Mediation, violence and the family

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Inequalities in family relationships raise questions about the usefulness of mediation in family law disputes.

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Mediation schemes are mushrooming all over the country as an alternative to formal dispute resolution through the traditional legal system. I have serious concerns about the appropriateness of mediation in any family law disputes. I am vehemently (dare I say violently) opposed to mediation where there is a history of family violence — in all the forms that such violence may take. My opposition, however, has become all-encompassing and I do not support mediation in any family law matters.

Let us first look at some issues and facts before I explain my position.

First, we all know that the family is not necessarily a warm, comfortable, supportive and benign environment. It is often scarred by the incidence of violence, harassment, possessiveness, intimidation, sexual abuse, inequality of power relationships and socialised traditional sex roles. When speaking of family violence, this includes spouse bashing, child abuse, incest, marital rape as well as abuse of parents, the elderly, siblings and other relatives. Wife abuse, specifically defined, is the deliberate infliction of any emotional, sexual, physical, financial, verbal or social harm by a husband, a *de facto* husband, lover, boyfriend or cohabitee on his present or former female spouse or partner. A single deliberate act of abuse would be included in this definition. Seriousness and frequency of abuse are not determinants. This definition is very broad.

Family violence and particularly wife-battering is one of the most widespread and under-reported crimes in Australia. It is difficult to assess accurately its incidence as it is privatised and normalised by some victims while others are unaware of available resources or reporting mechanisms or else fear taking any action. Many victims simply do not deem it to be unacceptable behaviour warranting intervention. Many wait *years* before telling anyone or seeking assistance; others turn to professionals who ignore it or lack confidence in dealing with family violence situations.

Mediation — the theory

Mediation is a formal procedure whereby male and female partners (generally heterosexual) meet with one or two mediators, identify problems and attempt to resolve them by reaching some sort of agreement. It is also sought to reduce or eliminate conflicts in the parties' relationship.

Effective or successful mediation relies on a number of factors:

- equal bargaining power and skills between the parties;
- voluntariness of the parties to participate;
- confidentiality of the negotiations;
- neutrality of the mediator.[1]

Given my rather bleak view of the family and well-founded educated suspicion that virtually all relationships involve some sort of inequality of power and/or harm inflicted by one party on the other (most commonly by the male partner on the female partner), mediation is not only inappropriate but serves to perpetuate the conflict and harm it purports to reduce. On such an analysis, mediation should never be pursued in family law matters.

In a relationship where there has been a history of abuse, the woman simply does not have equal bargaining power. She has typically fewer economic means and resources than her male partner and often 'ignorance' as to the full extent of the family's finances. She has been emotionally and physically beaten and as such has low self-esteem, is lacking in confidence, has poor powers of persuasion and is often lacking in expression and advocacy skills to articulate what she wants and what she fears.

This can be interpreted as a put-down of women's abilities. Sadly, however, it is simply a realistic recognition that abuse at home wears a woman down; erodes her ability to respond and promote her best interests; makes her desperate to keep the children at any cost; realises her need for time to heal, regain her emotional and physical strength, express her needs and wants and allay her fears. It acknowledges the subjective impact on each individual victim and not objectively how serious or frequent the abuse was. This healing and resurrection — if you like — cannot and should not be done in a mediation setting, face to face with the perpetrator in

one, maybe two or even three sessions of an average of one hour's duration each.

Equality is unrealistic for more general reasons. The particular relationship and particular family cannot be viewed out of context for, historically, the family is a product of sex-role stereotyping, social, economic and political inequality, male domination and misogyny. Mediation replicates this power imbalance. It does not confront it.

Mediation — the practice

Mediators assert that they are sensitive to the issue of family violence. First, parties are carefully screened at intake stage so that if any violence is disclosed, mediation will not take place. Second, if violence is disclosed during the mediation process, the mediation will be terminated.

I see a number of risks and problems nonetheless.

1. I do not believe that either of these safeguards is adequate or reliable. Mediators are counsellors, lawyers or other professionals who have received mediation training. They have their own personal and professional biases and experiences from which they cannot escape.

According to national statistics 40% of mediators who have been married or in *de facto* relationships have separated. They have either been 'left' or have done the 'leaving'. They bear scars of that emotional upheaval. They may or may not have an amicable relationship with their own former partners. Also, on national statistics as to public attitudes, one in five mediators will believe that it is acceptable for a man to beat his wife in certain circumstances.[2]

Maybe national statistics cannot be applied to a small, specific group of professionals. However, if applicable, we can say that among mediators, six out of ten will believe that it is justified for a man to yell abuse at his wife. One in five will think that threatening to hit can be justified; one in ten that slapping or smacking can be justified. One in sixteen will even think that extreme forms of violence are justified such as threatening or using a weapon on one's wife.[3] Others will believe that women have provoked or deserved the abuse. Others will simply ignore it or dismiss it as being too trivial, infrequent, non-physical or just part of normal male-female interaction.

