

Towards an Integrated Service?

WHEN FAMILY MEDIATION began to grow in England and Wales in the 1980s, it was very distinctive from legal practice in respect not only of its ideology, but also the characteristics of both its practitioners and clients. While practitioners came from a range of backgrounds, most were from caring or helping professions, including early retired volunteers not seeking a second career. Compared with legal clients, mediation services seemed to be used in the early days more by articulate and less conflicted people, often in the more affluent areas of the country. However, from about the mid 1990s, encouraged by the government's promotion of mediation in the context of divorce, lawyers began to become interested in adding family mediation to their professional repertoire. This was seen as a threat by some of the established family mediators. In 2005 Marion Roberts (2005: 520) wrote of 'the Law Society [claiming] control over a new and potentially lucrative area of professional practice, challenging established professional boundaries and therefore core understandings relating to the nature of legal practice and of mediation as a distinctive, discrete, and autonomous form of dispute resolution'.

Since then, as has been seen, non-lawyer mediators and lawyer mediators have been increasingly occupying the same territory of practice. Since LASPO, the population to be served by mediation has moved from being a relatively marginal group to potentially all court litigants, and public funding has sought to re-direct most seekers of legal help away from lawyers towards mediation. In Australia a similar change occurred with the establishment of Family Relationship Centres, which had to deal with a much broader and more demanding population than the early users of mediation, and it is now estimated that up to 80 per cent of cases mediated raise questions about domestic violence.¹ A change in the population served requires some change in the kind of service offered. In addition, in England and Wales, because of the legal aid changes, fewer cases are being referred by lawyers and so lack the 'where do I stand' preparation for mediation. The demand for both free and privately funded mediation remains limited. Nevertheless, mediation is almost always used together with the services of a solicitor at some stage, and often provided in a law office by either lawyer

¹ We are grateful to Jon Graham of Relate Australia for this insight.

or non-lawyer mediators. The practice of family mediation appears to be becoming increasingly integrated into legal practice. It is seldom used as a stand-alone service.

But, as described in chapter 3, the lawyers too are changing. There is less total care for a client, a wider range of pricing mechanisms and differentials and more limiting of the services provided to fixed-price and specific tasks. In this new environment, it is not surprising that lawyers are even keener to add mediation to their range of services, relating it more closely to their more supportive approach.

I. TYPES OF MEDIATION

In chapter 4 we described the institutional structure in which mediation services are located in England and Wales, and the objectives that mediation sought to achieve as found primarily in official documentation. We drew attention to what appeared to be problems and inconsistencies in the key distinction between providing information and giving advice, how directive a mediator might be in promoting options in what is essentially private ordering, and noted what we considered to be problems over accommodating legal principles, particularly the paramountcy of the child's welfare, with the distinction between information and advice and other aspects of mediation practice. We now return to some of these issues in the light of our observations and the experience of other jurisdictions.

We start by referring to discussions that have recognised that mediation can take different forms. Parkinson (2014: 37) writes that 'structured' mediation focuses on parties' interests, rather than their preferred outcomes, seeking to reach a settlement that meets as many of those interests as possible. She comments that 'lawyer mediators, in particular, are accustomed to playing an active role in working towards settlement', and adds: 'In structured mediation the mediator can exercise considerable power ... There are also risks of mediators steering participants towards a quick settlement rather than spending time building a mutually satisfactory settlement with both or all participants.' Structured mediation, she says, 'was not specifically designed for divorce or family disputes'. In contrast, 'transformative' mediation is designed to enhance participants' appreciation of each other's feelings and perspectives. However, Parkinson observes that this is not necessarily what people seek in mediation, and could take mediators outside mediation's 'ethical boundaries'. It would certainly lie outside the definition for publicly funded mediation,² as do 'narrative' and 'ecosystems' approaches, which refer to techniques for reducing tension between

² See Legal Aid Agency, *Family Mediation Guidance Manual* version 4.0, March 2015: paras 2.2–2.4), above p 81.

participants and promoting a higher level of understanding of differing perspectives within their social context.

An alternative typology is offered by Boulle and Nesic (2001: 27–29). They refer to ‘settlement’ mediation as encouraging ‘incremental bargaining’ and seeking compromise between the parties’ opening demands. ‘Facilitative’ or ‘problem solving’ mediation seeks to negotiate in terms of the parties’ underlying needs and interests rather than their legal entitlements. ‘Therapeutic’ mediation seeks to deal with underlying relationship issues. ‘Evaluative’ mediation seeks to reach a settlement in accordance with the rights of the parties within the anticipated range of court outcomes, which can blur the line between mediation and arbitration. They accept that these models may overlap, even within a single mediation. Others, on the other hand, insist on a purist model which is premised on absolute respect for client autonomy. On this view, the mediator has no interest in the outcome, and any ‘steer’ by the mediator towards an outcome, even by giving an indication of the possible view of a court, infringes client autonomy and is unethical and not even mediation, but ‘settlement broking’ (for examples see Stevenson (2015a) and Stylianou (2015)).

Which description best represents what we observed? Not surprisingly, we observed a mixture, and do not think it helpful to try to force a description into any particular categorisation. We see the warnings given about the undesirability of court proceedings should agreement fail (for examples see LM4 and LM1) and the occasions when mediators offered suggestions (or advice) about how agreement might be reached, such as the best way to decide how to distribute the contents of the home (M1 and LM1) or the proposals for shared parenting arrangements made by M9 and LM4’s work to move towards a mid-week sleepover in another dispute about overnight stays as efforts to bring about a settlement on which it was hoped the participants could agree despite any reservations they, or the mediator, might feel. But indications that mediators would state whether a solution fell outside legal parameters (M7, LM6, LM10) might reflect a more ‘evaluative’ approach.

However, these practices were usually accompanied by strategies designed to reduce tension and enhance communication between the participants, as in the ‘transformative’, ‘narrative’ and perhaps even ‘ecosystems’ models. This was particularly evident in the mediations by M7, LM1 and LM6 and the SPIPs (Separated Parents Information Programmes) conducted jointly by M7 and M8, and, perhaps with less success, LM4. So it seems that the mediators combined elements from the different typologies of mediation. There is nothing surprising about that. Indeed, it is entirely consistent with the two aims of mediation set out in the FMC Code:

- 2.1 Mediation aims to assist participants to reach the decisions they consider appropriate to their own particular circumstances.

- 2.2 Mediation also aims to assist participants to communicate with one another now and in the future and to reduce the scope or intensity of dispute and conflict within the family.

Similarly, section 2 of the Resolution Guide (2015: 9) states:

Family mediation is a process in which those whose relationship is ending or has ended, regardless of whether they are a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and to reach their own agreed and informed decisions concerning some or all of the issues relating to their separation, divorce, children, finance or property by negotiation.

However, it is an axiom of mediation that ‘Mediation must be conducted as an independent professional activity and must be distinguished from any other professional role in which the mediator may practise (FMC Code, section 5.1.7)’³ and that ‘Participants must be clearly advised [sic: this should perhaps read ‘informed’] at the outset of the nature and purpose of mediation and how it differs from other services such as marriage or relationship counselling, therapy or legal representation’ (FMC Code section 6.4). In the context which we were observing, the competing role was that of a lawyer, and the distinction between the role of the mediator and a lawyer here is built on the distinction between offering legal information and providing legal advice. As section 5.3 of the Code states: ‘(Mediators) may inform participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that they are not giving advice.’ Our analysis of section 5.3 suggested that this distinction may not be sustainable.

