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‘Best interests of children’?

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Mediators and their language

'Best interests of children'?

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Diary and happenings

Some people use the words 'pedant' and 'pedantry' as terms of abuse. I do not. To me, 'pedant' is a rude name for someone who examines with care the words he or she uses. As mediators we are used to examining the words our clients use, as their unconscious choice of language is often very informative. But it works in reverse, too: we can tell our clients a lot about ourselves by the words we use. And, more importantly, we can influence their decisions by what we say. So, I believe it is important for us to choose our words carefully, to give our clients useful messages and to avoid giving them the other kind. A mediator ought to examine his or her vocabulary critically as part of the process of continuing to strive to improve the quality of our work and we should not be deterred from doing so by accusations of pedantry.

In this article I want to examine what I think is a danger in our use of language, and the danger of relying on established verbal formulae. I want to illustrate the concept by examining critically a phrase that we know well and whose meaning we believe we recognise immediately.

My starting point for this examination is to acknowledge that, like most of us, I often rely on verbal formulae I have grown accustomed to. In fact, I know of one mediator organisation that directs its staff to use 'standard' language in preparing memoranda of understanding, and discourages the use of language that has not been previously examined and approved. I do not approve of this practice, and describe it only as an example of how all of us, including mediators, prefer to stay on a path we know than to try a different one.

Problems with standardised language

Of course, it is easier to rely on standard language, both in what we say and what we write, than to think carefully about our meaning and then select words to suit it, but I will argue in this article that unconsidered language contains traps. The first is that standard phrases 'package' our thoughts for us in a convenient way, thereby making it easier for us to avoid thinking carefully about what we actually mean to say, or write. This happens precisely because we use the words but do not choose them, because they come ready-made to our lips. The danger is that they may pass from our lips into the ears of our clients, and thence into their brains, without having first been considered carefully in ours. In this regard, (please notice that those three words 'in this regard' are an example of what I'm talking about) George Orwell offered advice in his essay 'Politics and the English Language' which is as valuable today as when he wrote the words, 56 years ago:

What is above all needed is to let the meaning choose the word, and not the other way around. In prose, the worst thing you can do with words is to surrender to them. When you think of a concrete object, you think wordlessly, and then, if you want to describe the thing you have been visualising you probably hunt about till you find the exact words that seem to fit. When you think of something abstract, you are more inclined to use words from the start, and unless you make a conscious effort to prevent it, the existing dialect will come rushing in, and do the job for you, at the expense of blurring or even changing your meaning.



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For mediators, the danger in relying on a known and accepted verbal formula instead of thinking through what we mean and then seeking the words that will most accurately express it and are least open to misunderstanding (which means working harder), is that instead of conveying our message to our hearers or readers we subtly distort it. Orwell analyses this process in some of his essays – especially the one quoted above – and describes it in his two best-known works of fiction.

Animal Farm of course reminds us of the brain-deadening effect of slogans. Re-reading *Nineteen Eighty-four* recently, I was disappointed by melodramatic aspects of the plot, which I had accepted when I first read it years ago, but was enthralled by the argument that deleting ‘unacceptable’ words from the language makes it harder for people to think ‘unacceptable’ thoughts, simply because the words needed to express the thought no longer exist in their vocabulary.

It seems to me that the converse is also true. If we want to retain the ability to communicate accurately and effectively – and that is the essence of our work as mediators – we must ensure our vocabulary is up to the job. If we offer our clients a message that comes readily to our minds through having often been used in the past it may be unhelpful to them. Or, as I will try to illustrate later in this article, it may be one that ethically we should not convey. I argue against using verbal formulae we have become used to, and that creep into our writing without our recognising that (to illustrate the concept by using one) they are ‘past their use-by date’, and therefore no longer provide nourishing food to the consumer.

It is in this context that I want to examine the expression ‘the best interests of a child’, as used by mediators. These are words we have become accustomed to, our eye passes over them and they seem innocuous, but I believe that if we analyse them we can peel layers of meaning off them, like an onion.

