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All human service providers work with clients who are trans and gender diverse, intersex, and/or non-heterosexual. It will not always be apparent, or necessary, to confirm the sex, gender or sexuality of clients in order to provide services to them. If practitioners take care to avoid cisgenderism and heterosexism with all clients, then they will be taking the first steps necessary to provide a service that is welcoming and inclusive. There are some services that mediators could be particularly well equipped to offer to trans and gender diverse, intersex and/or non-heterosexual clients, including: assistance to navigate conflict around identity; informed postseparation mediation services; and assistance to negotiate family formation agreements. Some issues are experienced by clients of diverse sex, gender and sexuality with greater frequency than by other clients, and mediators need to have accurate knowledge and be able to work in an appropriately inclusive manner. Mediators should be aware of historical as well as current legal treatment of individuals, couples and families who are trans and gender diverse, intersex and/or non-heterosexual, and be alert to dynamics of power that arise as a result of legal non-recognition of certain family relationships.

Keywords

Identity, conflict, coaching, separation, parental status

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Abstract

All human service providers work with clients who are trans and gender diverse, intersex, and/or non-heterosexual. It will not always be apparent, or necessary, to confirm the sex, gender or sexuality of clients in order to provide services to them. If practitioners take care to avoid cisgenderism and heterosexism with all clients, then they will be taking the first steps necessary to provide a service that is welcoming and inclusive. There are some services that mediators could be particularly well equipped to offer to trans and gender diverse, intersex and/or non-heterosexual clients, including: assistance to navigate conflict around identity; informed post-separation mediation services; and assistance to negotiate family formation agreements. Some issues are experienced by clients of diverse sex, gender and sexuality with greater frequency than by other clients, and mediators need to have accurate knowledge and be able to work in an appropriately inclusive manner. Mediators should be aware of historical as well as current legal treatment of individuals, couples and families who are trans and gender diverse, intersex and/or non-heterosexual, and be alert to dynamics of power that arise as a result of legal non-recognition of certain family relationships.

I Introduction

Inclusive practice is something that most mediators, and indeed most professional service providers, aspire to, and claim to deliver. People whose sexual orientation is other than heterosexual ('non-heterosexual'),¹ who are intersex,² or whose gender is other than man or woman, or

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¹ The author uses the phrase 'non-heterosexual' to describe sexualities other than heterosexual, however, it is not intended to present diverse sexualities as being deviant by the use of the term. 'Non-heterosexual' includes people whose primary sexual attraction is to people of the same gender as themselves (gay, lesbian, same gender attracted), people attracted to both men and women (bisexual), people attracted to all genders (pansexual) and people who are not sexually attracted to anyone (asexual): Samantha Hardy, Olivia Rundle and Damien W Riggs, *Sex, Gender, Sexuality and the Law: Social and Legal Issues Faced by Individuals, Couples and Families* (Thomson Reuters, 2016) 18–20 [1.100].

² 'Intersex' describes a person who does not fit the binary sex categories of male or female, with a mix of sex characteristics in their genitals, gonads, reproductive organs and chromosomes: *ibid* 4–6 [1.20].

different from the sex assigned to them at birth ('trans or gender diverse'),³ experience many barriers to human service provision. This article provides some hypothetical scenarios to demonstrate how mediators can take such considerations into account in order to actually achieve inclusive service delivery.⁴ Many mediators assume that, because they treat all clients in the same way and are not overtly or intentionally discriminatory, their practice is inclusive.⁵ This often means that clients are implicitly assumed to be heterosexual ('heterosexism'),⁶ and either a man or a woman — that gender being aligned with the sex assigned to them at birth ('cisgenderism').⁷ These are problematic assumptions because they either ignore or treat as a difficulty the diversity of human sex, gender and sexuality.

Human service providers will work with a diverse range of identities and relationships, whether or not they are (or need to be) aware of the details of their clients' sex, gender or sexuality. Inclusive practice requires that practitioners do not make assumptions of homogeneity between their clients. Practitioners also need a base-level of understanding of diversity of sex, gender and sexuality, to be alert to the social and legal issues that may impact on trans and gender diverse, intersex and/or non-heterosexual clients, and to avoid the strong societal habits of cisgenderism and heterosexism. It is important to maintain an attitude of curiosity rather than applying assumptions, and to be guided by clients about who they are, their life experiences, their relationships, and their family life. Background knowledge of the historical treatment of trans and gender diverse, intersex and/or non-heterosexual people in society and the law is useful.⁸ Practitioners can reflect upon their own life experience of sex, gender and sexuality and its influence on their service provision, as well as seek feedback from clients as part of an ongoing reflective professional practice.

³ The author uses the phrase 'trans and gender diverse' to refer to any person whose gender is different to the sex assigned to them at birth (which includes people who identify as transgender and people who identify as a woman or a man where this does not align with their sex assigned at birth) or whose gender is other than man or woman (including gender fluid, gender-queer and genderless): *ibid* 10–12 [1.50].

⁴ These hypotheticals formed the framework for the author's presentation at the National Mediation Conference in 2016. The answers to the hypotheticals draw from the information and advice explored in Hardy, Rundle and Riggs: *ibid*.

⁵ Mediator participants made this claim in a small pilot study conducted by Samantha Hardy in Victoria in 2009. Some results of the study are reported in Hardy, Rundle and Riggs: *ibid* chs 15, 17. The study is otherwise unpublished.

⁶ 'Heterosexism' describes a sociocultural system that privileges heterosexuality over other sexual orientations, and/or an assumption that people are heterosexual: *ibid* 27–8 [2.40]. This assumption excludes people of diverse sexualities.

⁷ 'Cisgenderism' is a set of assumptions that a person's assigned sex determines their gender, and that sex and gender are binary male/female man/woman concepts. Such assumptions delegitimise people's own identities of their gender and body: *ibid* 26–7 [2.30], adopting the definition used in Y Gavriel Ansara and Peter Hegarty, 'Methodologies of Misgendering: Recommendations for Reducing Cisgenderism in Psychological Research' (2014) 24(2) *Feminism and Psychology* 260.

⁸ One of the main purposes of Hardy, Rundle and Riggs book, above n 1, is to provide some basic information to inform practitioners about the importance of their personal experiences. For a more detailed discussion on this topic by those authors see ch 15.

First impressions and the way that prospective clients are made to feel welcome — and acknowledged for who they are — set the tone for further service delivery. Ways in which mediators can ensure that their practice environment is inclusive are explored in Part II of this article. Mediation service providers have much to offer individual clients in managing conflict related to their identity, whether working with couples or individuals, and this is explored in Part III. In Part IV, attention turns to mediating in the post-separation context with trans and gender diverse, intersex and/or non-heterosexual clients. Particular issues that might arise, in relation to both financial and parenting matters, are considered. Part V explores an area of mediation that can make a concrete and positive difference for diverse families — supported negotiation about family formation. Competent, inclusive mediators can offer a safe environment for robust, wise and realistic decision making between people who want to explore their options around family creation. Each of the aspects of inclusive practice are demonstrated through hypothetical examples. The examples explored in this article are by no means exhaustive, but they do demonstrate that there are particular life experiences, legal histories and societal stressors that must be acknowledged if mediation service provision is to be truly inclusive of trans and gender diverse, intersex and/or non-heterosexual clients.