Our empirical data confirms this view. The distinction has the hallmarks of a formula whose function is to maintain professional boundaries. It seems it may be impossible to maintain in practice. The data provide numerous examples of advice provided by mediators to participants both as regards process and outcome. M1 gave advice to one participant about obtaining a nominal maintenance order, and to both about drawing up their list of assets; M12 said that, unlike lawyers, ‘We (mediators) don’t encourage wives to claim maintenance,’ but went on to say: ‘We succeed with getting spousal maintenance and charge back; when the children leave home her income falls off the cliff.’ She also said: ‘It’s harder to get women to look ahead, especially about pensions,’ implying that mediators do make some effort to get them to do that. Although she added that ‘decisions are down to the people’, that is insufficient to distinguish this from what lawyers do, as that is true in that context too. In fact, M12 expressly stated: ‘You can give better *advice* if you have information from both,’ though still insisting that she gives ‘legal principles’. M9 gave advice about taking time to reach

³ The Resolution Guide (2015: 10) has an equivalent provision.

agreement, and eventually about how the living arrangements of the child should be shared. LM7 advised about what should be done with the proceeds of the sale of the home. LM10 (and her co-mediator) gave assurance that an offer was within a range acceptable to a court; and LM1 advised that the parents construct scenarios and how they could decide on distributing household contents, and gave extensive information about mortgages and the divorce process. Much of this is of course advice about process, but process can affect outcome. Some, however, is directly about outcome.

It is not our intention to suggest that the mediators acted in any way improperly or outside their remit in doing these things. We have noted the contrary view of Stevenson (2015), who holds that such approaches should be seen as 'settlement-broking' rather than mediation. To sharpen the distinction, she gives a hypothetical case where a client says: 'Sam is 8 now. He is old enough to decide for himself whether or not he sees his father. I'm not forcing him. It's up to him.' Stevenson suggests that informing the parties that a court would expect that the child should see his father is an example of the former approach. To act ethically, she argues, the mediator should encourage the participants to articulate the circumstances and their perceptions of the child's needs so they can settle on an option and see how it works out with the child. However, we believe that this sets up a false dichotomy. For, while a court would hold an assumption that it is normally in a child's best interests to remain in contact with both parents, this decision would not be taken without regard to all the circumstances, so these would need to be elicited if the information about the possible reaction of a court was to be in any way meaningful. Further, if the purist approach were taken, and it became clear from the additional information that the child was being manipulated and one party overborne by the other, is it really to be supposed that the mediator, who owes some responsibility to the child, would not give some indication about the child's interests, and perhaps seek a consultation with the child in accordance with FMC guidelines? Is a mediator to be totally unconcerned about imbalances of power (see Webley: *in press*)? The distinction rests on an idealised notion of autonomy as something 'possessed' by each participant untainted by any external influence. Such autonomy does not exist in the real world, and certainly not in mediation when the participants are at least influenced by one another. Nor do you deprive someone of autonomy by offering them advice. The question is only how influence is exercised and to what end. As Raz (1986: 155) wrote: 'Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility.'

Therefore, we believe that the criteria according to which the roles of mediators and lawyers are distinguished are unrealistic. The two main grounds upon which the mediators' activities are said to be different from those of lawyers are that mediators provide information (which suggests a neutral act), not advice, and that mediators primarily deal with resolving

current conflicts, whereas lawyers are not restricted to this but can offer advice and support in planning for the future, which involves guiding choices between options discussed based on the information or advice available, though at the end of the day the client chooses and gives instructions. The examples given above demonstrate how the provision of information frequently would be, and is intended to be, seen as pointing to actions or decisions which the mediator thinks are in the interests of the participants or a child (or sometimes just one of them). There is little to distinguish this from the way a lawyer delivers advice, apart from the fact that it normally comprehends the interests of two people. The fact that a mediator recommends that the participants consult their own lawyers before approaching a decision does not reduce its character as advice, but can be seen as alerting them to the possibility that they might receive different advice from a lawyer who was less constrained by accommodating the interests of the second person. A less benign reading is that by advising participants to consult their 'own' lawyers the mediator implicitly recognises that any legal information supplied (especially if by a non-lawyer) might be unreliable, and that this step is a safeguard against possible liability for giving negligent advice, for which they may not hold insurance. But mediators, especially if they are lawyers, are likely to be uncomfortable with this reading.

Myers and Wasoff (2011: 5, 7, 100) came to the same conclusion in Scotland. They added a point about transparency, which echoes the views of Greatbatch and Dingwall in a series of papers⁴ published from 1989:

For solicitors, the approach to option appraisal is a transparent process of outlining, on the basis of their knowledge and experience, the pros and cons of different approaches. In the mediation context the process is both transparent and opaque. The transparency of the process lies in the appearance of information sharing, the identification of aims, objectives and issues, and the joint discussion of possible options. The opacity of the process emerges from the way in which practitioners, also drawing on their expertise and experience appear, from their accounts, to subtly lead people in particular directions. This strategy is more indirect than is evident from solicitors' accounts. While a sophisticated approach it may be at odds with the rhetoric of mediation which suggests neutrality, impartiality and couple control (Ibid: 5).

The other respect in which the activity of mediators is closer to that of lawyers than usually understood is when mediators are not primarily seeking to resolve a dispute, but rather to respond to a need for one or both participants for information (or advice) in order to make a decision. As M12 explained in the 'MIAM' she gave to the researcher, mediation was 'an opportunity to sort out face-to-face all the practical and personal things directly but with the help of a mediator'. This clearly does not necessarily envisage a dispute.

⁴ Greatbatch and Dingwall (1989); Dingwall and Greatbatch (1991); Greatbatch and Dingwall (1999).

In the mediation by M7 the mediator's task was primarily to open channels of communication between the participants rather than to bring them to agreement over contested issues. This was problem solving rather than dispute resolution or even decision making. The clearest example of a mediator acting very much as a lawyer would do was in LM6's mediation, where the couple were essentially exploring the legal and other consequences that would accompany their separation should they choose to separate. But this was also true for LM7's mediation (although there may have been a dispute at an earlier stage), and the second part (on finances) of LM1's first mediation, and seemed to be likely if the second MIAM conducted by LM1 converted to mediation: the wife expressly said: 'We just wanted someone to talk through it all.' And a client in a MIAM may really be seeking legal advice, as in the final MIAM described for M7, which involved quite complex property issues.

II. WHO IS THE CLIENT?

As Myers and Wasoff (2011: 97) observe, there is of course one clear distinction between the position of mediators and that of lawyers in this context, which is that the mediator is able to see both clients together. A lawyer normally could not be instructed by both parties where there is conflict of interest, or a significant risk of conflict,⁵ between them but could act as a mediator between them because conducting mediation is not considered to be a 'legal activity' which is defined as including 'the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes'.⁶ That makes it possible for mediators to engage in an activity (assisting the parties to communicate directly with one another) which is denied to lawyers unless they 'become' mediators and refrain from giving 'legal advice or assistance', which is what they are primarily trained to do. But if it is conceded that legal advice and assistance are not uncommonly provided in mediation, then mediation might sometimes be thought to fall within the definition of 'legal activity', and within the prohibition against lawyers in professional practice receiving instructions from conflicted clients. However, this principle may be permeable. According to the Solicitors Regulation Authority Handbook, 2011, Code of Conduct:

- 3.6 Where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if: you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks; all the clients

⁵ Solicitors Regulation Authority Handbook, 2011, Code of Conduct, para 3.5.

⁶ Legal Services Act 2007, s 12(3)(i).

have given informed consent in writing to you acting; you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and you are satisfied that the benefits to the clients of you doing so outweigh the risks.

The recognition that clients might have ‘a substantially common interest’ seems to open the door, if only theoretically, for solicitors to act for both parties in a divorce case. Richard Tur (1995: 151) made a strong argument that ‘the law of lawyering and legal ethics should be adjusted to permit one lawyer to act for a divorcing couple, where appropriate, and always with the informed consent of the parties’. This was based on a view that it was too readily assumed that the parties’ interests are necessarily opposed in divorce, and that such an adjustment would bring about substantial savings in costs and time. We would put the matter slightly differently. It is possible that the parties’ interests at the time of, and after, separation may often be in conflict, but that they will share another interest, namely, that the conflict be resolved and disputes prevented or overcome in a manner that is both fair and minimally damaging to themselves and their children. That could be said to be a ‘substantially common interest’ under Rule 3.6. It could be further argued that, just as it is thought that a mediator can act ‘impartially’ with respect to the parties’ interests, so it is reasonable that a lawyer might be ‘satisfied that it is reasonable ... to act for (both) the clients and that it is in their best interests (to do so)’. It follows that for a lawyer to act as a mediator and give legal advice within the mediation would not necessarily breach the rule against lawyers advising conflicted clients.

