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Assessing appropriate processes for family law clients

Mediation, negotiation or litigation?

Linda Kochanski

Broadly speaking, mediation, negotiation and litigation are the three processes available to a person involved in a marital separation. In many instances, the choice made by the person is not necessarily the most effective or most suitable for their circumstances. For many people, the choice of the process they will use to resolve their family law issues is dependent on the first family law professional they see — whether that is a counsellor, mediator or legal practitioner. The choice of process becomes the choice of the professional and not necessarily what is most appropriate for the client.

Simply put, a separating person needs a process that resolves their family law disputes in a way that:

- they understand;
- they are comfortable with;
- they can participate in fully;
- is suitable for the circumstances surrounding the relationship; and
- achieves a resolution as expediently as possible.

Further to the above list of criteria, there needs to be consideration of the children of the marriage when choosing the process best suited to the separation. A recent survey indicates that there were 53,444 children affected by dissolution of marriage in the year 1999 to 2000.¹ When deciding what process should be followed, the family law professional should consider how the 'best interests of the children' could be realised.² There needs to be a holistic approach taken by family law professionals. The legal, social and family impacts need to be considered and the gaps that exist between the social scientists (counsellors, mediators) and the legal practitioners need to be bridged to ensure that the needs of those people involved in a separation are dealt with effectively and appropriately.

Interestingly, the Federal Government has identified this area as one of particular need. Expressions of interest were called for persons to train legal practitioners and mediators in child inclusive practice.³ The training also looks at family violence and its impact on the process that the party is entering into. Clearly, this is recognition that some family law clients are slipping through the system. It also suggests that the Government has identified that consistency in approaches to family law disputes across the disciplines would assist the parties.

The premise of this article is that by modifying the preliminary intake interview conducted by the mediation service of Relationship Australia Queensland, an instrument could be produced that all family law professionals could use for their initial interview.

All family law professionals conduct an initial interview as a rule, yet it would seem that they all interview for what is relevant to their particular discipline. A solicitor will focus on the facts of the separation and seek instructions from the client on what they wish to do. A mediator focuses on the parties' decision-making process and whether they are ready for mediation. If a client consults a counsellor immediately after separation, the emotional side of the relationship will be explored in detail.

What needs to happen is that the initial interview for a separating client should become an assessment tool so that the client could be directed into the most appropriate process at that time. This is not to say that clients have to stay with one process for the length of the dispute. What should eventuate is a seamless movement by the client between disciplines and professionals. Apart from the format of such a process, this model would also require major attitudinal changes on the part of the family law professionals. This, in the writer's submission, would be a

difficult exercise and will not be investigated in this article.

Family law professionals need to be constantly aware that their clients are probably experiencing one of the most emotional, vulnerable and volatile times of their lives. At such times, clients tend to place heavy reliance on the guidance of the experts. These experts need to ensure that they collect all the relevant information and use that data to assist their clients to make informed choices about how they should proceed.

Advantages of a uniform assessment instrument

A separation is an emotional process for any person. All family law professionals, whatever their discipline, have a duty of care to their clients. This duty of care requires the professional to ensure that the party is fully informed about their situation and that the party understands the impact of all decisions made.

Mediation, negotiation and litigation place different requirements upon the separating couple. A couple that is suitable for mediation may not necessarily use mediation for their dispute resolution process if they assess that negotiating may produce a solution more effectively and more expediently. It is important to note what a party needs to bring to a process to make it effective: while litigation may seem the obvious choice in some circumstances, further investigations may reveal that a modified primary dispute resolution method may better assist the client.

Mediation

For the mediation process to be most effective, the clients must have the ability to negotiate with each other on an equal footing. The mediator controls the process and, to that extent, may attempt to rectify any power imbalances that may be present. However, it is still the client who needs the ability to negotiate on his or her own behalf. To that end, they must feel 'safe' in the mediation. The word 'safe' in a mediation context means that a client:

- does not feel threatened or intimidated by the other party/s in the room;



- • is able to use 'I' statements and indicate what they want;
- is prepared to develop options;
- is 'emotionally reconciled' to the separation; and
- is able to focus on the decision-making process.

Unless an individual can assure the mediator that they are able to do all these things, mediation may not be the suitable process for them and the mediator should refer the client to another professional.

Negotiation

Negotiation in this context may mean either self-negotiation between the clients or third party negotiations, such as those conducted by a solicitor. If a client chooses a negotiation process, they must have a complete understanding of the relevant information and have the ability to negotiate on their own behalf without influence from any other party. In negotiations using a solicitor, it is often the case that the parties are still communicating with each other and the dominant party is often able to exercise influence over the other. This can result in the instructions given to the solicitor being contradictory in nature. Conversely, some clients may be able to negotiate between themselves successfully but are blocked by their legal representatives. A family law professional must be able to determine if the process being used can be varied in any way to assist the clients better. In this case, the possibility of calling a round table conference may be something to be explored earlier.