Before moving on, I would like mention that I have tried to illustrate

the concept of dead language in the previous paragraph in two ways. In using the onion as an example – based on Peer Gynt – I have offered what I think is a live metaphor, though only in context. When I talked about goods being ‘past their use-by date’ I used a dead metaphor, and then tried to revive it and illustrate the difference between a live metaphor and a dead one by mentioning that goods that have passed their use-by date may no longer provide nourishing food. I thought this was worth doing, and mentioning, because I think imaginative use of metaphorical language by a mediator can be very helpful and constructive, and dead metaphors rarely are. Indeed, they may even work against the process if they indicate the mediator has nothing original to contribute to the discussion. In talking about live and dead metaphors I have adopted Gowers’ definition (p 82 of the HMSO edition): ‘A live metaphor is one that evokes in the reader a mental picture of the imagery of its origin; a dead one does not.’ I think ‘past their use-by date’ no longer conveys to most people the picture of perishable goods offered for sale late in the process of their decay.

What does ‘best interests of a child’ mean?

The first thing we notice when, instead of letting our eyes pass over them, we examine the words ‘the best interests of a child’ is that the word ‘interests’ is not used in the normal sense in which we use it daily. If you ask children what their interests are, their list would probably include, depending on their ages and genders, dinosaurs, TV, body-contact sports, saving whales, TV, Harry Potter books, designer jeans, TV, members of the other gender and ‘doing nothing’ with their friends. Clearly, that is not the sense in which the word ‘interests’ is used in this phrase. It does not refer to what actually interests a child but to what someone – somebody else, that is – thinks is good for her. (In this article when I talk about a child I will use the feminine, to avoid repeating the his/her formula.)

So, interests don’t mean ‘interests’. They refer to things a child needs. Now a child has all kinds of differing needs.

She needs food and clothing. She will be helped over her childhood years to become a mentally healthy adult by receiving love, care, education, discipline and a host of other things. If each of us made a list of these needs, some would appear on all our lists, and some might be found near the top of every list. Other things might appear near the top on some people's lists, and not appear at all on others. The need for food, clothing and shelter for example, are of a different order from the others, as well as a higher level of urgency, because without them the child will die. But food, clothing and shelter are neither good nor bad in themselves. They are needed, and are good only in the sense that we say something is 'good for us' if it meets our needs or contributes to our well-being. Indeed, low-quality food – what we might classify as 'bad food' or 'junk food' (another dead metaphor) is better for a starving child than no food. These things are good in the sense that they meet a need or enhance our pleasure in life – the sense of the famous slogan, 'Guinness is good for you'. And even in that limited sense what is 'good' is not the need, but its being met. A child doesn't have a 'good' need. Or a 'good interest'. What is good for the child is that her needs are met.

I think this leads us to another example of careless speech. We use the words 'good interest' in normal speech only when we talk about the rate of interest on borrowed money. If we borrow money at a low rate of interest, we may tell our friends we have got a 'good interest rate'. If we are depositors, we will 'praise' a high one. But of course neither is 'good' in itself, or objectively. Low interest rates suit us if we are borrowers and high interest rates if we are depositors, but there's no ethical or moral element, and these rates are seen as 'good' or 'bad' to the extent that they suit us at a given time. If I change from being a borrower to a depositor or, more likely, from being a depositor to being a borrower, my view of what is good or bad will go through a 180 degree turn. That, as Oscar Wilde used to say in order to end further conversation, is all.

Now, if there's no such thing as a 'good interest' in the sense in which

we're using the word interest, meaning a need that the child requires to have met, how can there be a better one or a best one? If we list a child's needs and try to place them in order of importance and urgency, we may agree a hierarchy in which some will be more important than others, and some more urgent. (For example, a child's need for nourishment and care may be very important, while the need to have an ear-ache treated by a doctor, although if untreated it might clear up in a day or so, may be less important but more urgent.) But, as I say, neither these needs nor any other needs of a child, or indeed an interest in having these needs met, can be said to be better in any real sense than any other.