II First Impressions: Creating an Inclusive Practice Environment

Since many trans and gender diverse, intersex and/or non-heterosexual people frequently experience challenges to their identity, and daily stressors of managing visibility and/or discrimination, they may fear prejudicial or unfavourable treatment by service providers. Signalling that a mediation service is inclusive is a useful first step to encourage potential clients.⁹ However, Hardy, Rundle and Riggs caution that '[h]aving an inclusive practice involves much more than simply placing a rainbow sticker on the door and saying that you welcome diverse clients'.¹⁰

The point of intake can be where prospective clients turn towards or away from a mediation practice. The way that they are greeted, the way information is gathered about their identity and their family, language choices, and responses to disclosures that they make are all crucial in either reassuring or marginalising the client. The hypothetical client Alex will be used here to explore some of the ways that an inclusive first impression can be made.

⁹ Ibid [15.100], citing Carolyn Ford, 'LGBTI: Diversity's New Agenda' (2013) 21 *Law Institute Journal* 24.

¹⁰ Hardy, Rundle and Riggs, above n 1, 10–12 [15.90].

Alex:

Alex comes to a mediation service for an intake session. When the mediator first meets Alex in the waiting room, they cannot tell what Alex's gender is. The mediator leads Alex into their office and commences the intake process.

An inclusive practitioner will ensure that website information, administrative forms, face to face interactions and verbal questioning of the client are devoid of cisgenderism or heterosexism. This means including options for gender other than 'male' or 'female' and relationship options other than 'husband', 'wife', 'married' or 'divorced'.¹¹ Assuming a focus is placed upon the face to face interaction with Alex, the way that the mediator could seek identifying information from Alex might include the following questions, phrased in inclusive and open ways.

When taking demographic information from Alex, the practitioner should ask: what title the client uses; what is the client's gender; what gender pronouns the client prefers; whether the client is in a relationship at the moment; how they describe their relationship status; who they live with; their relationship to each of the people they live with; whether they have children; and current care arrangements for their child. Asking these questions in a way that does not assume that Alex is either a man or a woman, in a heterosexual relationship, living with people they are related to, or does or does not have children will ensure the Alex feels welcome, recognised, and included by the service provider.

Alex's title may be Mr, Ms, Miss, Mrs, Mx, Dr, or Alex may prefer no title. Alex's gender may be man, woman, agender, gender fluid, or genderless. Alex's preferred gender pronouns might be she/her, he/him, zhe, or they. If Alex has a partner, Alex may identify their relationship status as marriage, in a civil partnership, in a registered relationship, in a de facto relationship or dating. If Alex does not have a partner, their relationship status may be described as single, separated or divorced. Inclusive practitioners enable all of their clients to identify their relationship status in a range of ways that are not related to marriage. In Australia, a marriage-centric focus excludes many people, but is particularly problematic for same gender couples who are not legally allowed to marry. It is also important to ask all clients about whether they are parents and who they live with, without imposing limited views about who comprises a person's family. The lived experience of many clients will

¹¹ Marriage focused words necessarily exclude people in same gender relationships in Australia, as marriage between people other than a man and a woman is not legally recognised as a marriage: *Marriage Act 1961* (Cth) ss 5(1), 88EA. There is also Family Court authority that an intersex person is incapable of marrying in Australia: *In the Marriage of C and D (Falsely Called C)* (1979) 28 ALR 524. This case has been criticised, but it remains likely that a person whose sex is recorded on their birth certificate as indeterminate ('X') would be incapable of marrying in Australia. Trans and gender diverse or intersex people whose legal gender is a man or a woman are capable of marrying, but people whose legal gender is other than a man or a woman would not be able to meet the definition of marriage.

be much broader than a man–woman two parent couple living with the children born into their relationship.

Not all mediators will be working on subject matter that requires all or any of this demographic information to be gathered from the client. The above questions assume that Alex is seeking mediation in relation to a family matter. The principle of asking questions in an inclusive way can be applied across all areas of practice. Unnecessary questions about a client's identity should not be asked.

It is up to the client to define their own identity, family and parenting relationships. Mediators are not confined to legally recognised genders or relationships in mediation. Instead, mediators should be responsive to the client's perspective of their personal life. It is good practise to ask clients to identify the people who have been involved in the issues that they have come to discuss, how they would describe their relationship with each of those people, and what their child's relationship is with each of them. The key to inclusivity is to gather information from all clients without defaulting to binary ideas of gender or an assumption that all clients are heterosexual. Questions should be inclusive regardless of the practitioner's awareness of the client's sex, gender or sexuality.

Assume that Alex is gender diverse and non-heterosexual. When Alex first meets a mediation service provider, Alex may have a number of fears. These might include:

- insensitive treatment, curiosity or ridicule;
- being misgendered, or being asked to justify their gender;
- intrusive questions about gender history and/or identity;
- being treated as a stereotype and not an individual;
- the service provider possessing a bias or having a negative attitude towards Alex based upon stereotypes and/or prejudice;
- their relationship being dismissed as not 'proper';
- disapproval because they are a gender diverse and non-heterosexual parent; or
- breach of confidentiality (for example, by gossiping about 'my freaky client').

In order to make Alex feel comfortable, safe and confident about the quality of service that they will receive, an inclusive mediator will not engage in any behaviours that realise such fears. Explicitly demonstrating respect, affirming recognition of identity and expressing support for the client may also build the client's trust and confidence. For example, ensuring that the client's preferred gender pronouns are adopted (rather than avoided), and asking open questions that allow the client to explain their situation and thereby avoid assumptions (for example, asking a man in a relationship with another man whether he has children rather than assuming that he does not).

III Managing Conflict Related to Identity

Assuming that the client proceeds through the intake process and decides to engage a mediator's services, there are many kinds of conflicts about which they may be seeking mediation or conflict coaching services. Sometimes the conflict might relate directly to the client's identity as a person who is trans and gender diverse, intersex and/or non-heterosexual. Such conflict may be between mediating parties or a client may seek support in relation to a conflict with a person who does not engage in mediation.

A *Conflict Between Mediating Parties*

An example of conflict within a two-party mediation concerning a mediating party's identity is considered below.

Julie and Sally:

Julie and Sally were married for 15 years and raised two children together. They separated when Julian announced that she was going to live as Julie and preferred feminine pronouns. They are attending mediation in relation to their property and financial matters. At the first mediation session, Julie becomes visibly distressed as Sally insists on calling her by masculine pronouns and calling her 'Julian'. Sally states, 'That's who you are Julian, no matter who you want to be, it is a biological fact that you are a man.'

Julie asks the mediator to insist that Sally call her Julie and use feminine pronouns. Sally responds, 'Well why should you get what you want? This is a neutral process.'

The reason this scenario may be difficult for a mediator to manage is that a mediator strives to be impartial between the parties and to mediate in a fair and even-handed way.¹² Here, there is conflict between the parties and the mediator has been asked to prefer one party's language to the other's.¹³ There may be an issue with Julie's willingness to continue with the mediation process if Sally chooses to continue to misgender her. However, the mediator's dilemma is whether or not to intervene and require a party to be respectful during the mediation process. Different mediators may resolve this dilemma in different ways.