When a lawyer has only one party as client, whether what is provided is information or advice (and a lawyer may provide either), this is done with a view to furthering the interests of the client (although this may well take into account the interests of others). In such a case Marion Roberts (2014: 111) is correct to say that the role of the lawyer and client ‘is inseparable from the relationship of representative’, but this does not arise from the fact that the lawyer gives advice rather than information, but because the lawyer normally is concerned to identify and seek the best way to protect the interests of a single client. As Myers and Wasoff (2011: 97) put it: ‘The solicitor route is by its nature characterised by particularity’. But if it is possible to identify a common interest, as mediation claims to do in a dispute, the provision of advice, including legal advice, to protect that interest does not make the mediator a ‘representative’ of either participant. This is so whether the mediator is a lawyer or not, and the fact that this is not a ‘reserved legal activity’ would also allow a non-lawyer mediator to give such advice.

Lisa Webley (2004) discusses the issue from a different perspective. She raises the question: who is the client in family proceedings? Referring to the statement in the Law Society Protocol on Family Law of 2001 that a solicitor is to ‘have regard to the interests of children and long-term family relationships’ she observes that this places on the solicitor a duty that goes

beyond that owed to the client who gives the instructions. While Webley does not go as far as to state explicitly that other family members can be considered to be ‘clients’, her comment that this seems to ‘widen the net’ in respect of the question who the client is (Ibid: 249) indicates that it is not far-fetched to believe it is possible for a lawyer properly to give advice to two (or more) members of the same family. While the passage from the Law Society’s 2001 Protocol to which Webley refers no longer appears in the 2010 edition, Resolution’s Guide to Good Practice for Family Lawyers in Dealing with Clients (2012: para 5.1) has similar guidance:

When the client is seeking our help to define what objectives it is sensible to pursue then we can seldom do better than to help them reach out for what is most principled and what, whilst promoting their own interests, also promotes the welfare of the family as a whole, in particular what is in the interests of any children.

If lawyers should seek solutions that not only promote the immediate client’s interests, but also the welfare of the ‘family as a whole’, it is not a great leap to imagine the other family members as being, notionally, ‘in the room’, and from there to accept that the ‘other’ party could actually be in the room. So, while it might appear to be a major change to allow a lawyer to accept both parties together as clients, it could be argued that this is to some extent already recognised in such guidance. Our observations support the view of Myers and Wasoff (2011: 11) that ‘there is more common ground than one might expect from commonly made claims’ between the approaches of mediators and lawyers. The difference is that the mediator, *even if legally qualified*, proclaims not to be acting as a lawyer, disclaims giving legal advice, and advises the participants to consult other lawyers. But these are largely devices to maintain an outward distinction between the professional roles which seem to be converging at this point.

III. A PROPOSAL: ‘LEGALLY ASSISTED’ FAMILY MEDIATION

The market in divorce services being offered to separating couples has diversified rapidly (see chapters 2 and 3) and the boundaries between the different activities have become more opaque and permeable. People are using DIY online sources to do the preliminary work in a divorce, perhaps then moving to legal service packages at fixed prices, to mediation if in dispute, perhaps from mediation to arbitration and back again, and using expert advice on many matters from tax to parenting, or even purchasing a private financial dispute resolution (FDR) hearing. There are many options (to which we briefly refer below). This could be confusing for people undergoing the stress commonly associated with relationship breakdown. Barlow et al (2014: 6) report of the subjects they interviewed that ‘many felt that the full range of options and the implications were not given to them or not well

explained'. We therefore think it is important that opportunities should be available for them to be provided with information and advice about these options, and we address this in our proposal below.

We also believe that there is a case for adding to the present options a process that brings together the two key services, those provided by lawyers and mediators, which have so much in common in their working practice, so that clients, particularly those with limited means, can find what they need in one place. While sometimes it may be necessary to involve more than one professional in attending to the various needs of couples who contemplate separation, much of the expense and stress could be reduced if a one-stop service was available. Marc Lopatin has recently developed a scheme attempting to make mediation more attractive by linking it with the provision of legal services both before and during the process under the title 'Lawyer Supported Mediation'.⁷ Lopatin's scheme envisages linking legal and mediation services in price-capped 'packages' but still separates the mediating from giving legal advice, and assumes separate legal representation of the participants. But might it not be possible to combine the two key skills, legal expertise and communication skills, in one service? The advertising strategies of many divorce service providers suggest that this could be what many people want. Even Marion Stevenson, who seemed to consider that mediation which sought to influence outcome was not mediation proper, but 'settlement-broking', later conceded that there was a place for 'settlement-broking' 'when clients understand that this is what they are buying' and refers to it as 'a model where they are given support in structuring a fair, reasonable and practical settlement' (Stevenson 2015b, d).

In the Netherlands a group of lawyers have formalised the relationship between mediation and law by forming an association, the vFAS (*Vereniging van Familierecht Advocaten Scheidingmediators*), of lawyers who are also qualified as mediators or mediator advocates who offer mediation with legal advice to couples who wish to and can appropriately work together.⁸ Alternatively if parties wish to be separately advised, vFAS offers the services of FAS mediator-advocates separately to each party. These lawyer mediators then are committed to working in a non-adversarial way and negotiating with each other to reach agreement. If a mediation begins but breaks down the parties are free to seek the help of two separate lawyers who may be FAS lawyer mediators. If this form of help also fails to reach agreement the parties will need to go to court for adjudication. All the FAS lawyer mediators are specialist family lawyers of at least five years' standing who have been fully trained as mediators.

⁷ See Lopatin (2014) for a full account of the scheme, later launched as Dialogue First.

⁸ See 'Scheiden Doe Je Samen' from the *Vereniging van Familierecht Advocaten Scheidingsmediators* www.verenigingFASnl. June 2015. postbus 65707 2506 EA DEN HAAG.

When a FAS intervention ceases, the FAS lawyer mediator is not allowed to act for one party against the other, and nor is any member of their firm or any other adviser such as an accountant or counsellor who has been involved so far. The FAS lawyer mediator charges at the same hourly rate whether mediating or giving legal service, but of course the mediation service is cheaper as only one hourly fee is charged. FAS therefore offers choice: mediation with legal advice for both parties together from a lawyer, and legal services for each party separately from lawyers with a commitment to seeking settlement. The service is mainly used by people with property and the charging rates are not low. But legal aid could be available for those on low incomes.

At present in England and Wales, the only way for a divorce practitioner committed to helping both parties together to reach a fair and informed arrangement by using both full legal knowledge and mediating skills is to be a lawyer who has trained as a mediator but has stepped down from the Law Society Roll. This can be seen in the Divorce Negotiator scheme developed by Carol Sullivan over the last three years, where following her own difficult and costly divorce, she decided that there must be a better way through the process.⁹ She had practised as a family solicitor, but withdrew from the regulated profession in order to be free to advise the two separating clients together, and she uses mediation techniques to help them move towards settlement. She is able, unlike a formal mediator, to draft consent orders, though not to represent parties in court. In order to do what needs to be done, she left her profession but retained her skills.