And if no need is better than another certainly none of them can be described as 'best'.

Grammatical analysis

On its face then, the phrase 'the best interests of a child' is meaningless. If in trying to find a meaning for it, we analyse it grammatically, I think we will recognise it as an example of what grammarians call 'transferred epithet', which Trask describes thus:

This is the usual name for the curious English construction in which an adjective is understood as modifying, not the noun following it, but somebody or something else. Example: *She was smoking a pensive cigarette.* Here it is not the cigarette that is pensive, but the woman smoking it.

Fowler has a somewhat different 'take' on it. He says,

A curiosity of our language is the way in which an adjective can be made to operate in such a way that it has merely an oblique relevance to the noun it immediately qualifies. Examples: *'It's not your stupid place'* she says, *'it's anyone's place.'* – P. Lively, 1987 (the person addressed, not the place, is stupid).

If we classify the phrase 'the best interests of a child' as another example of transferred epithet, it begins to have a meaning. The rational, logical order of the words has been changed, so that 'best' appears to be an adjective, qualifying 'interests'. So, when we say 'what is in the best interests of a child?' what we mean is 'what is best in the interests of the child?' or 'what is best



for the child?' The word 'best' has been shifted from where it belongs (and where I think it is an adverb) and placed so that it seems to be an adjective qualifying 'interests'.

There may be some other rational explanation for the phrase 'in the best interests of a child' that I may be missing, but I have failed to find any other way of interpreting it that is rational and gives it meaning. (And conveying meaning is surely the purpose of language?)

Does this matter? Don't we all know what we mean when we talk about a child's best interests? And if those words, in that order, however illogical, have an accepted meaning, why make a fuss about using them? After all, they appear in legislation and in court judgements, and if they're accepted by lawyers, who are trained to use words precisely, doesn't it follow that they must have a clear meaning?

Meaning of phrase in a legal context

I think the difficulty for mediators is the context in which these words are used by lawyers, and which determines their meaning. They are usually – and I think only accurately – used in the context that somebody, usually a judge, has or may have to make a decision in what lawyers call a 'custody dispute'. 'The best interests of a child' is a useful shorthand in that context because of how the courts in most English-speaking jurisdictions operate. Two or more parties to a dispute argue in front of a judge in favour of their view, and the function of the judge, normally, is to make a choice between opposing sets of arguments or interpretations. In a 'custody dispute' two or more proposals about how children are to be reared are presented to the judge and the judge's duty is to decide which proposal seems to him to be 'best', that is, which is likely best to meet the needs of the children. (Of course, judges sometimes substitute their own ideas, not advocated by any party, but I do not think the phenomenon of judicial inventiveness affects how the phrase is used by lawyers, or its meaning in context.)

So, when a lawyer uses the words 'the best interests of a child', what she

means in a grammatical sense is 'what will best serve (or protect) the child'. But her primary meaning, in a real sense, not a grammatical one, is 'what an actual or hypothetical judge may think will be best for children about whose future she may be called upon to make decisions.' And of course when the legal profession adopted this shorthand they understood what it meant, to them.

But, as words sometimes will, when not kept under control, this phrase has expanded its meaning. In lawyer-talk, its meaning is no longer confined to 'what a judge may think will be best for children'. Lawyers now use it in their daily work of negotiating divorce or separation terms for their clients. When they do, I do not think its meaning is confined to 'what a judge thinks, or might think'. I think it often means 'what I think will be best for the child'. In a more extreme form, since the practice of law leads us to become dogmatic, it may come to mean 'what will be best for the child'.

It seems to me that this phrase, useful in the legal context, has spilled over into family mediation. I am not sure whether mediators have unconsciously picked up what we might call the secondary meaning described above ('what I think will be best for the child', or 'what will be best for the child'), or have taken the words in their original meaning, the basis on which a judge's decision should be made, but it is used by mediators in talking with their colleagues and by some mediators in talking to their clients.