From a facilitative mediator's perspective, there are limits to what topics of disagreement can be appropriately facilitated between mediating parties. Gender identity and preferred pronouns are an individual matter and cannot be made an issue to be resolved. Julie has the right to be referred

¹² Mediation Standards Board, *National Mediator Accreditation System* (1 July 2015) 11, Standard [7.1]
<<http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>>.

¹³ Law Council of Australia, *Ethical Guidelines for Mediators* (August 2011) Guideline 2
<http://www.lawcouncil.asn.au/FEDLIT/images/Ethical_guidelines_for_mediators.pdf (28 October 2016)>.

to using her preferred name and pronouns. The facilitative mediator may choose to meet privately with each of the parties to discuss the dilemma. In the private meeting with Sally, the facilitative mediator might emphasise that the mediator's job is to help the parties explore and try to resolve their differences. Julie's identity is not something that can be mediated, just as other aspects of a person's identity are not open for negotiation with others. Mediation facilitates negotiation of relationships and decision making between parties, not compromise about the individual identities of the parties. The mediator could acknowledge Sally's discomfort about Julie's transition to living as a woman and that it is a difficult time for Sally. The need for both parties to feel safe and respected in the mediation process could be emphasised. The mediator might also mention that if Julie does not feel respected by Sally, she may not feel safe to negotiate in the mediation. This might lead to the mediator asking Sally how important it is to her that the mediation proceed.

The facilitative mediator would then meet with Julie and emphasise the mediator's role to help the parties to try to resolve their differences. Julie's distress at Sally's misgendering of her could be acknowledged. The mediator could note that, although Julie's identity as a woman is something that Sally is finding difficult to accept, it is not something that is capable of being mediated. The importance of safety and respect in mediation could be emphasised. The mediator could remind Julie that she has a choice about whether or not to continue with the mediation. Julie could be invited to reflect upon how important it is to her that the mediation proceed.

By contrast, a transformative mediator may support the parties to recognise the fundamental relationship and identity conflict that they have about perceptions of Julie's gender and to decide how they will respond to that conflict. Julie's distress is an indication that she is not being recognised. Sally's refusal to acknowledge Julie's gender could be based upon her need to have the relationship she shared with Julian recognised and honoured. They are both (probably) experiencing an erasure of identity and consequent lack of recognition, which is motivating their negative conflict interactions. In transformative mediation, a mediator will watch for expressions of disempowerment or lack of recognition and intervene in those moments with a focus upon the micro-interaction that has been observed.¹⁴

B Coaching Individuals

Some clients may seek support to make wise decisions about managing their visibility and/or disclosing details of their sex, gender or sexuality. Visibility management is a constant, ongoing, all pervasive stressor in the life of many trans and gender diverse, intersex and/or non-heterosexual people.¹⁵ Clients may seek the services of a mediator or conflict coach in

¹⁴ See generally Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Wiley, revised ed, 2004).

¹⁵ Hardy, Rundle and Riggs, above n 1, ch 3.

relation to experienced or anticipated conflict. The following example involves a client's need for support to make decisions about disclosure and visibility of his same gender relationship in his workplace.

Jody:

Jody seeks mediation/conflict coaching services in relation to a workplace matter. Jody works for a construction company as an apprentice carpenter. His colleagues have taken to calling him a 'silly poofter' and making fun of his hairstyle. Jody keeps quiet about his relationship with Kevin because he expects that if his colleagues discovered that he is in a same gender relationship, they would be hostile towards him.

Jody and Kevin are foster parents. Kevin has become ill and needs to have an operation. Jody needs to take personal leave in order to care for Kevin and their foster children for at least eight weeks. During that time he will be able to work, but will need to work less hours in order to take the children to school and meet them after school.

Jody seeks advice about how to approach his conversation with his boss in relation to taking the personal leave.

Jody is seeking guidance to help him to make decisions about whether and how he will approach the request for leave. He is anticipating a homophobic reaction or consequences that go beyond his relationship with his boss and into his ongoing working relationship with other tradespeople. The mediator's role is to help him consider a range of opportunities and risks to support a wise decision. Conflict coaching techniques may be useful in this scenario.¹⁶ In coaching Jody around his conflict, the mediator will need to be open to hearing about fears and concerns that they may not have considered in their own day-to-day life, but which are very real to many people in same gender relationships. Managing visibility and the risk of homophobia and/or transphobia is a constant feature of life as a person who is trans and gender diverse, intersex or non-heterosexual.¹⁷

The first stage of a conflict coaching process is goal setting. Jody's goal is to 'have a safe conversation with my boss about adjusting my work hours.' Whether he has achieved his goal might be measured by the conversation being rated at 5/10 rather than 1/10, as he currently fears. The mediator/conflict coach might then guide Jody to consider, such as:

- What has happened? Jody can be invited to reflect upon his reasons for thinking that his conversation with his boss will not go well.
- Why does it matter? What is it about the conversation with his boss that Jody is not looking forward to? Jody probably fears hostility, prejudice or discrimination. Consequences could include being treated badly by his colleagues or the boss. The worst-case scenario

¹⁶ Here, reference is made to elements of the REAL conflict coaching approach recommend by Conflict Coaching International (2012) <<http://conflictcoachinginternational.com/>>.

¹⁷ Hardy, Rundle and Riggs, above n 1, 31–3 [2.70].

would be the boss finding a reason to terminate his employment. Jody could be invited to reflect upon the information or power he has that will help him.

- Other perspectives: Jody could be invited to imagine how his boss would describe the situation that he has just described. Does his boss know about the way his workmates have been speaking to him? What is Jody's impression of his boss's personality and view of Jody as a worker?
- Preferred future: Jody could be invited to imagine how he would like things to be, how he would like the conversation with his boss to go, and what would make him feel that the conversation had gone well.
- Action steps: Jody can be coached to identify what he could do to maximise the chances of a safe and constructive conversation with his boss. This might include the mediator coaching him on exactly what he wants to say to his boss. He might like to role-play the conversation with the mediator/conflict coach. If Jody decides to have the conversation with his boss, the coach could help him to plan when he should have the conversation and identify how he will know whether the conversation went well. A useful coaching question is to invite Jody to think about what would happen if he did not have the conversation.
- Reflection: Coaching sessions should always end with the client being invited to reflect upon the session itself.

Both Julie and Jody's hypothetical examples illustrate how cisgenderism and heterosexism have significant impacts upon the experiences of trans and gender diverse, intersex and/or non-heterosexual people. Discrimination and other anticipated adverse treatment are risks that clients will often want to manage proactively and mediators may assist in this process.

IV Particular Issues in the Post-Separation Context

There is no homogeneity of intimate couple relationships in any context, regardless of the sex, gender or sexuality of the people in the relationship. There is also vast diversity of experiences, approaches, and patterns of behaviour post-separation. Every client's situation is unique and no assumptions should be made about trans and gender diverse, intersex and/or non-heterosexual clients, or their relationships. However, some dynamics may be atypical in heterosexual relationships and more prevalent in separating couples where one or more of the parties is not heterosexual, or is trans, gender diverse or intersex. Some clients will have strong support networks of either family of origin or quasi-familial networks. However, many will not be well supported. It would be prudent to ensure that all clients are asked at post-separation mediation intake questions such as:

- Do you have family or friends supporting you at the moment?
- Have your family been supportive of your relationship?
- Are your family aware of your separation?