Our proposal for a unified, one stop service in this jurisdiction is similar to the Dutch system explained above. We argue that it should be possible for a suitably qualified lawyer to accept two parties contemplating separation, but seeking agreement, as joint clients, and accordingly to advise them jointly in drawing up a separation agreement, should the clients desire this. The prospect of parties drawing up marital agreements with the assistance of a single lawyer is familiar in European countries where the emphasis is upon ensuring that a notary should not see the parties separately, but together. Indeed, in such cases the notaries 'have to explore the intentions of the parties and the facts of the case and have, accordingly, to instruct the parties about their rights and duties' (See Dutta 2012: 172, for Germany; Pintens 2012: 79, for Belgium). By contrast, in England, it has been said that when a pre-nuptial contract is signed 'it is usually without ceremony, but symbolically sees the couple coming together after being with their separate legal teams' (Vardag and Miles 2015: 137–38). The position in Italy regarding separation agreements has been explained as follows:

A consensual separation (*separazione consensuale*) can be reached if the spouses agree, by and large, at least on: getting separated (obviously), assets splitting, and

⁹ See www.divorcenegotiator.org.uk/about/ (accessed 7 August 2015).

custody and maintenance of children. In this case, they can go to the same lawyer and give him/her power of attorney to represent them in court. Then the lawyer will go into more details and advise the couple on the best legal way to get what they both want. Finally, he/she will draw up a legal agreement on the 'separation conditions' and submit it for judge's approval (so-called *omologa*). After a hearing in court, where the judge will try to reconcile the couple, if he/she holds the conditions of the agreement fair and balanced, separation is granted.

Of course, sometimes spouses cannot reach an agreement on their own, although they would like to or maybe they thought they did and went to the same lawyer for a legal draft, but then realised that they actually did not agree on every single condition. In these cases, the same lawyer can and will, in fact, try to reach a (more) suitable agreement for both parties. There is no doubt that, in doing so, the lawyer will give legal advice. I would argue that this is necessary because the agreement has to hold up in court. If he/she succeeds in getting the spouses to agree on the conditions of their separation, the proceeding will fall into the same category as before.

If the lawyer sees that a consensual separation is not an option, he/she will advise the couple to seek separate legal counsel. The lawyer may or may not retain one of the spouses as a client and represent him/her in the contentious separation proceeding that is about to start.¹⁰

But, as our evidence shows that facilitating agreement between two persons who are present together can be a demanding process that requires special skills and training, we suggest that if lawyers were to be permitted to accept two potentially conflicted parties as joint clients, the conditions under which this was undertaken would need to be carefully considered and mediation training provided. So we believe that a lawyer who accepts joint clients in this context would need to have undergone the same mediation accreditation processes as presently apply to family mediators, for, while some cases may appear to be relatively straightforward and amicable, requiring information and advice, the fact that the parties are contemplating separation, or have separated, means that the dispute resolution skills of mediation could become relevant at any time.

We do not think that this service should be provided only by practising lawyers. It should be open to non-lawyer mediators as well, but just as the lawyers should have undertaken mediation training, non-lawyer mediators would need to have undertaken specially focused legal training in order to be able to openly offer good-quality legal advice in the course of the mediation, not covering all aspects of law but only those necessary for this area of work, rather as licensed conveyancers were trained for their specific area of activity following the ending of the solicitors' monopoly of conveyancing.

They could do this since this is not a 'reserved legal activity' which is confined to persons authorised for this purpose under the Legal Services

¹⁰ We are grateful to Giovanni Cinà, *avvocato*, for this information.

Act 2007.¹¹ For convenience, we call this ‘legally assisted family mediation’. If legally assisted family mediation fails, the lawyer mediator involved would not be permitted to act as a legal representative for either of the parties, who would need to seek their own separate legal adviser, who may or may not be trained for legally assisted family mediation.

Under this proposal, the conditions for a lawyer to accept joint clients should be essentially the same as those which currently apply if the lawyer acts as a mediator. That is, there should be no domestic abuse, or undue imbalance of power, and information should be openly shared. If these conditions are not met, the couple would not be suitable for legally assisted family mediation. Barlow et al (2014: 32) recommend that MIAMs (which are focused on, and frequently seek to promote, mediation) should be replaced by DRIAMs (dispute resolution information and assessment meetings), to widen the options under consideration. To guard against bias, they suggest they be provided ‘independently of dispute resolution services’, and should be free. While this would be attractive in an ideal world, our suggestion is more modest. Just as at present a mediation should be preceded by a MIAM, acceptance of joint clients for legally assisted family mediation should be preceded by a meeting in which the lawyer both assesses the parties’ suitability for being accepted as joint clients (including screening for violence) and explores other options, some of which are discussed in the next section of this chapter. Many lawyers already hold an ‘options’ meeting with potential new clients to discuss what kind of service is appropriate. But another step towards joint client work was observed in an innovative legal practice, where a lawyer mediator runs a joint Choosing Options Together (COTS) session, charging £200 an hour for both clients. This process should be encouraged and enhanced, aided perhaps by a better appreciation of the range of options available. If legally assisted family mediation were to be chosen, a further important step would need to be taken involving a judgment whether the parties have sufficiently common interests and willingness to move forward that agreement between them is a realistic possibility. This assessment stage is already an important element in a MIAM. Should the assessment be negative, neither the lawyer mediator making the assessment nor anyone in that person’s firm should be able to take on either party as an individual client.

We see this as a new option which could be provided by lawyer mediators who would either be lawyers with mediation training or mediators with appropriate legal training. Our proposal would simply entail removing two current *restrictions*, namely, the assumption that practising lawyers cannot advise two parties jointly, as discussed above, and, secondly, the specific prohibitions in the mediation codes against a mediator offering advice. In place of that the mediator in legally assisted family mediation should be

¹¹ Legal Services Act 2007, ss 12, 13.

permitted or encouraged to offer an opinion on the effects of any matter under discussion on the interests of either participant, and *required* to do so with regards to the interests of any children.

Once again, our evidence suggests that it is difficult to maintain the present distinction between offering information and advice, which we think serves little purpose other than to maintain an artificial distinction between acting as a mediator and acting as a lawyer. This distinction would disappear if the two practices were brought closer together in the way we suggest. Of course neither participant would be obliged to follow the mediator's opinion, and they should be told that is the case, and of their freedom to consult an independent lawyer, tax expert, child welfare adviser or any other source of professional help should they so wish. But this is no different from the current position between lawyer and client. The lawyer currently openly gives advice and takes instructions, while the mediator may only cautiously approach giving advice or an opinion, but in either situation the clients can ignore, accept or reject whatever is offered. It is only in arbitration where the parties choose to agree to accept the view of the decision maker, and in adjudication where they are bound to do so.

Legally assisted family mediation would not replace either negotiation between lawyers or mediation as currently practised. There is therefore no reason why forms of mediation, such as the 'transformative', or those which we have called 'purist', should not continue to be available in those cases where it is appropriate. However, we believe that it would be beneficial if the Resolution and FMC Codes were modified by the insertion of the italicised words as follows, at least if the mediation is given state support, whether by funding or otherwise:

Family mediation is a process in which those whose relationship is ending or has ended, regardless of whether they are a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and to reach their own agreed and informed decisions concerning some or all of the issues relating to their separation, divorce, children, finance or property by negotiation *within the principles of the law*. (Resolution Guide to Good Practice on Mediation 2015: 9)

Mediation aims to assist participants to reach the decisions they consider appropriate to their own particular circumstances *within the principles of the law*. (FMC Code: 2.1).

There was much concern when arbitration or mediation by religious bodies was under discussion that the state should not be supporting processes that resolved family issues according to norms that departed from those of the wider community (Malik 2014; Eekelaar 2015). It therefore seems reasonable to expect that if mediation aims to reach a specific outcome (rather than being confined, say, to improving communication between the participants), that the outcome should be consistent with the principles of the civil law.

This addition would require non legally qualified family mediators to demonstrate training in the basic principles of family law.

In legally assisted family mediation, therefore, the mediator would not be ‘neutral’ as understood in the current model for family mediation, as the outcome sought would fall within the concern of the mediator. But, as we indicated earlier,¹² the mediator can, and should, remain impartial as between the participants. In our view, the modifications suggested in any case make explicit what often presently occurs in mediation, but in a hidden and inconsistent way, which Myers and Wasoff (2001: 5) call ‘opaque’. For example, one of the most important principles of the law is that the welfare of the child should be paramount. We referred earlier¹³ to the comment by the Family Justice Review that ‘all mediation should be centred on the best interests of the child’ and noted that suggestions about hearing the child have the potential to oblige a mediator to steer the parties towards an agreement informed by an assessment of the child’s interests made in the context of the child’s views, especially in the light of the ‘responsibility in regard to the welfare of any child of the family’ placed on the mediator by Resolution’s Guide (2015: 14–15). It would therefore be appropriate to acknowledge that this introduces what is an important principle of law into the conduct of mediation. But that is not the only principle of law that is relevant. The statement in Resolution’s Guide (2015: 11) that mediators ‘*have a responsibility ... to inform clients if they consider that the outcome/s they are considering might or would fall outside that which a court might approve or order*’ suggests that the preferred outcome is an agreement that complies with legal principles.