Use of phrase by mediators

In the mouths of mediators, I submit, it contains not one trap but two. The first is that it appears to mean 'what is best for children' but its primary meaning is: 'what, on a matter on which there is room for many opinions, somebody (maybe sitting on a bench, maybe not) thinks will be best for them'. If we use these words, thinking that they mean one thing while in fact they mean something subtly but significantly different, we mislead our clients by our use of language.

And that trap (to mix metaphors) is the slippery slope that leads us into the second one. If a mediator uses those

words to herself or in talking to her colleagues it is possible she may mean 'what my clients may think will be best for their children'. But the danger is that, without realising it, and because of the ease with which she uses the phrase, she is actually thinking, 'what I assess will be best for my clients' children'.

And if she is thinking in that way, without realising it, she is – and more importantly, her clients are – moving towards major trouble. Because we're not judges: we're mediators. It's not our job to make that kind of assessment. It is, specifically, our job not to make that kind of assessment. But if we've allowed ourselves to be conned by language we have used without carefully considering it we may come to believe that we are talking about what will be good for the children of our clients although what we're actually talking about is 'what I think will be good for these kids'. And if so we have moved out of the role of neutral mediator and have assumed a decision-making role. We have done it without realising it, and it is unlikely that our clients will recognise it either. Because we've used a formula that's useful to judges we're in danger of starting to think like a judge, while the formula allows us to fool ourselves into thinking that we're still mediators and haven't assumed a set of judicial robes.

If we are in that danger through using a formula that tilts us in that direction without our being aware of it, it may be useful to focus on the word 'best', remind ourselves of the phrase 'mother knows best', and bring back to our minds that one thing a mediator must never do is to think that he or she knows best.

Influencing clients unconsciously

I think there's another problem with the phrase 'the best interests of a child'. The legal context in which it originated is where parents fail to agree on how to bring up their children and a judge is called upon to make decisions in default of parental consensus. Of course, this arises most often where the parents are no longer living together, or plan to part. Most parents who bring up their kids together work out how to

do it without help – or interference – from outside. Faced with separating spouses who have different plans for parenting, a judge will identify which of these conflicting plans may best serve the interests of the children. In very many countries, legislation provides that in making this decision the judge should prefer what he or she sees as the needs and interests of the children to the interests of their parents, and it is in this context that the phrase we are examining appears most often in statute law

Now, if we think about it we will see that this is quite a different order of priorities from those that apply in the 'intact family', where spouses live together and share in the burdens and joys of rearing their children. In the intact family, children's needs and interests will probably not be neglected, but they will not necessarily take centre stage. For example, many adults nowadays decide to migrate from cities and live in the country. This may not be the best possible arrangement for their children to go to school. Instead of a short walk from their city home to school and back they may now face a long daily commute. Adults may decide to move from where they currently live to somewhere not within commuting distance, or may be required by an employer to do so. In either case their children may be uprooted from their schools, separated from school and neighbourhood friends, and transported to a strange environment. Some parents send their children to boarding school, though they believe a home environment will be better for their children, because the circumstances of their own lives make it easier for them to do so, or because they see no realistic alternative. None of this may be 'in the children's best interests', but it often happens. The reason it happens is that in most families the parents are the decision-makers, and loving and responsible parents make decisions that try to balance every family member's needs and interests, but don't always and invariably prefer their children's needs over their own.

Most family mediators agree in saying that one of the most important and valuable aspects of what they offer



is to preserve the decision-making rights of the parents. ('Empowerment' is the word we usually use, though I think it contains another trap). 'Empowering' clients to preserve their autonomy is one of the main objectives and boasts of marital mediation practitioners. Now, autonomy means that parental decision-making may respect and take into account the needs of their children, but is not necessarily controlled by those needs to the exclusion of the parents. As Hamlet's uncle Claudius (a nasty man, but sensible and pragmatic) says, 'We with wisest sorrow think of him/Together with remembrance of ourselves'. In fact, it is only where parents separate and fail to agree on parenting that a judge is allowed to decide whether their plans about their children are 'in their best interests', or to give priority over parental needs to what he or she sees as their children's interests.

