer; makes me look like an idiot.”
- “He’s a real bastard at home, but in front of you, he’ll be as smooth as silk.”
- “She’s very attractive and usually gets her way.”

4 Intolerance and inflexibility

Some personality types by nature or nurture appear to have no ability to consider a problem from anyone else’s perspective other than their own. This is not only an angry stage through which the person is passing during the grieving process.

This “type” particularly emerges in relation to value conflicts.¹⁹ One person may refuse absolutely to even consider the possibility that children may be permitted to attend a state school; to read certain books; to be exposed to people drinking alcohol; or that women might manage a business or employ a child carer.

Such apparently total inflexibility gives that inflexible person a considerable amount of initial power. She/he can stonewall his/her legal adviser, opponent and mediator. A large amount of time, energy and money are spent on devising strategies to exert power (eg charismatic, sanction, threatening) on the inflexible person.

5 Adjustive dissonance

A state of entrenchment and inflexibility may also be only a temporary phase as one or both disputants pass through the ubiquitous grieving process.²⁰ For example, the “loss” of the relationship may cause one party to be angry - “it’s a matter of principle; (s)he can’t do this to me” - for an extended period of time. This state is particularly common for males after a bombshell separation.²¹

The other party may have “accepted” the inevitability of the separation years before the actual physical separation takes place. This is sometimes known as “adjustive dissonance” in the grieving process.²² The person who is passing

¹⁹ See Moore's "pizza"; Moore *supra* note 3 at p 27.

²⁰ Ann Milne, "The Nature of Divorce Disputes", ch 2 of J Folberg & A Milne, *Divorce Mediation: Theory and Practice*, (New York: Guilford Press 1988); E Kubler-Ross, *On Death and Dying* (New York: Macmillan, 1969); R S Weiss, *Marital Separation*, (New York: Basic Books, 1975).

²¹ P Jordan, *supra* note 17.

²² Milne, *supra* note 20 at p 30.

through states of anger, denial, shock or depression may have particular strength or weakness in the dynamics of the bargaining process. For example, an angry person may be weak if cajoled into a series of foolish letters, admissions or legal expenditures by a cool and dispassionate partner. Conversely, the angry person may be so unrealistic, careless or destructive, that his/her spouse may give into demands in order to reduce stress, expense and time-wasting.

6 Different Readiness to Take Risks

Where one disputant is willing to take risks such as flipping coins, relying upon judicial decisions, spending money on valuers or experts, then (s)he may have considerable power over another disputant who is more risk averse. The risk-averse negotiator may readily accept something at the bottom of the range, rather than venture a larger prize via a later, expensive and uncertain dispute resolution process.

7 Communication Skills

It is trite to observe that, by nature or nurture, some people have a greater array of communication skills than others. They are able to listen, express themselves, use appropriate language, patiently consider alternatives and avoid personal insults. Such skills invariably impress mediators and judges and give the skilled person considerable power in bilateral negotiations.

8 Relationship Conflict and "Pressing Buttons"

One common cause of conflict arises from a pattern of behaviour, responses and attitudes which have developed over a period of time and have become reflexive.²³

For example:

- "She always dominates the conversation."
- "Whenever we discuss that topic, he just goes silent."
- "He thinks that all women, including me, are stupid."
- "She always blames me and I lose control and start ranting."

Those ingrained patterns of response can give one party considerable conscious or subconscious power over another. When used consciously, this power is often referred to as "pressing his/her button" - a wilful method of causing distress and dysfunction to the other party.

²³ C Moore, *The Mediation Process*, *supra* note 2 at p 27.

9 Persistence and Patience

One person may be more persistent than another - able to concentrate on a task for hours or years. The other may prefer a broad brush and become impatient with long term discussion and re-discussion of an issue. This difference in personality (and learning style) may of course have a decisive effect on the process of negotiation unless the difference is identified early and strategies developed to allow for such differences.

10 Self-esteem

When a person feels competent and skilled regardless of what others may think of him/her, then that person has special power in any negotiations. Many forms of power and levers such as threats and higher moral ground, are ineffective against such self-esteem.

11 Existential esteem

Some people have a strong sense of meaning and being loved externally in the universe. This can promote a degree of calm which is very powerful against threats and aggression or lack of due process.

The writer has seen a number of women with a strong Christian faith display a devastating serenity, reasoned assertiveness and commonsense against spouses who have "negotiated" via dirty tricks and violence. (There may have been elements of conscious antagonism in these displays of other-world worldiness). They certainly had no apparent fear of pain or death - only a quiet and steady determination to protect their children.