These questions will help the practitioner identify whether there is a need to refer the client to professional counselling for support and may also raise awareness of dynamics around visibility that should be taken into account during service delivery.

Three examples will be explored to illustrate particular issues in the post-separation context: dynamics that may play out between separating couples, the influence that uneven parental status can have in mediation, and considerations where there are more than two adults who have a significant relationship with a child.

A Dynamics in Separating Couples

There are a number of general issues that a mediator should be alert to when working with separating couples where at least one client is trans and gender diverse, intersex and/or non-heterosexual. These include the role of cisgenderism and/or heterosexism in separation, the influence of historical legal non-recognition, visibility management, and issues surrounding planned family formation.¹⁸ Cisgenderism and/or heterosexism may influence the degree of conflict between mediating parties. These factors can be the cause of conflict, can be used as a weapon in conflict, can provide a context that influences the way that conflict plays out, and may impact on options for managing and resolving the conflict.¹⁹ Cisgenderism and heterosexism may be used by one person at the end of their relationship with a trans and gender diverse, intersex and/or non-heterosexual partner as a tool of power (and possibly abuse). Whether sexuality, relationship status or gender history, some partners will turn to cisgenderism and/or heterosexism to hurt their former partner. In some contexts this can pose an acute danger to the wellbeing of a party.

The historic lack of recognition of same gender couple relationships can be highly relevant to separating couples whose relationship was formed in the context of non-recognition, yet subsequently became legally recognised.²⁰ They may have organised their financial affairs and contemplated consequences of separation that differ markedly from the

¹⁸ Ibid ch 11.

¹⁹ Ibid [17.60].

²⁰ The legal recognition of non-married relationships and relationships other than those between a man and a woman is a relatively recent development, which has been achieved incrementally over a long period of time. The *Property (Relationships) Amendment Act 1999* (NSW) was the first statutory provision to legally recognise same gender relationships. A more recent development was the 2008–9 reforms to Commonwealth laws that addressed discrimination against same gender couples in a wide variety of legal areas. This swathe of reforms included the introduction of part VIIIAB of the *Family Law Act 1975* (Cth), which enables non married couples who meet the definition of ‘de facto’ to have their property and financial matters determined under the Act. Under section 4AA(5)(a) of the *Family Law Act 1975* (Cth), the definition of de facto includes couples other than a man and a woman.

outcomes that the application of current laws would produce. Prior to legislative recognition of same gender couple relationships, the ordinary laws of contract and equity that apply between strangers were applied to determine post-separation property and financial matters. Recognition laws apply retrospectively, as the primary factual question is whether the parties were in a legally recognised relationship, assessed at the date of separation/judicial consideration, not the dates on which they negotiated their financial affairs.

Separating couples may not have lived visibly as a couple in many contexts, which makes their separation invisible in some areas of their life. Even where they did not hide the nature of their relationship, it may not have been recognised by family, friends or workmates as a significant intimate partnership.²¹ This can heighten experiences of isolation and make it difficult for people to receive the support that would come from recognition of the breakdown of their relationship. Where a person lacked support for their identity or relationship during the relationship, separation from their intimate partner can involve a devastating loss of social and emotional support.

Furthermore, where the couple explored the possibility of parenthood but did not have children, the end of the relationship may mean the end of the possibility of becoming a parent, and this can be an added cause of grief. The pathway to parenthood for trans and gender diverse, intersex and/or non-heterosexual people usually requires a great deal of time, resources, planning and negotiation.²² Where the separating couple have commenced assisted reproduction, there may be a need to negotiate about genetic material that they have acquired for the purpose of family formation.

All of these dynamics are demonstrated through the hypothetical example of Bethany and Hannah, below.

Bethany and Hannah:

Bethany and Hannah have recently ceased living together after sharing a home for nine years. Bethany is from a strict Christian background and has not disclosed to her family her sexuality, the nature of her relationship with Hannah, nor the fact that they have been planning to have children together. Bethany and Hannah lived together and usually shared a bed, but presented to Bethany's family as flatmates. They have always maintained separate finances, and each highly values their own independence and autonomy. Bethany and Hannah's friends are aware of their intimate relationship and plans to form a family.

Bethany and Hannah have engaged in multiple attempts for Hannah to conceive via IVF. Their separation has been triggered by the stress of multiple unsuccessful IVF treatments and Hannah's desire that they become more open about their relationship.

²¹ Hardy, Rundle and Riggs, above n 1, 250–4 [10.40]–[10.60].

²² Ibid ch 12.

Bethany wants to stay in the home, which she purchased when she was 19 years old. Hannah moved out of the home on the premise that she 'needs a break' from their relationship. Hannah has since met with an old school flame who is a successful family lawyer. Hannah's friend told her over lunch that she needs to protect her financial interests and that she should make a claim against Bethany. Hannah claims that Bethany will need to pay her out her interest in the home so that she can move along with her life.

Bethany thinks that Hannah is letting down feminists everywhere by expecting a property adjustment. Furthermore, Bethany believes that Hannah's claim is contrary to an express verbal agreement that the women had between one another that they would maintain financial independence. Bethany has not ever prevented Hannah from building her own wealth. Bethany would need to borrow some money if she were to pay Hannah out. Bethany's family are reasonably wealthy and in a position to lend her the money. Bethany is concerned about how she could explain why she needs to pay Hannah for the house, which has always been in Bethany's name only.

This hypothetical scenario reveals that Bethany's family have not been informed about her sexuality, the nature of her relationship with Hannah or their attempts to form a family. As her family adhere strictly to conservative Christian views (their faith is a reason for Bethany's decision not to come out to them), they are unlikely to provide Bethany with financial support while she grieves the end of her relationship with Hannah. The people who do know about the relationship are mutual friends, who may align themselves with one or other of the women or try to maintain a friendship with both. Bethany may be very reliant upon Hannah as her primary emotional support and the breakdown of their intimate relationship may leave her vulnerable to loneliness and/or social isolation. These facts signal that it would be appropriate to check in with Bethany about her needs in relation to emotional support and/or counselling at the end of the relationship.

Visibility management is something that mediators need to be acutely alert to. There may be disagreement about the level and context of visibility, visibility may be used as a manipulative tool in the mediation, and it may also affect the workability of proposed outcomes. Hannah and Bethany have a history of disagreement about visibility, and Bethany's desire to maintain the status quo may provide Hannah with a tool of power. If Hannah wanted to manipulate Bethany, she could threaten to 'out' her to her family, which could be a devastating experience for Bethany and result in complete loss of her family's support. The possibility that one client might use the threat of 'outing' their former partner as a weapon of abuse must be taken into account by mediators.²³

²³ Ibid [11.70], [17.80] citing Carrie Chan, 'Domestic Violence in Gay and Lesbian Relationships' (Topic Paper, Australian Domestic & Family Violence Clearinghouse, 2005)

Bethany and Hannah's intimate personal relationship started at a time when it was not recognised in law as a couple relationship. They made explicit but informal agreements about the financial aspects of their relationship and their expectations about the degree of interdependence between them. Their personal values of independence and autonomy led to their agreement to keep their finances separate and that neither would expect financial support from the other. The agreement was never formalised or put into writing. Since 2009, Bethany and Hannah's relationship would likely be defined as a de facto relationship for the purposes of the property and financial claims that could be made under the *Family Law Act*.²⁴ This means that laws that did not apply to Bethany and Hannah at the time that they entered their relationship may now be applied to determine whether and how a property adjustment ought to be made between them. Those laws impose expectations of interdependence, mutual care, and financial support that contradict the explicit agreements between the parties.²⁵ Technically, the parties' agreements would be relevant in determining whether it would be just and equitable to make an adjustment of property interests between them and how much of an adjustment ought to be made.²⁶ However, it would be only one of the myriad of circumstances around the relationship that would be unravelled and examined should the matter ever reach court.