The final major matters for attention in any move towards integration would revolve around the termination of the mediation. Apart from termination when agreement has been reached, the occasions for termination would be the same as presently set out in Resolution’s Guide (2015: 33–34) which include the presence of a power imbalance that cannot be addressed, or if either party lacks capacity to negotiate to reach a ‘workable, fair and reasonable outcome’, or where there are safeguarding issues concerning children, or deliberate failure to disclose financial information, or where the participants simply cannot make progress. These could be seen as specific instances when there is insufficient commonality of interests to allow joint advice. Apart from such circumstances, which should already terminate mediation under current guidance, the mediator should accept the participants’ agreement, as now, even if he or she has earlier expressed an opinion that the agreement, or aspects of it, are not in the interests of either or both of the participants, and draft an MOU on this basis. As regards children, the mediator should accept that the participants may have a different view from the mediator’s expressed opinion on the matter, but should be alert to the

¹² Above, p 87.

¹³ Chapter 4.

possible need to take steps under safeguarding procedures if they consider that the parents are not acting in the best interests of the children. Also, the mediator could decline to translate the agreement into a Consent Order (which the mediator, if a lawyer, or legally uplifted mediator should be able to draw up) if the mediator considered that any aspect of it was inappropriate for that purpose.

As intimated above, we are proposing legally assisted family mediation as a form of one-stop mediation with legal uplift, whether the mediation is carried out by lawyer or non-lawyer mediators. But there is no reason why mediation should not continue to be provided as it is at present. Mediators who are not lawyers might wish to do this for a number of reasons, from a wish to concentrate in the private sector on therapeutic aspects of mediation to concern that their present insurance indemnity policies would not cover them if they were to accept that they could give legal advice. If this occurred, there would be (at least) two forms of mediation on offer. Clients would choose which was more attractive for them. Legally assisted family mediation might save costs as the participants would have less need to seek additional legal advice from their own lawyers, or for drawing up a Consent Order (whose terms the mediator could discuss directly with both participants).

At present it seems clear that a Consent Order cannot be drawn up by a mediator (even if a lawyer) because this would involve giving ‘some form of advice’, and thereby breach the FMC Code (Resolution Guide to Good Practice on Mediation 2015: 45).¹⁴ That would change under our proposal for legally assisted family mediation because the lawyer (or legally trained) mediator would be able to give advice to both participants. There might be concern that such a Consent Order, on which the parties had not received independent legal advice, would be less likely to be accepted by a judge, and more vulnerable to challenge even after made by a court.

As regards the readiness of a judge to accept the terms of a draft Consent Order, the reason why judges do not scrutinise them in detail was expressed by Ward LJ in this way in *Harris v Manahan*:¹⁵

The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are *sui juris* and who are represented by solicitors know what they want. Officious enquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.

¹⁴ In August 2015 the Solicitors Regulation Authority intimated that a solicitor could draw up a Consent Order for both parties on a joint retainer, but without giving advice, and only if satisfied that various conditions had been met such as absence of undue influence, duress or imbalance of power, or vulnerability, which might be difficult for a lawyer who had not conducted the mediation to assess: www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/August-2015.page.

¹⁵ [1996] EWCA Civ J0524–8; [1997] 1 FLR 205.

It has also been said that ‘formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement’.¹⁶ The reference to representation by *solicitors* (in the plural) reflects the current standard practice, and should not be taken to rule out the possibility that a party’s voluntary participation in legally assisted family mediation and agreement to an outcome in the light of legal advice given to the parties jointly by one lawyer as proposed here would not equally be grounds for considerable restraint by a court in reviewing the agreed outcome. Similarly, having strongly emphasised the policy objectives of restraining litigation, particularly in family cases, Ward LJ proclaimed that Consent Orders, once made, should be capable of challenge on the basis of bad legal advice only in the rarest cases (causing the ‘cruellest’ injustice). If that is the view taken about bad legal advice, there seems to be little reason to challenge a Consent Order on the ground only that legal advice had been given to both parties jointly. In any event, since those using this process would need to be inclined to co-operation, they would be less likely to adopt combative methods later (though of course this could happen). Where parties are initially heavily conflicted, they should have separate representation throughout.

IV. AN ADR CONTINUUM

ADR is usually seen as standing for ‘alternative dispute resolution’, where the resolution processes are seen as being alternative to ‘adversarial’ ones. But King et al (2009), writing within the Australian context, rejected sharp dichotomies between adversarial (where the parties control the issues to be addressed and the evidence to be considered) and inquisitorial justice (where the judge plays a more active role) (Ibid: 5) or between court-based litigation, where adjudication by a third party is envisaged (seen as ‘adversarial’) and ADR, where the parties retain control of decision making (seen as ‘non-adversarial’) (Ibid: 101). They noted (Ibid: 94–95) that ADR tends to be either roundly praised or, conversely, criticised, for example as being ‘second-class’ justice (Tyler 1988–89) or as promoting a ‘harmony ideology’ that conceals much coercion (Nader 1993). They therefore sought to develop the idea of ‘non-adversarialism’, which is not the opposite of

¹⁶ *Edgar v Edgar*[1980] 1 WLR 1410 (Ormrod LJ). This approach is likely to be reinforced after the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, which applied a similar approach to pre-nuptial and post-nuptial agreements, since separation agreements are a species of post-nuptial agreement. See Miles (2012); Scherpe (2012: 512–13). Scherpe (Ibid: 494) suggests that the requirements regarding independent legal advice in upholding marital agreements may have weakened after *Radmacher*, becoming just one factor in determining what is fair.

adversarialism, but forms part of a continuum, 'a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees' (King et al: 5). Since 'alternative' suggested processes that were opposed to or supplementary to 'adversarial' processes, the view that most processes combine elements of adversarial practice suggested that ADR might be better understood as referring to 'appropriate dispute resolution' to emphasise that focus should be upon the best process for the issue in hand (Ibid: 89). King et al saw non-adversarial justice as an approach that focuses on non-court dispute resolution, aimed at prevention rather than post-conflict solutions, and which itself divides into 'hard non-adversarialism' (involving paternalistic judicial management) and 'soft non-adversarialism' with more party control but with emphasis on compromise (Ibid: 6). They pointed out that 94 per cent of applications to the Family Court of Australia in 2001–02 were resolved without judicial determination, and described a movement away from a dispute-resolution court system, towards a problem-solving justice system which is more comprehensive and preventive and much wider than the court process itself, with ADR playing an important part. They explained how, in Australia, as elsewhere, after a period of messianic enthusiasm, then a sceptical reaction, ADR services were slowly moving towards 'professionalisation and standardisation' (Ibid: 96–97, 121). But this is not easy, as our account of the process in respect to mediation in England and Wales testifies.¹⁷ They identified four kinds of ADR—facilitative: with practitioners providing a process for parties to resolve their issue (for example mediation and negotiation); advisory (conciliation and expert appraisal); determinative (arbitration and private judging) and hybrid (where the practitioner combines a variety of roles) (Ibid: 89–90).