Some will side with the male; some will side with the female; others will pretend to be neutral.

Neutrality is advocated but I doubt that it can exist. And indeed from a feminist perspective, neutrality is not desirable. If a woman has been subordinated, oppressed and beaten throughout a relationship, she needs to be encouraged and empowered to redress the imbalance of her past experiences. Effective mediation is supposed to be based on neutrality and impartiality but if the mediator remains neutral, the male, with greater power, resources and 'persuasive strength', is more likely to get whatever he wants. He may intimidate the mediator as well as continuing to intimidate his former partner.

2. I do not believe that mediators, however experienced, have the skills to discover whether violence has taken place. One can ask very precise questions such as 'has he ever hit you, slapped you, pulled your hair, forced you to have sex, locked you inside the house?', but the answers may not be accurate. The woman may fear disclosure in some instances; the woman may not consider any of these actions to be unacceptable behaviour and as such would state that she has not suffered abuse. It would be impossible for the mediator to assess whether there has been violence and the impact that any violence has had on the victim. Therefore, we are locked in to the mediator's subjective assessment as to the occurrence and extent of any suffered abuse and indeed she may not label her experiences as abusive.

Violence or abuse in a relationship cannot be compartmentalised. We cannot put it to one side saying 'OK, we don't mediate violence but let us discuss the children, the property and money'. Abuse permeates the entire relationship and cannot be conveniently packed away.

3. There is a further risk. Women who have been abused may be urged by their solicitors, counsellors or the courts to attend mediation, even if the violence is acknowledged. Mediation is a private process. It sanitises the violence; it gives the message that violence can be negotiated. It does not give any message to the perpetrator to take responsibility for his behaviour nor even that his behaviour is unacceptable.

4. By definition, mediation tries to reduce or resolve conflict and thereby acknowledges blame or fault on both sides and where there has been violence, it merely tells the victim that she was at fault too;[4] she has done something wrong to provoke the hostility or anger or violence and she too must compromise. This totally ignores the underlying causes of wife abuse and the societal conditions that institutionalise abuse in a political, social and economic context. It merely reinforces the husband's and society's view that the family is sacrosanct and it is acceptable to beat one's wife. It does not recognise the many forms which abuse may take and the pervasive and weakening effect of such abuse.

5. Mediation does not afford the victim any protection. It cannot provide enforceable sanctions to ensure her future safety. Indeed, it sanitises and decriminalises the behaviour, conveying to the perpetrator *no* message of disapproval or criminality, and reinforcing in the victim feelings of despair, isolation and blameworthiness. It keeps the abuse inside the private arena without attracting public disapproval and sanctions.

6. Intervention by the legal system can be a deterrent to violence continuing. One Canadian study found that with women who had been abused during marriage, those who engaged lawyers were less likely to report post-separation abuse by former partners than those involved in mediation. That is, post-separation abuse decreased more with lawyer and court intervention than with intervention by mediation.[5] This is directly related to the point just made that mediation decriminalises, prioritises and normalises spouse abuse.

7. There are also economic pressures and factors of expediency at play. Lawyers and judges are relieved to have somewhere to send these matters. Mediation assists long waiting lists in the courts and is 'flavour of the year' in terms of family law disputes. It is a burgeoning industry and safeguards may be relaxed or dispensed with in exchange for political and economic expediency.

Mediation as it operates in Melbourne relies on public, government funding so it must demonstrate success and cost effectiveness. It must be speedy, cheap, efficient and produce numbers of 'successful resolutions and agreements'. Parties are pressured to reach agreement; court and organisation-based mediators are pressured to reach agreement quickly. Private mediators, too, promote agreement and relax the rules. Agreement, restraint and compromise all reign supreme.

Conclusion

My thesis is simple: because mediation is not appropriate at all in situations of family violence and on my analysis, *all* relationships experience inequality,

power imbalance, disengagement and harm of some sort, mediation is not appropriate in *any* family law matters.

Mediation is suitable for one-off problems which can be operationalised, segmented and resolved according to the compromises and needs of the parties involved. The disputes where mediation is appropriate and desirable as a viable form of alternative dispute resolution are disputes such as problems with neighbours ('you play loud music late at night!'); 'you flush the toilet always during my meal times and my dining room adjoins your toilet'; 'your dog always poos on my front lawn!'); commercial disputes and business transactions, motor vehicle accidents and small claims type agreements.