A mediator will need to assist the parties to explore their own ideas about fairness and justice, while recognising the 'shadow of the law' applying to legal disputes.²⁷ Bethany and Hannah may have complex attitudes towards the law, given the historic denial of legal benefits of relationship recognition and the current somewhat dismissive attitude of the law to private agreements that they made.²⁸ Mediators often face ethical dilemmas in deciding upon whether, and if so, the most appropriate way to acknowledge, prompt or guide mediating parties to consider and/or obtain advice about the legal view of their dispute. Bethany and Hannah's scenario highlights some additional challenges for historically legally

3; Linda M Peterman and Charlotte G Dixon, 'Domestic Violence Between Same-Sex Partners: Implications for Counseling' (2003) 81 *Journal of Counseling and Development* 41; Allan E Barsky, 'Mediating Separation of Same-Sex Couples' in Jay Folberg, Ann L Milne and Peter Salem (eds), *Divorce and Family Mediation: Models, Techniques and Applications* (Guilford Press, 2004) 351, 363.

²⁴ *Family Law Act 1975* (Cth) s 4AA.

²⁵ In Australia, once a non-married intimate relationship meets the threshold requirement of recognition, essentially the same set of rights and responsibilities that apply to married couples apply to the non-married intimate relationship: see Hardy, Rundle and Riggs, above n 1, 288–9 [10.320].

²⁶ *Family Law Act 1975* (Cth) s 90SM(4). See also the discussion in Hardy, Rundle and Riggs, above n 1, 272–3 [10.180].

²⁷ See generally Frederick Hertz, Deborah Wald and Stacey Shuster, 'Integrated Approaches to Resolving Same Sex Dissolutions' (2009) 27(2) *Conflict Resolution Quarterly* 123; Jennifer Jackson, 'Collaboratively Negotiating Agreements with Same-Sex Partners: What do Professionals Need to Know?' [2008–09] 10(3) *Collaborative Review* 1; Hardy, Rundle and Riggs, above n 1, 523–5 [17.120].

²⁸ Hardy, Rundle and Riggs, above n 1, 493–5 [16.20].

unrecognised same gender couples. The laws that apply to their relationship have changed dramatically during their relationship and regardless of the private arrangements that they made between themselves.

Another issue that may be relevant to Bethany and Hannah's scenario is the grief that they are experiencing about their lost opportunity to have a family and their fear of not finding another partner due to a (perceived) scarcity of options. The stress of IVF is well known, and this is likely to have been a significant source of strain on Bethany and Hannah's relationship, perhaps with disagreement about whether or not to continue attempting IVF procedures.²⁹ Because creating a family can be difficult and generally requires money and time, trans and gender diverse, intersex and/or non-heterosexual people can find themselves grieving lost opportunities for family creation as well as the end of their relationships. Sometimes there will be frozen sperm, eggs or embryos about which decisions need to be made by separating couples. Mediators should anticipate the need for this issue to be discussed in the mediation, and should not impose ill-informed assumptions of biogenetic-based decision making power.

B Uneven Parental Status

Biogenetics is just one factor that may create uneven parental status between trans and gender diverse, intersex and/or non-heterosexual clients. There are many different connections that parents may or may not have with their children, including: biogenetics, gestation and birth, care giving, parental responsibility, and legal parentage.³⁰ Where the parents of a child necessarily have different connections to their child, the parent with the greater connection may use that as a tool of power (as opposed to a legitimate demonstration of the child's best interests). Legal and biogenetic parentage in particular may be used by parents to minimise the other parent's role in the child's life. This is a tool of power that is available in same gender parenting partnerships with greater frequency than in parenting partnerships between a man and a woman. Mediators need to make decisions about how they will respond to such a use of power. It is never appropriate to refer to a biogenetically related parent or donor as the 'real mother' or 'real father' of a child. The following example of Maximillian demonstrates some of the dynamics that may arise around uneven parental status:

²⁹ Elizabeth Peel, 'Pregnancy Loss in Lesbian and Bisexual Women: An Online Survey of Experiences' (2010) 25(3) *Human Reproduction* 721.

³⁰ Family Law Council, 'Report on Parentage and the Family Law Act' (Report, Family Law Council, December 2013) ch 2 <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf>>; Hardy, Rundle and Riggs, above n 1, ch 12.

Maximillian:

Maximillian is six years old. His fathers, Josh and Jax, have separated. Josh is Maximillian's biogenetic sperm provider. Maximillian was born via a surrogacy arrangement carried out in Thailand. The Family Court of Australia made parenting orders in favour of Josh and Jax when Maximillian was two, and the Court also made a declaration of parentage recognising Josh as Maximillian's legal parent.

In FDR, Josh has said three times, 'Jax, you're not Max's Dad, so why don't just stop pretending that you are? He needs to be with his Dad, you've decided to leave us, so just go, leave us.'

Josh is trying to minimise the significance of Jax's role as Maximillian's father. This is based upon the lack of a biogenetic or legal parental relationship between Jax and Maximillian, but is most likely motivated by hurt and grief at the end of the couple relationship between Josh and Jax. Seeking to deny Jax's role as Maximillian's father may be a way of punishing him. Jax has provided care for Maximillian his entire life and has exercised court recognised legal parental responsibility since Maximillian was two. Denying Jax's role as a parent is a misrepresentation of the reality of Maximillian's life. It is, however, reflective of their uneven legal status, which arose because they formed their family through an international commercial surrogacy arrangement and it was not open to the court to make a declaration of parentage in favour of both men.³¹

Although some provisions of s 60CC of the *Family Law Act 1975* (Cth) only apply to legally recognised parents,³² it is the reality of the child's relationship with a parent in daily life that matters when a court is deciding what parenting arrangements are in the child's best interests.³³ Josh may have some legal priority over Jax as a result of their uneven parental status.³⁴ However, the technical legal priority in circumstances such as this case, where the child has been raised jointly by two parents with uneven legal parental status, is not necessarily going to determine the outcome of a parenting order application. 'It is always the particular child and his or her particular needs that must be at the centre of a decision'.³⁵ There is still some risk of heterosexist and/or cisgenderist prejudices influencing family report writers, mediators, and/or legal decision makers when dealing with

³¹ See *Mason v Mason* [2013] FamCA 424 (7 June 2013). See also *Carlton v Bissett* (2013) 49 Fam LR 503 in which parentage orders were not able to be made in similar circumstances.

³² *CZEB v CZEB* [2012] FamCAFC 53 (3 April 2012).