Australia was one of the first jurisdictions to adopt a facilitative approach to family dispute resolution, requiring attendance at a non-legal dispute resolution service before going to a court. But already there are hybrid elements. If we look at the relationship between legal and mediation work in Australia, signs of the kind of convergence or at least rapprochement between lawyers and family dispute practitioners we have raised can already be seen. The 65 original Family Relationship Centres, where attendance is mandatory for parental disputes before using the court, with some exceptions, began by excluding legal services from their work, as part of the attempt to move away from a culture of litigation towards more co-operative post-separation shared parenting. But lawyers and courts are now accepted as part of the range of services needed by families. The Coordinated Family Dispute Resolution Service offers early access to publicly funded legal help to parents with issues of violence or abuse (see Moloney et al 2011). Similarly in New Zealand, outside specific circumstances (for example, where the application

¹⁷ See chapter 4.

is by consent, or in cases of violence and abuse) mediation is required before filing an application on a parenting issue to the family courts unless a 'family dispute resolution form' is filed (for example, where mediation has been abandoned or the dispute completely resolved). The costs will fall on the parties unless tight legal aid conditions are met. Although not in the legislation, concerns about lack of legal advice led the government to introduce a scheme allowing four hours' legal advice for those who meet the strict criteria of legal aid, which could cover advice during and after mediation, or even the identification of a right to proceed to court without mediation, as in cases of domestic violence. The legislation is silent about the attendance of lawyers at the mediation. If a dispute does proceed to court, judges have the option to order fully subsidised counselling if they believe this will help the parties, but this is expected to be rare (see Atkin 2015; Family Mediation Task Force 2014: 36).

Even where facilitative models are given strong government support, the part which courts play in these processes can vary considerably between jurisdictions, and also how mediation sits within a system, who provides it, who uses it, how users are directed to it. And outcome measures remain elusive.¹⁸ A key element in governmental assessment of the effectiveness of ADR in the UK is reduction in the level of court use in family matters. International comparisons are often made, but these can be misleading if there is no consideration of the way the court is used in different settings.¹⁹ In England and Wales people do not usually attend court for the actual divorce process, but only apply for hearings on matters of finance or parenting which either cannot be resolved, or have been resolved but the parties need assurance of enforceability through a Consent Order. All applicants to court must go to a MIAM to be told about mediation and assessed for suitability. The court welfare service, CAFCASS, will screen applications concerning children for any safeguarding issues. In some other jurisdictions one or both of the parties or their lawyers must attend court for the divorce process even where there is agreement.

But courts may also be used for triage to appropriate support services as well as dispute resolution through both court orders and voluntary mediation. For example in Germany, representation by a lawyer is compulsory, though where divorce is by consent, one lawyer may represent the parties jointly. The actual court proceedings can be preceded by a mediation session at the court (Martiny 2002). Following the reforms of 1998, the court, run by the Land, is not seen as the place which tells parents what to do

¹⁸ See Dr Tern Geurts, Ministry of Security and Justice, The Hague, 'The Impact of Mediation', Paper given at The Hague International Meeting on High Conflict Divorce, May 2015, where 1,000 papers on impact were studied but found only 13 published evaluation studies to be of value, and the only randomised controlled trial study in the US reported less parental conflict and less use of court after mediation but no impact on the welfare of the children.

¹⁹ See, eg, Family Mediation Task Force (2014: 35, Annex C).

when they have parenting problems, and it is not focused on quick decision making but instead facilitates access to long-term support by working with the Youth Advisory Service run by the municipality. This offers easy access to a range of support services, and its officers attend court and speak to families with the goal of making gradual progress. There is a constitutional right to advice from welfare officers on visitation, and to protected visitation in high conflict cases. In Germany, reducing court use is not a policy aim, and it is estimated that this way of using the court to gradually lower tension may be more cost-effective than attempting rapid decision making on complex matters. Mediation is available as one of many helping services, and it is used for specific disputes, but not for providing the longer-term help which is often needed by families with problems. The court is the 'hub' for access to help, not just for dispute resolution.²⁰

In France, everyone attends court for their divorce with their lawyer, but often for less than 20 minutes (Bastard et al 2015; Biland et al 2005). Mediation is not widely used even though it is a highly qualified profession, with two years' training (in the UK basic training for mediators takes nine days) but demand has remained low. The government prepared legislation to enable judges to send couples to two sessions of mediation without their consent, but the draft law was withdrawn in the face of widespread opposition from many quarters.²¹ In Belgium, short-term court-ordered mediation by agreement is used when necessary, but in 2013 the Amicable Settlement in Court procedure was set up by which a magistrate can require parties to meet with him or her to work on reaching agreement which will be given legal certainty. The process is free, legally aided, and if agreement is not reached, the parties come back to court but see a different judge.²² New court-centred developments are not confined to Europe. In Nova Scotia the judge can hold binding a Binding Settlement Conference attended by parties and their lawyers before a hearing begins, where the judge can lead the parties to an agreement which then becomes binding. A court hearing is avoided, but the judge has acted almost as in the English FDR proceedings.²³ In California, where mediation on children issues is mandatory, the family

²⁰ Dr Thomas Meysen, 'The German approach in family court proceedings and the interplay to support services by the child and youth welfare system', *High Conflict Divorces, Mediation and active interventions from an international perspective* (Ministry of Security and Justice, The Hague, May 2015).

²¹ See Proposition de Loi relative à l'autorité parentale et à l'intérêt de l'enfant, Art 17: www.assemblee-nationale.fr/14/propositions/pion1856.asp and discussion by Benoit Bastard: www.huffingtonpost.fr/benoit-bastard/mediations-familiales-divorce_b_5252500.html (accessed 6 October 2015).

²² Dr Patrick Senaevé, 'The origins of family courts in Belgium and the in court mediation', *High Conflict Divorces, Mediation and active interventions from an international perspective* (Ministry of Security and Justice, The Hague, May 2015).

²³ Lecture by Justice J Williams, Supreme Court of Nova Scotia, Westminster University, 30 April 2015.

courts provide this free and the agreements reached have the status of a court order when signed by a judge.²⁴ Alternatively, parties with the necessary resources may buy the services of a private judge registered to adjudicate and the order carries the weight of any other court order.²⁵ In these American and Canadian examples the court remains central, but seeks to avoid contested hearings. In a growing number of jurisdictions in South America and Eastern Europe notaries can grant divorces in uncontested cases as well as act as mediators and arbitrators, although there have been concerns that they may lack the necessary skills to deal with conflicted parties (Kennett 2016, citing Lesseliers 2012).

Mandatory universal mediation for those considering coming to court is increasingly discussed as a policy option, even where mediation can be court ordered and takes place after a hearing. In the Netherlands political pressure for universal mandatory mediation arose after a particularly distressing recent case (Zeist) where a couple had prepared a parenting plan, were not currently in litigation and there was no reason to expect any problems with their shared parenting. The father's arrangements were later changed by the judge and there was a delay in letting him know. He became very distressed, took the children and killed them. Experts in the Netherlands have resisted the mandatory mediation proposal following the failure of mandatory parenting agreements as part of the divorce process to reduce conflict, and also because of the belief that universal provision is rarely necessary or cost-effective. But there is also a development described earlier with lawyers with mediation training joining together in the organisation vFAS. Serious concerns have been expressed over the way evidence of domestic violence is dealt with in mandatory mediation in California (Johnson, Saccuzzo and Koen 2005) and regarding the cost-effectiveness of adding mandatory mediation to the court process (Salem et al 2007; Salem 2009).

In jurisdictions where court use is low, it is not necessarily as a result of the use of mediation but because parenting problems after divorce are seen as child welfare issues, not part of a legal dispute between adults. Child welfare services do the necessary work, and court involvement is minimal. In Scandinavia²⁶ courts are little used for family matters generally. For example, in Norway 'ordinary' separations do not go near a court, and the mandatory use of pre-court mediation is being reconsidered on the basis that it is not value for money. Arrangements for children can be discussed with the welfare authorities who provide a certificate which entitles parents to various forms of support, and the arrangements made can be enforced by a court.

²⁴ See www.courts.ca.gov/1189.htm#acc11728 (accessed 3 August 2015).

²⁵ Kennett (2016).

²⁶ Vaula Haavisto, 'The Fasper Project in Finland'; Professor Odd Arne Tjersland, 'Experiences with separating parents in Norway'; Thea Totland, 'The Norwegian legal system including mediation and enforcement', *High Conflict Divorces, Mediation and active interventions from an international perspective* (Ministry of Security and Justice, The Hague, May 2015).