12 Ethnicity and gender

Cultural habits of denigration and/or marginalising of women, the aged, children, and certain racial groups may lead to members of those groups feeling a lack of confidence and assertiveness in a negotiation/mediation. Habitual deference, silence or politeness by one party will often be a form of weakness which has traditionally allowed a more outspoken person to "win".²⁴

What Forms Does Power Take Particularly When Exercised by a Mediator?

This question has been answered in part by illustrations given under Mayer's ten categories of power.

Virtually every step taken by a mediator involves the exercise of power. The very function of a mediator is to exercise influence on the process and dynamics of negotiations. This power can obviously be exercised helpfully or unhelpfully. The

²⁴ D Storer (ed), *Ethnic Family Values in Australia* (Sydney: Prentice Hall , 1985).

emphasis here is on power over process, rather than power to press for a particular substantive outcome. The latter form of power, although available to any mediator, has many potential problems (including progressive loss of power and reputation).

Christopher Moore has identified twelve categories of mediator power²⁵. The following list uses different though overlapping classifications of mediator power than those expounded by Moore.

In relation to process, the skilled mediator has the following forms of power:

1. Authority and respect as someone who is accustomed to dealing constructively with conflict. Disputing parties often change their behaviour in the presence of such a person and are willing to try a process which has proved helpful "in the mediator's experience".
2. Ability and experience to re-organise the physical environment, timing and parties to be present for the negotiations.
3. The "right" (as part of the mediator's contract and practice) to organise the orderly collection and summary of "facts" - past information and a future range of predictions relating to valuations, umpires' behaviours and human behaviour.
4. The sanction of withdrawing from being a facilitator if the parties do not make reasonable efforts to comply with the suggested process. Most disputants do not want the stigma of a label such as "unreasonable".
5. The mediator has power arising from knowledge of causes of conflict, and of a battery of interventions which may avoid or reduce the causes of conflict. This is indeed an example of knowledge as power.
6. The mediator is persistent and optimistic, both characteristics arising from experience that:
 - (a) these characteristics are necessary prerequisites to constructive decision-making;
 - (b) the mediation process is very effective and in itself has a wisdom which is constructive in most situations of conflict. The optimism and confidence of any worker who has walked a path many times before

²⁵ See C Moore, *supra* note 2 at pp 271-278.

(eg builder, doctor, electrician) usually allays some anxiety of people enmeshed in apparently unresolvable problems.

7. By orchestrating the steps leading up to a mediation, the mediator puts into place a number of dynamics which **in themselves** press the parties to find their own resolution even before any joint mediation takes place. Thus there is the relatively common event of “settlement at the door of the mediation”. For example, one or both parties may become embarrassed about discussion of certain issues even before a mediator; solicitors may scrupulously give legal advice for the first time; solicitors, in preparing documents for the mediation, may revise initial advice on the probabilities of a successful court outcome; the expense of mediation may have a sobering effect upon aggressive litigants; during intake sessions solicitors and parties may learn about interest based bargaining, or that their arguments have orthodox counter-arguments.
8. Mediators have great influence where they are able to **educate** one or both parties about the basic principles of interest-based bargaining. Solicitors often play a major role in this education process also, as they do not want themselves or their clients to lose face by appearing ignorant on the basic principles of interest-based bargaining. Thus clients of lawyers who have been trained in mediation skills often arrive at mediation sessions well prepared for the negotiation process.

For example, the mediator or preparing lawyers can train parties how to articulate interests rather than positions; how to use non-inflammatory language; how to mutualise concerns and interests; how to list issues; how to articulate a range of options; how to listen; how to make face-saving offers prefaced by the ubiquitous phrase “what if...”.

9. Experienced mediators have considerable influence over disputes by persistently **clarifying**. They clarify the **process** so that there are few surprises or ambushes; the **interests** and **needs** of each party, by providing uninterrupted speaking time, by reframing, by use of visuals; the **issues** or questions to be addressed and in what order; the list of **options** generated to answer each question; **statements** or **offers** made by summarising or repeating these in clear and dispassionate language or writing. Persistent clarity is persistent pressure.
10. In limited circumstances, mediators may have direct or indirect coercive power. Moore comments:

“...Because mediation is voluntary and the mediator serves the parties, he or she usually has few direct coercive techniques available to influence disputants. Exceptions include some court-related mediators who are empowered by statute to make recommendations to the judge if the parties cannot settle; interveners practicing med-arb, a mediation-arbitration hybrid in which the parties agree to allow the intervener to mediate until an impasse occurs, at which time the mediator becomes an arbiter and decides the conflict’s outcome; and international mediators with powerful superiors that can damage recalcitrant parties.