³³ *Family Law Act 1975* (Cth) s 60CC(3)(m) has been used to take into account the same considerations that apply to legal parents in respect of non-legal parents: see, eg, *Connors v Taylor* [2012] FamCA 207 (5 April 2012) [94], [193]–[194].

³⁴ The presumption of equal shared parental responsibility does not apply to Jax, as he is not Maximillian's legal parent, but a person who stands in 'locus parentis' to the child: see *Brianna v Brianna* (2010) 43 Fam LR 309, 343 [182]; *Donnell v Dovey* (2010) 42 Fam LR 559, 578–9 [92]; *Mulvany v Lane* (2009) 41 Fam LR 418; *Hort v Verran* [2009] FamCAFC 214 (1 December 2009).

³⁵ *Wilson v Roberts (No 2)* [2010] FamCA 734 (19 August 2010) [330] (Dessau J).

parenting disputes, which will generally have the effect of making decisions or recommendations in favour of the biogenetically related parent.³⁶ There is some evidence of the privileging of biogenetics even where both parents are legal parents.³⁷ Some questions might be posed to each of the parents in a private session to assist them to reflect upon their attitudes about their parenting statuses. This approach is most likely to be taken by a Family Dispute Resolution Practitioner following the primarily facilitative model.

When meeting with Josh in a private session, the mediator might acknowledge Josh's emotional pain about Jax's decision to leave their relationship and check whether he has had appropriate counselling support. The mediator could invite Josh to take a child focused perspective by noting his statements that Jax is not Maximillian's father and asking how he thinks Maximillian perceives his relationship with Jax. Josh might also be invited to reflect upon whether Jax's lack of legal or biological connection with Maximillian has been an issue in the past. The mediator could note that Jax has been treated by a court as someone who should have legal parental responsibility for Maximillian and query whether Josh thinks he has a strong argument that this should change. The mediator might suggest that legal advice on this matter would be appropriate.

In a private session with Jax, the mediator should first check about his emotional state and whether or not he has counselling support. The power dynamics between Josh and Jax in their relationship, whether or not Josh has concentrated on his parentage status before, or whether Jax's lack of legal or biological connection with Maximillian has been an issue in the past might be explored. The child-focused perspective can be reinforced by asking Jax to identify who Maximillian considers to be his parents. Checking whether or not Jax has sought legal advice about parenting issues and his parental status might also be appropriate.

The challenges involved in uneven parental status are most likely highlighted at times of disagreement about parenting, which makes it a factor in many post-separation parenting disputes.³⁸ Family Dispute Resolution Practitioners need to be aware that there is no legal prioritisation of biogenetic parentage (although legal parentage often follows biogenetics), that many parents who are trans and gender diverse, intersex and/or non-heterosexual will not have a biogenetic or legal parentage relationship with their child, that uneven parental status may be used as an instrument of power, and that neither legal nor biogenetic parentage is determinative of the parenting arrangements that are in the best interests of a child. An appropriate way to frame a discussion of parenting

³⁶ See, eg, *Re Patrick* (2002) 28 Fam LR 579; *Snell v Bagley* [2011] FMCAfam 526 (3 June 2011); *In the Marriage of N and H* (1982) 8 Fam LR 577.

³⁷ See, eg, *Halifax v Fabian* (2010) 44 Fam LR 554; *Dent v Rees* [2012] FMCAfam 1303 (19 December 2012); Hardy, Rundle and Riggs, above n 1, 455–8 [14.220].

³⁸ As well as being used by the parent with more kinds of connection to the child, legal parentage has some legal advantage in terms of the child's right to know and be cared for by (legal) parents and the distinction between parents and non-parents in other provisions of part VII of the *Family Law Act 1975* (Cth).

in post-separation contexts is to invite the parties to explore parenting during their couple relationship, and their child's relationship with each of them, before turning to consider future parenting arrangements. The best interests of a child are not necessarily promoted by minimising or extinguishing the time that they spend with a non-legal and/or non-biogenetically related parent.

C Multiple Adults Involved in a Child's Life

Some children who were born into and/or are being raised by at least one trans and gender diverse, intersex and/or non-heterosexual parent will have ongoing relationships with a number of adults who play parenting or parent-like roles. Even though only two people can be legally recognised as parents, there are no barriers to more than two people being recognised as people who have an interest in the care, welfare and development of a child. Non-legal parents can obtain parenting orders in their favour.³⁹ Mediators and Family Dispute Resolution Practitioners may find themselves working with families about the parenting of children who have multiple adults involved closely in their lives. Non-legal parents might include known sperm donors, whose relationship with the child and involvement in the child's life will vary drastically from family to family.

Some basic errors to avoid include: assuming that a known sperm donor who has been involved in a child's life when the child has been raised by two mothers is (or is not) appropriately called the child's 'father'; making assumptions about legal parentage; asking who the biogenetic parents are; and assuming that all of the significant adults in a child's life should participate in the mediation or assuming that only the legal parents should participate in the mediation. It is always best practice to invite clients to explain their family relationships in their own terms. As mediators do not give legal advice, it is not necessary for mediators to ask questions that unravel the legal and biogenetic relationships in a family. A lawyer would need to identify the legal parentage of a child in order to give sound legal advice. Mediators should concentrate upon the ways that their clients define family, and the bases upon which they want to make decisions in the best interests of their child. Family Dispute Resolution Practitioners need to meet their obligations of providing information about the legal framework applying to family disputes,⁴⁰ but clients should be directed to legal advisors for analysis of their legal family relationships.⁴¹

Some of the issues that might arise in mediations involving multi-parent families are explored through the hypothetical scenario involving James, below.

³⁹ *Family Law Act 1975* (Cth) s 65C(c) provides that 'any other person concerned with the care, welfare or development of the child' may apply for parenting orders in relation to the child. Non-legal parents may apply under this provision.

⁴⁰ *Family Law Act 1975* (Cth) ss 60D, 63DA.

⁴¹ The law surrounding legal parentage is complex and it is not appropriate for mediators or Family Dispute Resolution Practitioners to give legal advice.

James:

James was conceived by assisted conception. His biogenetically related parents are Stuart and Susan. Susan has been in a long-term relationship with Sally and they were a couple at the time of James's conception in 2005. When James was born, Susan and Stuart's names were put on his birth registration as his mother and father. Stuart and Susan have never been a couple. Stuart has spent regular time with James since his birth, including every second Sunday, and this time has gradually increased as James has grown older.

Susan and Sally separated in February 2016. Susan and Sally seek post-separation Family Dispute Resolution services. Sally wants her name put onto James's birth certificate.

As a child-focused practitioner, a Family Dispute Resolution Practitioner would determine James's support networks as well as learning more about the level of support that he receives from Sally and Susan. It is important that Family Dispute Resolution Practitioners use language that does not assume that the child's family is comprised of biogenetically related people or that the family network includes the parent's family of origin. It is appropriate for these practitioners to ask questions that help parents to focus upon the best interests of their child. Questions that might be asked about James's support networks include:

- Who is important in James's life?
- Who has done the parenting work for James in the past?
- Has James got what he needs around the separation right now?
- Are there people other than the two clients who James can talk to about their separation?