But Tjersland's research found that 40 per cent of those using it did not need conflict resolution, 40 per cent needed advice and received it, and the last 20 per cent stalled and left without agreement. There are also concerns that mediation services concentrate on short-term issues and fail to deal with long-term family problems. In Sweden there are no specialist family courts, but where problems arise a form of mediation known as 'co-operation conversations' is held with a social worker to address parenting problems (Ryrstedt 2009). Here there are concerns about the pressure on parents to reach agreement, and a tendency to focus on parental issues rather than children's needs (Ryrstedt 2012). In Scandinavia divorce is less problematised, as financial matters are more open and equal, tax returns are in the public domain, and parents tend to share childcare while living together or apart. So parenting difficulties are the central concern and are seen as an indication that a family has problems, not just a dispute. A similar approach is taken in Finland where parents have autonomy over the arrangements regarding children but can go to the welfare authorities and prepare a written agreement which the courts can enforce. But the children's officers are so overburdened that parents are going straight to court to avoid long delays. If agreement is not reached the judge will co-mediate with a child welfare expert, but there are concerns about the cost of involving welfare authorities in addition to the legal framework.

In England and Wales the slow convergence which we observed and endorse between mediation and legal practice raises many new questions where this kind of international information may be helpful in considering where mediation (in whatever form, voluntary or mandatory, in or outside court, publicly funded or privately paid, with or without a close relationship to child welfare services) might be best placed on the ADR continuum. But mediation not only sits alongside negotiation by lawyers and facilitation by judges, but also alongside other forms of private ordering, including arbitration and 'neutral evaluation', as well as the therapeutic transformative models of mediation and counselling. How will potential users who currently have difficulty in understanding what mediation has to offer cope with these variants?

Lucinda Ferguson (2013) has suggested an alternative image to that of the continuum or 'sliding scale', namely, that of intersecting circles, 'most significant where distinctive, ie where not overlapping'. She points out that many of the methods contain variable mixes of similar elements, for example, state involvement and personal choice, and it could be misleading to suggest that a coherent method of grading can be adopted. In particular, she observes (Ibid: 120) that 'instead of starting with pre-determined categories of dispute resolution and then looking to their content and variation therein, it might be more profitable to start by observing disputing couples and their engagement with dispute resolution. We could then examine those activities to consider what categories of resolution process emerge.' Our observations

have indeed suggested that *a priori* categorisation can be disturbed by empirical evidence. Ferguson's model caters better than a continuum for the overlaps between the various processes, and we suggest the following sequence, which reflects *roughly* a diminishing degree of third-party input into (or increasing degree of party control over, and private ordering with respect to) the final outcome, simply for ease of presentation, but accepting that elements can overlap.²⁷ The Report of the Family Mediation Task Force (2014: 22) uses a diagram which sets out the value of the different services according to cost to individuals, opportunity to solve problems and highest allocation of funding, aiming at the provision of information and parenting plans for all, triage and allocation to dispute resolution services and SPIPs for half, supported dispute resolution and other support for 30 per cent and judicial decision making for 5 per cent.

Our full sliding scale of modes by which problems encountered by parties who are or have separated are dealt with comprises: 1. Adjudication²⁸ by a court with full representation; 2. Adjudication by court without representation as a LIP; 3. Facilitation by a court in an attempt to avoid adjudication; 4. Neutral evaluation at court but not as part of proceedings intended for adjudication (for example, FDR hearings); 5. Arbitration outside court; 6. Arbitration after mediation (Medarb);²⁹ 7. Early neutral evaluation or FDR arranged privately; 8. Legally assisted one stop family mediation (see note 29) under our proposal; 9. Lawyer-led negotiation (the 'full legal'); 10. Lawyer-led negotiation (unbundled); 11. 'Managed' divorce via the internet; 12. Mediation (see note 29) under the 'purist' non-legal model; 13. Private negotiation with internet-based legal information; 14. Private negotiation with other professional advice, such as financial advisers; 15. Private negotiation without professional advice ('kitchen table' agreements).

The first two (1) and (2) are the categories to which the rest are usually seen as 'alternatives'. The third (3), facilitation by a court, stands between adjudication and non-adjudication. It occurs in the context of court proceedings that could result in adjudication, but where the judge assists the parties

²⁷ Another characterisation is to see the 'scale' as showing a movement from strong focus on outcomes towards emphasis on the parties' behaviour, such as reaching agreement, improved communication and simply putting up with however things turned out: see Eekelaar and Maclean (2013: 15–23).

²⁸ Adjudication may be divided into processes that are inquisitorial and those that are adversarial, although many processes contain elements of each style, and that which occurs solely on the basis of evidence presented in court, or that which occurs after the court has received a report by a court-appointed (expert) official, who has conducted an independent investigation, for example (in England and Wales) by CAFCASS. In Sweden in the case of a financial dispute the (non-specialist) court may appoint a 'marital division officer' who is a local lawyer to provide a decision which would be enforceable but appealable: see Maclean, Wasoff, Hunter, Ferguson, Bastard and Ryrstedt (2011: 335).

²⁹ The 'mediation' categories could be further divided into cases where mediation is compulsory (whether through court order or otherwise) and where it is not and whether the mediation agreement becomes a court order or not, free or paid for.

to settle so that adjudication can be avoided. Hence the authority of the judge is a significant factor in achieving an agreed outcome. We described the process in detail in *Family Justice*, giving examples, and observing that ‘by facilitating agreement, the judge guides the parties towards the outcome envisaged by the law, exercising judgment as to how much latitude the parties should have in fashioning their own solutions’ (Eekelaar and Maclean 2013: 98). In (4), prior to the hearing of any financial dispute, the parties may be required to attend FDR proceedings before a judge with the express aim of reaching agreement. This outcome is frequently assisted by the judge giving an indication of how he or she would decide the issues in dispute. If agreement is not reached, directions will be needed for preparing for an adjudicated hearing before another judge.³⁰ The Belgian Amicable Settlements Scheme and the Nova Scotia Bindings Settlement Conferences referred to earlier are variants.

Arbitration (5) has long been widely used in commercial matters, and has developed into a major form of dispute resolution, especially at international level. It has considerable benefits for disputants, including the ability to choose the arbitrator, the location of the proceedings, to some extent the law to be applied, privacy and speed. It does not necessarily come cheap. Lawyers are usually present. It is governed by contractual principles according to which the parties enter into an arbitration agreement under which they select an individual before whom they will present their respective arguments regarding their dispute, define the issues to be addressed, and agree to be bound by the arbitrator’s decision, which, if necessary, a court will enforce. The use of this form of dispute resolution in family law was given a boost in England and Wales by the launch of a family law arbitration scheme by the Institute of Family Law Arbitrators (IFLA) in 2012 (see Ferguson 2013), confined to financial and property issues but the arbitrators are expecting to be able to gradually extend their work to children issues.³¹ The IFLA arbitrators must have practised for eight years, and have two days’ training, or be retired judges. International family arbitration could be attractive for English lawyers if their decisions are enforced abroad under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It seems to be assumed that domestic arbitral awards in the IFLA scheme are binding, and will therefore be enforced as a court order on application to the court under section 66 of the Arbitration Act 1996.³² However Ferguson (2013: 128–31) points out that in family law cases the judiciary retains a discretion whether or not to enforce an award in

³⁰ For a useful description, see Family Justice Council (2012).

³¹ Although there is no technical bar to doing this the arbitrators are currently working on ways of making the process clear and acceptable before going ahead.

³² The grounds for challenging the award are restricted to ‘serious irregularity affecting the tribunal, the proceedings or the award’: Arbitration Act 1996, s 68(1).

the light of its compliance with family law principles and that it is therefore misleading to suggest that arbitration awards in such cases are ‘binding’.³³ Surveying the use of arbitration in family matters in a wide range of jurisdictions, Kennett (2016) observes that the ‘commercial’ model is usually modified for the following reasons: an imbalance of power; the fact that the parties are not repeat players and so are less familiar with the system and dispute resolution methods than commercial parties the involvement of third parties—in particular children; the state’s interest in families and the existence of significant mandatory regulation; and the fact that marriage is a special type of contract—notably because of its length and the fact that it can be expected to pass through many vicissitudes.