So, if I am working with separating or separated spouse-parents, and I use the words 'the best interests of [your] children', does my use of those words give my clients messages that are not articulated, but are implicit in my choice of language? It seems to me that it does, and that I am giving them more than one message.

The first message, based on the meaning of the words as I've analysed them above, is that there is one unique plan that they can discover or evolve which will be better for their children than any other. Secondly, I am telling them it is their task to discover it, and thirdly that if they fail to adopt that plan, they will be failing in their duty as parents.

But I think there is a message of even more substance buried in these words. If 'best interests of children' is a phrase that has a specific meaning in a legal context, and if, as I have now come to believe, it belongs only in that context, am I not also, by using those words, changing the context in which my clients' discussions about future plans for their children take place? And does this not mean influencing them away from what I would describe as the normal family situation, where the needs of children are an important factor in parental decision-making, but are not the only one and not

necessarily an over-riding one?

That is, if I talk about 'the best interests of [your] children', am I not without realising that I am doing so giving my clients a concealed message, that they may receive also without recognising its content, that in the mediation process it is their duty to put their children first, to sacrifice themselves and their needs and interests, and to devise a 'parenting plan' on the same basis as a judge would if they had failed to agree on parenting and were fighting a custody battle? If so, I think this must mean that I am telling them they are no longer entitled to exercise the autonomy in decision-making that they previously enjoyed as adult parents of juvenile children, to make decisions affecting the children with due regard for the interest of all concerned.

At least, this is what I now think I imply if I start talking about the 'best interests of their children'. If I am right in how I interpret that message it is inconsistent with the basis of mediation, and the promise I have made to all my clients, that the process will protect their right to make their decisions, free of outside influence – including mine.

Does it matter?

I can imagine someone who has read this article so far becoming impatient, and saying,

Does it matter? If we want our clients to make wise decisions, and to protect the interests of their children by their parenting plan, is it any harm to nudge them in a constructive direction? Or to remind them that if they fail to agree a judge will make decisions for them, in accordance with fixed criteria?

To which I reply,

Yes and no. Or, rather, no and yes. Reminding them that a judge will make the decisions for them if they fail to agree may be a good move at a given time. And if I do this consciously as part of my strategy as a mediator in a session, and it is a well-thought-out strategy, it may be harmless, or even constructive. But I don't think I should give them that reminder unintentionally and unconsciously, by an inept choice of words.

And my answer to your first question is,

yes, there is harm in my trying to help my clients to make wise decisions, if what I mean by 'wise decisions' is decisions I think are wise. And what else can I mean? What other criteria can I apply? I cannot steer my clients in the direction of making what I think are wise decisions that will be good for their children, and at the same time try to liberate them to make their decisions that they think will serve their interests and – to the extent they decide they should be taken into account – the interests of their children.

So it seems to me that these words contain imbedded in them messages that contradict my 'empowering' role as mediator. If I knowingly deliver such messages I renege on what will be at least an implied promise, if not an overt one, I have given my clients to respect and uphold their autonomy. If I do so without realising what I am doing, I at least have that excuse, but that does not affect the quality of my action, only my ability to try to excuse it.

If we talk about 'the best interests of children', and blunt our awareness of the fact that we are talking lawyer-talk, not mediator-talk, we may neglect another question that a family mediator may have to address at short notice and should therefore have thought about in advance: 'If what my clients think will be good for their children differs significantly from what I think will be good for them, do I intervene and advocate what I believe will be best for them, or do I accept their judgement?'

This is a question that, if we think about it away from the mediation room, most of us will probably answer in the same way: no. But it isn't a question that arises only, or even mainly, away from the mediation room. It arises when we are working as family mediators with clients who are trying to work out their (repeat: their) parenting plan, and we often have to answer it on the spot, with no time for reflection.