If the clients choose to negotiate between themselves, the emotional aspects of their relationship can overwhelm the negotiations and cause them to break down more quickly than they might have if they had used counselling or mediation.

Litigation

For a client to participate fully in litigation they must not only be able to give full instructions but they must be prepared for the 'snowball' effect of a court process. Once commenced, a court application is difficult to stop and a client must be able to invest time, money and emotions in legal action. They must clearly understand the implications of

beginning such an action and must be aware of the impact upon their families, their health and their life for the time the action takes. Unless the family law professional can be assured that the client understands and accepts these things, other options should be explored with the client.

What areas should an assessment tool cover?

There are many forms that a preliminary assessment instrument may take. However, an instrument exists that can be modified — the mediation intake preliminary interview. This interview collects relevant data and assesses the suitability of the couple for mediation and also allows the parties to make that assessment. Laurence Boulle in his most recent publication acknowledges both the specialised function of the intake interview as well as the ability of the intake to 'stream' disputes.⁴ Boulle also recognises the use of intake to refer disputes to the appropriate dispute resolution option.

It is also important to note that in family and child mediation under the *Family Law Act 1975* (Cth), there is already recognition of the intake process.⁵ Under the Act, the main purpose of the intake interview is to assess the level of domestic violence between the parties and to assess whether they are suitable to proceed to mediation.

The Relationships Australia Queensland model of intake falls within the guidelines of the *Family Law Act*. All parties requesting mediation with Relationships Australia must have an intake interview and there must be a 24 hour gap between intake and the first mediation session.⁶ This break allows both the parties and the mediator to assess whether the mediation process is appropriate. The major consideration under the Act is the safety of all parties and the ability for the parties to negotiate as equals.⁷

It is interesting to note that the regulations dealing with mediation and the intake process were enacted in June 1996. Relationships Australia has been conducting an intake interview along the same lines since 1989. The Relationships Australia model goes further than what is prescribed in the regulations and this makes it a model that could be modified and used across disciplines. ➤

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Motivation

➤ The Relationships Australia model looks at the motivation of the parties and how they want to resolve this matter. This question could equally be applied to all processes: mediation, negotiation or litigation. If a client hasn't the motivation to settle the matter by a primary dispute resolution method, then litigation or solicitor based negotiation may be the best options for the party. However, if a client indicates a high level of motivation, this may point to self-negotiation or mediation. A family law professional must consider the motivation of the client; a person who seeks a primary dispute resolution method for the purpose of being obstructive may need to be disqualified from the process. This obstructive behaviour could be indicated by a history of broken agreements, and questions therefore need to be asked about previous negotiations and agreements made prior to coming to the interview.

Conflict resolution patterns

A family law professional who ascertains the past and present conflict resolution patterns of a separating couple can assist in the making of an informed choice about the process best suited to the circumstances. In gathering data about the conflict resolution patterns, a professional is able to assess not only the way the parties resolved issues in the past, but also if a power imbalance exists during the present separation. If there is too great a power imbalance, neither negotiation nor mediation may be suitable, and so a court based process may be the one to follow. Acknowledging a power imbalance is not enough; clients must be able to identify ways to redress it.

It is accepted that clients involved in a violent relationship should not use a primary dispute resolution process. However, the difficulty is that many clients will not label themselves as either a victim or perpetrator of family violence. Emotional abuse, financial and social isolation, and verbal putdowns are all forms of family violence that greatly affect the power imbalance and a client's ability to negotiate successfully on his or her own behalf.

Assessing this early in the process would help the family law professional assist the clients in deciding the best options for

resolution. This assessment should not be left up to the individual alone, as a wrong decision may place them in a potentially dangerous situation. Conversely, a family law professional should be careful not to dismiss matters that could be resolved by primary dispute methods as ones suitable only for litigation. Many separations have some incident or incidents of violence towards the end of the relationship. These incidents may not represent a cycle of violence and may not indicate a significant power imbalance. Careful, direct questions need to be asked to ascertain perceptions of safety and the ability to negotiate before a decision should be reached.

Decision-making processes

The model should also include questions about how decisions were made in the relationship. This allows the family law professional to ascertain if and how a client will make decisions about the present issues in dispute. If a client indicates that the other party made most of the decisions during the relationship with little or no input from them, the family law professional should consider what has changed (if anything) and what process would give the disadvantaged client a voice in any decisions. Though litigation may be the obvious choice, some of the other primary dispute methods may be adapted to assist the clients to find a resolution.