There are, however, several indirect coercive techniques that may incline the parties toward settlement. The mediator’s display of impatience or displeasure, as indicated by nonverbal communication or verbal statements, may “coerce” a party to move toward agreement. This may be especially true when a party wants the intervener’s respect or wants to maintain the respect of his or her group and when this respect may be eroded by continuing an unpopular course of action. Mediator or peer approval or withdrawal of approval can be very important in moderating hard-line positions.”²⁶

11. The gender of the mediator(s) results in a form of power which is often problematic. For example, a male may believe that a female mediator (judge or marriage counsellor) is biased towards the views and interests of the female, and vice versa. Therefore, perceived or actual gender alliances readily form in mediation sessions thereby making the isolated person feel suspicious.

When is an imbalance of actual or perceived power between parties so marked that the mediator has an ethical duty to terminate the mediation?

Although power and power imbalances are inevitable in all negotiation, the motives, procedures and consequences associated with power raise difficult ethical questions (on any version of ethics). To what extent should the various forms of power be exercised or qualified?

There has been extensive discussion about the suitability of the “classic” mediation process where there is an actual or perceived marked imbalance of

²⁶ Moore, *supra* note 2 at p 277.

power between the disputants. These concerns multiply as it is increasingly common for some form of mediation to be mandatory, and as mediation services become staffed by the under-trained, over-worked and under-paid. However, the concerns expressed are partly modified by the protocols and strategies developed by various mediators, and by the general failure of the litigotiation process (or other dispute resolution processes) to cure many types of imbalance of power (eg., inequality of finances, memories, perseverance, information). That is, the alternative of "going to court" often fails to protect certain types of disputant "weakness". Approximately 90% of litigious claims are settled by negotiation. The remaining 10% which proceed to judicial decision only result in satisfied customers in less than half of those cases²⁷.

Ethical standards for mediators attempt to provide guidelines for mediators. For example:

"[t]he Code of Professional Conduct of the Colorado Council of Mediation Organizations states that "a mediator's satisfaction with the agreement is secondary to that of the parties." The Code goes on, however, to say that "in the event that an agreement is reached which a mediator feels is (1) illegal, (2) grossly inequitable to one or more parties, (3) is the result of false information, (4) is the result of bad faith bargaining, (5) is impossible to enforce, or (6) does not look like it will hold over time, the mediator may pursue any or all of the following alternatives: (1) Inform the parties of the difficulties which the mediator sees in the agreement. (2) Inform the parties of the difficulties and make suggestions which would remedy the problems. (3) Withdraw as mediator without disclosing to either party the particular reasons for his/her withdrawal. (4) Withdraw as mediator but disclose in writing to both parties the reasons for such action. (5) Withdraw as mediator and reveal publicly the general reason for taking such action (bad faith bargaining, unreasonable settlement, illegality, and so on)".²⁸

Folberg and Taylor comment:

"The mediator may decide that the inequality is a permanent condition or one that cannot be effectively dealt with in mediation - such as physical abuse or intimidation, a total disparity in financial

²⁷ P McDonald, *Settling Up*, *supra* note 7 at 230-240.

²⁸ *Code of Professional Conduct*, Colorado Council of Mediation Organisations, 1982 p 4 cited in A M Davis and R A Salem "Dealing With Power Imbalances in the Mediation of Personal Disputes", (1984) 6 *Mediation Quarterly* 17 at 24.

sophistication, significantly lower intelligence of one participant, a language or physical handicap, or a long-standing behaviour or mental problem. In such cases, the mediator has a ethical responsibility to notify both participants of the evaluation, suspend the mediation process, and refer them to lawyers, psychologists, or other helpers outside of mediation... Mediators are not charged with the responsibility of balancing all relationships. They must ensure, however, that participants are not railroaded into choices that are unconscionable.”²⁹

Conclusion

The sources and forms of power in serious family disputes are complex and ultimately unknowable. Nevertheless, attempted systematisation and discussion of the sources and forms of power in any dispute can facilitate constructive intervention; and may avoid hasty overreaction in the face of that shibboleth and catch-cry, “inequality of bargaining power”.

Exercises

1. From your experience, give examples of Mayer’s ten categories of **power**.
2. Pyramid - write out most common kinds of power you have witnessed in family disputes.
3. Pyramid - write out examples where supposedly weaker parties had **power**.
4. Give common examples of sub-conflict which in your experience occurs on the “same team” in family disputes.

²⁹ J Folberg & A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, (San Francisco: Jossey Bass, 1984) cited in Davis and Salem *ibid*. See also Law Society of New South Wales, *Family Law - Advisory Code of Practice* 1992, para 2.2.