Double-think

And when I say we have to answer that question, I have in mind that our answer to it determines whether we're mediators or not. If we allow ourselves to think that our view about our

clients' children's needs is better than theirs, then we have stopped being mediators, whatever we may call ourselves. If we disclose that assumption and our clients are sensible people, they will thank us for our time – and go elsewhere. But the danger that concerns me is not that we may tell our clients that we prefer our judgment about their children's interests to theirs, but that we may ourselves begin to think that our judgment is superior to theirs, without realising we have done so, and may conduct the mediation on that assumption. And, to one mediator at least, the phrase 'best interests of the child' is a short-cut to that sort of thinking.

This brings us back to Orwell and to *Nineteen Eighty-four* again, this time by reference to the concept of double-think, defined thus (Penguin edition, chapter 9, p 171):

Double-think means the power of holding two contradictory beliefs in one's mind simultaneously, and of accepting both of them. The Party intellectual knows in which direction his memories must be altered; he therefore knows that he is playing tricks with reality; but by the exercise of *double-think* he also satisfies himself that reality is not violated.

The danger we face is not of consciously playing tricks with reality, but doing so without realising what we are doing. We are aware of our role as mediator, and that it excludes any attempt to influence the content of our clients' bargain. We bring that awareness into our room when we start to work. But as our family clients begin to discuss how they will take care of their children for the future we are tempted to participate in the discussion, not merely as managers of the negotiations but as participants. We may wind up doing exactly what we know in the abstract we should not. And I believe that by using, in our minds or in speech, the words 'the best interests of the children' we may both tend to regard that as a desirable objective of the mediation process and fall into the trap of assuming we have an understanding of what is in 'the best interests of the children'. If we do, we violate a basic principle, on which we 'sell' the concept of mediation to the



public, and which our clients expect us to observe. Because we are not entitled to believe that we understand what those words imply or mean in practice, let alone that we have an insight into their interpretation superior to that of our clients.

It is that if we use such words as ‘the best interests of your children’, or any other words, or pursue any other strategy aimed at steering our clients towards an agreement that we believe will be good for their children, we are in breach of the principle of client self-determination.

And I think this line of argument brings us up against a contradiction some of us face, and I suspect others may ignore, in our working lives as mediators. It is that if we use such words as ‘the best interests of your children’, or any other words, or pursue any other strategy aimed at steering our clients towards an agreement that we believe will be good for their children, we are in breach of the principle of client self-determination.

That our motives may be good – that we may be doing what we think will serve the next generation – is irrelevant. Clients come to mediation with the understanding that the mediator’s job is to help them to reach an agreement that will suit them, not one the mediator or anyone else prescribes for them. Most of us explain this to our clients at the beginning of our first meeting with them, but even if we neglect to do so, I believe most clients come to mediation with that understanding of what mediators offer. If we seek to influence our clients towards favouring their children over themselves in their decision-making, we are guilty of a breach of our promise that we will help them to make their decisions free from any pressure or influence – including pressure or influence coming from us.

To think that we can deliver on this promise and at the same time try to influence (‘encourage’ is the euphemism we sometimes hear in this context) their decision-making in favour of an

agreement that we think will benefit their children is an exercise in double-think – ‘the power of holding two contradictory beliefs in one’s mind simultaneously, and of accepting both of them.’

So when I am in my mediator’s chair I avoid talking about ‘the best interests of children’. And I distrust use of those words by anyone else except in the severely limited context of ‘which, from a number of different parenting plans, a judge selects because he or she thinks it will be better for the kids than any alternative on offer.’

Pedantry vindicated?

To return to where I started, I suggest there is value in what is sometimes called pedantry. Perhaps it takes a true pedant – someone who never takes even the smallest verbal coin without examining it closely, turning it over in his hand and biting it to make sure it’s OK – to identify a hidden danger in an apparently innocuous phrase.

The search continues. I will continue to try to avoid using any word or phrase without asking myself does it have precisely the meaning I want to convey, and does it carry any hidden meaning that I don’t? As I said above, I have doubts about ‘empowerment’. ●

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