Adjustment to separation

Clients need to adjust to or at least accept the separation. If one client is not reconciled to the separation and finds it difficult to make decisions without becoming highly emotional, then the family law professional needs to take this into consideration. A client who is emotionally unrenconciled may not be able to participate in any dispute resolution process. To encourage a client in such a state would disregard the duty of care that practitioners owe their clients. How do you make such an assessment? Again, direct questions about their own perceptions get the most honest responses. In addition, the practitioner's own observation of the client, the client's non-verbal responses and their general demeanour will assist in assessing the ability of the client to proceed.

Child inclusive practice

As indicated previously, it is the duty of all family law professionals to have the best interests of the children of the marriage as their paramount consideration. The impact of the processes on the children should be considered when assessing which one to follow to resolve the issues in dispute. Although litigation may look like the probable option for a client, consideration should be given to using a primary dispute resolution method to resolve some of the initial children's issues. Also, the possible use of family therapy during litigation should be considered to support the children and the family through a very difficult time. A co-operative approach across disciplines should be the goal for all family law professionals.

What would the format of an intake interview be?

The intake interview could be simply a series of questions that form part of the overall first interview conducted by the practitioner. The interview would be conducted at the initial meeting with the party.

For the assessment, the questions would need to cover:

- administrative details for the agency file;
- the issues in dispute and whether they are covered by a particular process;
- emotional adjustment to separation — whether the client is ready to proceed;
- conflict resolution patterns — family violence and the existence of power balances would be explored;
- if family violence is indicated does a Domestic Violence Protection Order exist or is one being considered — if there is, what does it say? Does it preclude any process from being entered into?;
- decision-making processes, then and now;
- children — how they are coping, their issues, concerns and needs;
- motivation to settle — whether there are any hidden agendas;
- what the client wants to achieve, what process the client had in mind and the reasoning behind it;
- previous communications/negotiations between the parties — whether communication was satisfactory and negotiations achieved results; and

- • discussion of process options with party, to assist in making an informed choice.

The exact format of the instrument could be left to the particular discipline to incorporate into their practice. As long as there was a consistency about the content, the intake interviews should produce similar results, namely:

- processes suiting the party's needs;
- more referral between disciplines; and
- focus on the children in family law matters.

What can intake interviews achieve?

There are many family law professionals from a number of disciplines dealing with an increasing number of family law clients. There is no consistent approach in working with these people, despite the fact that most practitioners practice according to the *Family Law Regulations*. There are also a number of clients that slip through the gaps. They get referred from one professional to another, until finally they represent themselves in court applications or just give up and allow the other party to proceed without any further input.

Consistency in the initial intake would assist the clients by exploring all their options at an early stage so that they would have information to proceed. It would give them an awareness of the processes involved and the impact that the processes would have on them.

A consistent intake interview would help bridge the gap that exists between the family law professionals. Appropriate referrals would increase and the multi-discipline approach to dealing with family law matters could become a reality. Clients would be referred with confidence to other professionals dealing with the same issues and focusing on the same goals. Children's issues would have the prominence they were supposed to have under the *Family Law Act*.

Perhaps more significant than the other factors is the fact that by developing a uniformed

approach to the initial interview of all family law clients, there would be a move towards recognition of the 'duty of care' owed to the client at all stages of the process. ●

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Endnotes

1. Family Law Council *Annual Report 1999-2000* p 22.
2. *Family Law Act 1975* (Cth) s 60.
3. *Courier Mail* Saturday 10 March 2001.
4. Boule L *Mediation Skills and Techniques* Butterworths Sydney 2001 p 23.
5. *Family Law Act Regulations Orders 59 and 60*.
6. *Family Law Act Regulations Order 60*.
7. As above.

Bibliography

Boule L *Mediation: Principles Process Practice* Butterworths Sydney 1996.

Boule L *Mediation Skills and Techniques* Butterworths Sydney 2001.

Commonwealth of Australia *Family Law Act 1975* (Cth).

Commonwealth of Australia *Family Law Act Regulations* 1974.

Family Law Council *Annual Report 1999-2000*.

Folberg J and Milne A *Divorce Mediation: Theory and Practice* Guilford Press New York 1988.

Haynes J *The Fundamentals of Family Mediation* State University of New York Press Albany 1994.

Moore C *The Mediation Process: Practical Strategies for Resolving Conflict* Jossey-Bass San Francisco 1986.

Relationships Australia, Queensland 'Policy on mediation' 1996.

Relationships Australia, Queensland 'Intake sheet' 2000.

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