The next question that will be considered is whether or not Stuart should be involved in the mediation between Sally and Susan. Stuart is a third party to their post separation disputes; however, he is a significant person in James's life and is currently named as a parent on James's birth certificate, which has been raised as an issue between Sally and Susan. James's legal parentage has evolved over time, which makes this issue ripe for deeply emotional disagreement between the parties.⁴² When James was born in 2005, there was no scope for Sally to become his legal parent (outside adoption). It was probably ambiguous whether Stuart was legally recognised as James's father. However, in keeping with the practice adopted in many known sperm donor scenarios, Stuart's biogenetic relationship with James was reflected by his inclusion on James's birth

⁴² See Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No-one At All' (2012) 26(2) *Australian Journal of Family Law* 116.

certificate.⁴³ Post 2009, Susan and Sally are deemed by law to be James's legal parents, provided they were in a de facto relationship at the time of conception and Sally consented to the assisted reproduction procedure.⁴⁴ Sally and Susan are the only people entitled to be named on James's birth certificate. Legally, Stuart has no parental status and his name could be removed by the registrar on application by Sally and Susan. Lack of legal parentage status also means that Susan and Sally can enter into a parenting plan, as James's parents, without Stuart's agreement.⁴⁵

The guiding principle in children's matters should be who is important in the child's life, regardless of legal, biogenetic or social status.⁴⁶ However, in this case, Sally and Susan are the mediator's clients and it should be their decision whether or not Stuart is invited to participate in their mediation process. Susan and Sally can engage in mediation about their disagreements between one another without including Stuart. It may be helpful for mediators to think about Stuart as a non-legal parent (such as a grandparent) who has cared for a child on a regular basis for the child's entire life and who is undoubtedly a significant person in the child's life. How would that kind of person typically be treated in mediations between parents? Although the inclusion of a third party might assist a holistic resolution of matters related to a child, it is the parties rather than the mediator who should control decision making about this issue. There are no 'usual' arrangements for biogenetically related non-parents such as Stuart, so mediators need to be very open to learning how Stuart's relationship with James is defined and conducted, without applying any assumptions. If Susan and Sally agree that Stuart should be included in decisions about parenting arrangements, the parties may then discuss how that should happen. This may mean bringing Stuart into the mediation or Susan and Sally could consult with him outside of the mediation.

As part of the mediator's reality testing, Susan and Sally could be invited to consider Stuart's likely reaction to the removal of his name from James's birth certificate. They can then make decisions about whether and how to inform Stuart of Sally's application to the Registrar. The prospect of removal is likely to be a highly emotional one for Stuart. These discussions about Susan and Sally's decision-making tend to assume that they will agree about Stuart's involvement in the mediation, how to talk to

⁴³ See *AA v Registrar of Births, Deaths and Marriages and BB* (2011) 13 DCLR (NSW) 51 for an analogous scenario (although the sperm donor's name was entered onto the child's birth certificate some time after birth in that case).

⁴⁴ *Family Law Act 1975* (Cth) s 60H(1) and equivalent state and territory provisions. See examples where a mother's name was added to a birth certificate post-separation in circumstances where her legal parentage was not recognised at the time of the child's birth: *AA v Registrar of Births, Deaths and Marriages and BB* (2011) 13 DCLR (NSW) 51; *Dent v Rees* [2012] FMCAfam 1406 (19 December 2012).

⁴⁵ *Family Law Act 1975* (Cth) s 63C (1)(b)–(ba).

⁴⁶ This is in keeping with the spirit of the 'best interests of the child' principle (see *Family Law Act 1975* (Cth) ss 60CA, 60D) as demonstrated by cases such as *Wilson v Roberts (No 2)* [2010] FamCA 734 (19 August 2010) [330] (Dessau J) [330]. Legal parental status does have some priority, as discussed earlier.

him about the removal of his name from James's birth certificate, or both. Susan may have an interest in involving Stuart in the mediation to wield their joint power of biogenetic parentage and disempower Sally.⁴⁷ There is a strong cultural privilege given to biogenetic parentage, even where it is not reflective of legal status. This is a dynamic that mediators should be alert to and they should make decisions about how to respond to such a power play.

V Supporting Negotiations About Family Formation

The final area in which mediators may find themselves working with trans and gender diverse, intersex and/or non-heterosexual clients is in relation to decision making around family formation. Mediators can provide valuable services to explore possibilities, points of view and motivations, and can facilitate agreements around conception, pregnancy, birth and parenting. A mediator's job is to assist their clients to make wise decisions for themselves. Mediation can offer an opportunity for a thorough exploration of possibilities, beliefs, needs and options. One of the most common areas of conflict for parenting mother couples is conflict between them and a known sperm donor.⁴⁸ Thorough negotiations at the family formation stage may make conflicts less likely to become problematic at later stages. Naturally, changes in expectations, desires and/or circumstances make it almost inevitable that some conflict around parenting will arise between mothers and an involved known sperm donor at some stage. Pre-conception agreements may help parties to navigate conflict in a more constructive way when it occurs.

If clients know that a mediator is supportive of their goals (in principle), then this will help to build trust between the client and the mediator. It is recommended that mediators acknowledge and honour their clients' desire to form a family to enable them to feel that they are in a safe place to have an open, honest and potentially difficult conversation with one another, assisted by the mediator. If people seek mediation services in relation to family formation, there is an opportunity to make a real difference and support in-depth consideration of a range of questions that might otherwise be glossed over in the eagerness to create a family. The mediator's job is to invite clients to consider particular questions, with the benefit of a dispassionate attitude and an awareness of the range of issues that could become contentious.

⁴⁷ See, eg, Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *AJFL* 99, 125 fn 105 citing *X, Y, Z and A, B* (unreported, Family Court, Joske J, 2 September 1992; unreported appeal to the Full Court of the Family Court, Baker, Lindenmayer, McCall JJ, 13 September 1993); *Packer & Irwin* [2013] FCCA 658 (1 July 2013); Hardy, Rundle and Riggs, above n 1, 439–41 [14.100]–[14.110].

⁴⁸ Damien W Riggs, 'Lesbian Mothers, Gay Sperm Donors, and Community: Ensuring the Well-Being of Children and Families' (2008) 17 *Health Sociology Review* 226; Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18(1) *International Journal of Law, Policy and the Family* 76; Fiona Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court — the case of *Re: Patrick*' (2002) 16 *Australian Journal of Family Law* 204 cited in Hardy, Rundle and Riggs, above n 1, 446 [14.140].

There is no reason why this kind of mediation service could not be provided to cisgender and heterosexual couples. However, family formation is necessarily more complex for other clients. Becoming a parent is usually a deliberate, well-considered plan of action for trans and gender diverse, intersex and/or non-heterosexual people. There are often multiple individuals and relationships involved in family planning. Most trans and gender diverse, intersex and/or non-heterosexual people require assisted reproduction methods in order to create a family, and often require at least one donor of biogenetic material.

Some mediators may find themselves working with clients who want to pursue options for family formation that the practitioner finds unusual or confronting. For example, a trans man may plan to take a break from hormonal treatment in order to carry a child in his womb and also breastfeed the child after birth. Another unusual example that may arise is an intersex woman who plans to have sperm harvested from her internal testes in order to conceive a child. Many intersex clients will have had sex organs removed in surgery during childhood and may experience grief about their lost opportunity to parent a child to whom they have a genetic relationship. Mediators and other professionals need to be open minded and supportive of these kinds of possibilities, as their job is not to make judgments about their client's bodies or life choices, but to support clients to make well-considered decisions. A practice of reflecting upon their observations of their own practice and feedback from clients will assist mediators to avoid challenging clients inappropriately or asking questions that are curious, but inappropriate and/or unnecessary.