By way of conclusion, let me anticipate and respond to some possible criticisms of my comments.

1. I do adopt a very broad all-inclusive view of violence in the literal sense of violation by one party of another party's rights, power, self-esteem, confidence and development. It covers the full gamut of physical, emotional, verbal and sexual harm.

2. Adopting such a definition, I view all relationships as being violent, the degree, extent, meaning, intention and impact of such violence obviously differing.

3. Most agree that mediation is inappropriate in cases of family violence. Given my broad definition of violence, mediation is therefore inappropriate in all family law disputes.

4. My absolute prohibition on mediation denies parties — particularly women — the choice and the option of participating in the mediation process. Some women may feel strong, articulate and emotionally powerful enough to participate in mediation and not be threatened by the other side. I acknowledge these as a small minority of women, but I do not trust the processes by which these women are identified by others nor identified by themselves. Self-assessment is as fraught with danger as assessment by service providers.

5. I discount mediation as an alternative form of dispute resolution in family law disputes but in doing so I do not adopt litigation as the only acceptable process. Mediation does not change the legal system. It works because of the legal system. It is really legal 'medication' where the letter 'c' representing courts and the adversarial system has been removed. It changes nothing. I have reservations about the adversarial process and our legal system and I suggest that we have to be creative and explore other options.

References

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2. Public Policy Research Centre, *Domestic Violence Attitude Survey* (1988) Office of the Status of Women, Canberra.
3. Public Policy Research Centre, above.
4. This is a disturbing trend of many schemes in the U.S.A. See Astor, H., 'Domestic Violence and Mediation', (1990) 1 *Australian Dispute Resolution Journal* 143 at 144-145.
5. Ellis, D., 'Marital Conflict Mediation and Post Separation Wife Abuse' (1990) 8 *Law and Inequality* 317 at 328.

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17. Hanks, P., School Leavers, Government Policy, and the High Court, (1977) 2(7) *Legal Service Bulletin* 251-254.
18. Note *Social Security (Amendment) Act* 1992 (which came in to effect on 2 November, 1992) prevents such school leavers from receiving benefits until the resumption of the following school year.
19. Phone interview with Graham Hemsley, 8 October 1992.
20. See for example, *AMP Society v Goulden* (1986) EOC 92-164, and *Dao v Australian Postal Commission* (1987) EOC 92-193.
21. See Hunter, R., 'Women v AIS', (1990) 15(1) *Legal Service Bulletin* 40.
22 See 'Inquests: Flemington and Kensington Community Voice', Nos 1 to 10.
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24. See Fitzroy Legal Service, 'They said we'd get lawyers, not you guys', May, 1986.
25. See Faine, J., 'Land Speed Record for Law Reform', (1985) 10(6) *Legal Service Bulletin* 295.
26. Bailey, S. and others, *Urgent Repairs Needed*, Federation of Community Legal Centres (Victoria), October, 1988.
27. See ref. 17, p.251, footnote 1.
28. See ref. 3, p.255.
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30. *Halliday v Neville*, unreported High Court decision.
31. See ref 20.
32. Gardner, J., 'Consumer Credit, Waltons Credit Policies Under Attack', (1976) 2(3) *Legal Service Bulletin* 89.
33. Mental Health Legal Centre, 1992 Annual Report, pp.10-12.
34. See National Legal Aid Advisory Committee, Legal Aid For The Australian Community, Appendix A.
35. Kids in Justice, Youth Justice Coalition, NSW, 1990.
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17. By 'legal culture' I mean a narrow world view that is confirmed, if not inculcated from the very first law lecture, or in the case of paralegals, from the first official contact with the business end of a legal enterprise. This culture enshrines dominant and cherished western values, in particular an adversarial model of truth, a reverential attitude to facts, a faith in legal solutions to social problems, a sociological blindness to power imbalances in human relationships outside the legalised definition of natural justice, individuation of solutions to disputes, and a too ready if not irresponsible embracement of some traditional sources of forensic knowledge, specifically psychiatry. For further discussion see Lowry, M., 'Law School Socialisation in the United States', (1983) 3 *Windsor Yearbook of Access to Justice*, 245-55.
18. Johnstone, Q., and Weglinisky, M., *Paralegals, Progress and Prospects of a Satellite Occupation*, Greenwood Press, Westport, 1985.
19. For a critical analysis of community legal centres in Brisbane see Parker, C., above.
20. Moore, 'People as Lawyers', above, p.131.
21. Parker, above, pp.92-93.