While the IFLA has clear rules, it is perhaps not surprising in a setting so clearly concerned with private ordering that there should be much variation in practice. The IFLA rule 1.4 states that its rules should not be subject to alteration or amendment without the consent of the parties and the arbitrator, but the default position would then be that they can be changed with that agreement, except for any such change which would be contrary to current law. This opens the way to changing the definition of issues to be included, the processes to be followed and even the binding nature of the award. This follows from the contractual basis of the process, which is subject to little if any supervision or screening for power imbalances. Indeed, in one case described to us, the barristers for both parties negotiated all day as they would have done in court, and reached an agreement which the arbitrator who had taken no part in the negotiations proclaimed as the arbitral award. Perhaps it is considered sufficient protection that in these cases the parties are usually separately legally presented.

The use of arbitration by ‘religious’ tribunals has raised a separate set of concerns, for, while the jurisdiction of arbitrators rests on the agreement of parties who are separately represented, this could be problematic in a religious context, and the adjudication may involve the application of religious laws that are inconsistent with the principles of the civil law. Ontario has famously legislated that arbitrators must apply Canadian law, which is clearly a restriction on the scope of private agreement, and even without such a constraint it is questionable whether English courts would enforce arbitral awards that were seen to violate fundamental principles of justice.³⁴ A variant of arbitration, or of adjudication, occurs if parties are allowed, as in California,³⁵ to select (and pay) their own judge (usually a specially

³³ Ferguson (2013) also draws attention to the implications for understanding the norms that govern the outcomes of family breakdown if their resolution by arbitration, which is a private process, becomes normal.

³⁴ See the debate concerning the Arbitration and Mediation Services (Equality) Bill 2011, discussed in Eekelaar (2011); Eekelaar (2012); Bano (2015).

³⁵ See www.crinfor.org/coreknowledge/private-judging (accessed 1 May 2015). These options are fully discussed in Kennett (2016).

authorised retired member of the Bench) who is enabled to deliver a judgment enforceable as any other court judgment. Arbitration (6) with mediation envisages that the participants to a mediation agree that, should they fail to reach agreement, the mediator may make a determination, which they will implement, and which might be enforced by a court. The effect of the mediator transforming into an arbitrator (which is a form of adjudication) on the mediation process needs careful consideration. It is perhaps hard to see why someone would readily enter a form of negotiation process in which they agreed in advance to accept a decision with which they disagreed.

In some US jurisdictions which compel mediation in disputes over children, the mediation is carried out by a ‘Child custody recommending counselor’, not a lawyer but a professional who combines expertise in psychology and law, who will make a recommendation on matters not resolved by the mediation. Since this does not depend on the parties’ prior agreement (because the mediation is mandatory), and as recommendations are frequently adopted by the courts,³⁶ this almost amounts to an adjudication, thus illustrating the advantages of Ferguson’s image of these processes in terms of overlapping circles. Nancy Johnson et al (2005) have warned of the dangers of combining a power to make recommendations with mediation in cases with evidence of domestic violence. Their study showed that in many cases recommendations were made which paid insufficient attention to the evidence of violence.

Early neutral evaluation (ENE) (7) occurs when the disputants pay for a selected individual to hear their respective positions and give an opinion about the merits. The parties are not bound to follow it, and the opinion has no standing in any subsequent court proceedings. It can, however, form the basis for further negotiation between the parties.³⁷ The process is largely unregulated, but parties tend to approach a senior barrister, seeking his view of what various judges would be likely to decide in their case. Their up-to-date experience is their selling point.

The evidence and analysis of this book has led us to propose developing a stronger, stand-alone form of mediation combining law-based negotiating skills with mediation for dealing with separation disputes in a cost-effective way leading to fair and informed settlement: that is, method 8 on the continuum. But this must be seen together with methods 9–13. We have observed that they share many elements. These, and the other processes that constitute the ‘spectrum’, or ‘intersecting circles’, offer people who are experiencing difficulties in a separation a wide range of options from which to choose what is most suitable for their circumstances. However, as Diduck (2014: 619) observes, their freedom to choose is seriously undermined if government policy, whether described as neo-liberalism or marketisation, creates

³⁶ See Johnson, Saccuzzo and Koen (2005).

³⁷ See www.cedr.com/solve/ene/ (accessed 1 May 2015).

obstacles hindering access to some of them, for example, by permitting (limited) legal aid only for mediation (of a certain type) and not for other forms of assistance.

V. FINALLY—LEGAL AID

Traditionally the purpose of family justice was held to be protecting those made vulnerable by the process of family breakdown. This gradually developed into a policy of promoting ‘fair and informed settlement’. But fairness and being informed do not occur naturally: they depend on social conditions and actions. Since LASPO one route for achieving those objectives has been virtually closed for a large section of the population. This book has examined the alternatives that have been emerging. They are not without promise. But their growth has been haphazard, almost chaotic, and the quality often unknown. It is not even clear that some of the measures are cost-effective. As the National Audit Office intimated, the Ministry of Justice may have saved money under one heading, but has no idea of the costs building up elsewhere.³⁸ We think it is likely that the convoluted method of the public funding of mediation, with its intricate relationship with the provision of legal advice, might well generate more costs than are necessary in order to achieve the same level of service provision, and at the same time fail adequately either to protect the vulnerable or support fair and informed settlement.

This book has focused primarily on the nature and mechanisms of the services for separating families. It has not examined the legal aid system as a whole, although legal aid policy has had a profound effect on those services. Our proposal for legally assisted family mediation, too, has implications for the provision of legal aid in this context. By calling the process ‘mediation’ it might seem to qualify for legal aid since ‘mediation provided in relation to family disputes’ and ‘civil legal services provided in connection with the mediation of family disputes’ are within scope of the scheme.³⁹ Yet this is possible only if the subject matter is a ‘legal dispute’⁴⁰ and (as is commonly understood) no legal advice is offered in respect of that dispute. Our proposal challenges this bizarre situation by suggesting that the mediator, if properly qualified, could offer legal advice, and also that a ‘dispute’ in the strict sense need not necessarily be present. Yet we think legal aid should be available for legally assisted family mediation. Indeed, costs could be saved by concentrating the service in a single provider rather than, as at present, potentially using three (two lawyers and a mediator).

³⁸ See above p 19.

³⁹ LASPO, Schedule 1, para 14(1).

⁴⁰ The LAA’s *Family Mediation Guidance Manual* version 4.0, March 2015: para 2.2.

One could imagine that government might be willing to make legal aid available for this process as a means of encouraging this mode of reaching settlement. But if it did so, it would become hard to justify withholding it from an individual who sought legal advice on a family issue as a single client, especially if the other party refuses to attempt to reach a settlement. It is not for us to try to settle the parameters of the legal aid scheme, though it will be clear from our remarks in chapter 1 regarding the justifications given for limiting the scope of the scheme in family cases⁴¹ that we do not think that these represent satisfactory policy, and we have sympathy with the observations we cite by Collins J in *S v the Director of Legal Aid Casework and the Lord Chancellor*.⁴² But we conclude that, whatever positions are taken on those wider issues, surely it is time to consider how to make it possible for the anomalies created by professional boundaries to be removed so that a service to both parties, such as that offered by Divorce Negotiator (see above), can be provided without the providers having to leave the accredited and regulated profession of solicitor but by adding the benefit of mediation skills to the process. Instead of lawyer mediators being forbidden to give the legal advice which parties need to frame their settlement-seeking activity, and non-lawyer mediators being ill-equipped to do so, could we either train lawyers to add mediation to their skill set while continuing to act as lawyers, or enable mediators to add legal knowledge to their resources, or preferably both, so that separating parties can benefit from both information about the legal framework and advice and support in making the best possible use of it?

⁴¹ See p 8.

⁴² (2015) EWHC 1965; see p 10.