Mediation about family formation could be between two members of a couple who are exploring their options. Decisions that need to be made include: whose genetic material will be used, who will carry the child, whether to use known or unknown donors, anticipated and preferred relationships and/or involvement of known donors, how the family will present to extended family and the general public, who will care for the child, and when the child will be informed about their genetic heritage and the circumstances around their conception and birth. These decisions may be matters about which two people disagree, notwithstanding that they are motivated to form a family together. Dispute resolution processes such as mediation have a role to play in assisting couples to explore their differences and ensure that each is fully informed about the other's point of view.

In other circumstances, there may be more than two people exploring their options for family formation. Negotiations between Sharon, Mary and Mike will be used as an example to illustrate the kinds of decisions that are involved in family formation and particular considerations for mediators in these matters.

Sharon, Mary and Mike:

Sharon and Mary are a couple. Mike is one of their friends. Sharon, Mary and Mike have asked a mediator to support their negotiations about Mike providing sperm to inseminate Mary.

There are no traditional expectations about sperm donor relationships with children and in practice there are a wide variety of ways in which sperm donors are and are not involved in conception and children's lives. The mediator should balance their attention to the needs and interests of Sharon and Mary as the intended parents and Mike as the donor. The parties may each assume that the other participants have the same expectations that they do. Without the benefit of mediation, fundamental differences of opinion and need could remain hidden until they emerge in distressing and/or high conflict circumstances.

Considerations that a mediator could prompt the clients to explore include:

- Their motivations for entering into their proposed agreement;
- Each of their anticipated roles in conception, pregnancy, birth, and in the child's life;
- Practical details of how and where conception will occur;
- Who will attend medical appointments during pregnancy;
- Who will be the child's parents and who will be identified as family;
- Who will be named on the child's birth certificate;
- With whom will the child live and spend time;
- Who will be the important adults in the child's life;
- Who will make decisions about the child's medical care, schooling, and other important matters; and
- When will the child be told about the circumstances of their conception and genetic heritage, who will decide when it is the right time to tell the child and who will tell the child at that time.

The mediator will also play a highly valuable role in assisting the parties to reality test their proposed family plan. The mediator can raise questions that assist parties to reality test their proposals. Clients ought to be prompted to consider counselling and legal advice, particularly about enforceability of the agreement (it will not be), prior to finalising an agreement. It might be useful to invite each person to explain their understanding of the agreement, which can provide an opportunity to check details and highlight matters that the parties appear to have glossed over or avoided discussing. The question of who will ultimately have control over the parenting arrangements might also be usefully raised as a question.

The reality testing questions about what parties intend to do if one or more of them changes their mind about the terms of the agreement are extremely important. It is very difficult for non-parents to understand or predict the way that becoming a parent will change their relationships, priorities, needs and/or lifestyle. Where it is anticipated that more than two

people will be involved in a child's life from birth, more opportunities for conflict arise.

It is important that parties in negotiations about family formation are informed about the legal status of their agreement. Mediators would be wise to check that the limitations are understood. Agreements about family formation, including parenting plans, are not legally enforceable.⁴⁹ The legal parents of a child are determined by the means of conception, which person gives birth to the child, that person's relationship status, and whether that person's partner consented to an assisted reproduction procedure.⁵⁰ Legal parentage at birth may be transferred by adoption or surrogacy.⁵¹ In Australia, surrogacy agreements are not legally binding,⁵² and transfer of parentage from the birth mother to the commissioning parents can only be made after a child has been born.⁵³ It may be arguable that pre-birth agreements fall within the definition of a parenting plan, where they deal with parenting matters.⁵⁴ Under the *Family Law Act 1975* (Cth), a parenting agreement only falls within the definition of a 'parenting plan' when it is signed by a child's parents.⁵⁵ However, other people may also be parties to a parenting plan.⁵⁶ Courts will take parenting plans into account in making parenting orders if it is in the best interests of the child to do so.⁵⁷ Courts have also taken into account family formation agreements entered into by the parties prior to the conception and/or birth of a child.⁵⁸ Agreements are not going to be determinative of decision making, but they will provide a useful written account of what was discussed and intended at the time.

It is useful to create a written record of family formation agreements as this provides the parties with something tangible to contemplate after the mediation, to consider carefully before going ahead, and to refer to when they face challenges. These records provide a tool to facilitate smooth implementation of agreements. There is no guarantee that conflict will not arise after the child has been conceived or born, hence it may be useful to encourage the parties in family formation negotiations to discuss how they intend to manage disagreements and changes in circumstances during the implementation of their family plans. Mediators can help the parties explore their preferred ways of trying to resolve the inevitable challenges

⁴⁹ Where a person applies for parenting orders, the court will have regard to parenting plans that have been entered between a child's legal parents, but those agreements are not enforceable. Family formation agreements may or may not meet the definition of a parenting plan. *Family Law Act 1975* (Cth) ss 63C, 65DAB.

⁵⁰ *Family Law Act 1975* (Cth) ss 60F, 60H–60HA, 69P–69U.

⁵¹ State and Territory Adoption Acts and Surrogacy Acts (eg *Adoption Act 2009* (Qld) and *Surrogacy Act 2010* (Qld)); *Family Law Act 1975* (Cth) s 60HB.

⁵² For example see *Surrogacy Act 2010* (Qld) s 15(1).

⁵³ *Ibid* s 21(1).

⁵⁴ *Ibid* s 63C(2).

⁵⁵ *Ibid* s 63C(1)(b)–(ba).

⁵⁶ *Ibid* s 63C(2A).

⁵⁷ *Ibid* s 65DAB.

⁵⁸ See for example *Wilson v Roberts (No 2)* [2010] FamCA 734 (19 August 2010), where the agreement was a pre-conception agreement made between two same gender couples.

of co-parenting, such as by providing the parties with guidance as to how they will manage a party changing their mind about what was agreed upon over time. For example, a clause in the agreement that sets out an agreed process for re-negotiation could assist the parties if they are in conflict later in their family formation process.

VI Conclusion

Mediators are experts in supporting their clients to explore conflict. This article has argued that it is important for mediators to foster a broad understanding of the kinds of conflict that their clients might be experiencing in their daily lives, their relationships and their family. The powerful societal assumptions of cisgenderism and heterosexism form a background to all conflicts involving clients who are trans and gender diverse, intersex and/or non-heterosexual. These assumptions may emerge as power plays between clients who have previously shared experiences of cisgenderism and/or heterosexism. A core practice technique that should be adopted for all clients is to ask questions in ways that do not make inappropriate assumptions. Clients should be invited and encouraged to share their own ways of defining their relationships and family.

Mediators must understand that society may have treated some clients differently to others, and that certain groups of people have only recently received legal recognition. Despite radical legal reforms in recent years, discrimination continues, legal rights are still denied, and there is still a failure to recognise the experiences of trans and gender diverse, intersex and/or non-heterosexual people. Mediators must be aware of these dynamics if they are to provide a truly inclusive service.