THE COUNSELLOR'S ROLE IN FAMILY LAW DISPUTES

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To litigate, conciliate or mediate? The perspective of a mental health professional.

We all know that litigation is alive and well. For many of us this fact is brought home regularly by a hurried trip up George Street into Tank Street and up to Level One or Two of the Federal Courts building to be subjected to variable levels of mental jousting or even attempted bullying, not to mention the pleas of harried judicial officers to, "Tell us what you think should happen, witness". For you lawyers, the court is an extension of the office and for some court experts it has at least become familiar territory and even at times a good place to catch up with friends. This is not the case for most of the unfortunate individuals who, for one reason or another find themselves baring their souls and discussing in open court the most intimate details of their lives and their relationships.

Those of us who have been involved for some time in helping separating couples sort out their differences have observed first hand the growing push in recent years by the Federal Government to encourage counselling, mediation, conciliation and conferencing, rather than the adversarial alternative of litigation. This is not without good reason and back up from research into the relative benefits of the various methods of conflict resolution.

The research into "better ways" of handling post separation family issues started a long time ago. One of the early studies was by Amren and MacLeod (1979) in Canada who researched the success of the Unified Family Court Project, whereby 17 family counsellors were appointed to negotiate out of court settlements with divorcing couples. Amren and McLeod compared the durability of settlements reached through these "no fault" facilitated

agreements, consent orders negotiated between the lawyers, and orders following trials. It was found that within 10-24 months of the making of the orders, those most likely to fail were the consent orders and that the conciliated agreements and those based on orders made after trial were equally durable. It was opined that the critical factor for success could have been the parties' direct involvement in the process. In other words – that there was actually some therapeutic benefit to "having their day in court", but that the less destructive and less expensive alternative of resolving the issues with the assistance of a family counsellor was equally effective in the short to medium term.

The stakeholders:

Who are the most important stakeholders in Family Law matters involving children? The people who prop up the system – the legal representatives, counsellors, judicial officers and their support staff? The disputing parents and significant others? Or the children caught in the middle? If you have to think about that question for even a second, then you are in the wrong game. I shall assume you knew the answer instantly.

As important change agents in a field of professional endeavour which has the potential to impact significantly on the type of society we bequeath to the generations which will follow us, there are certain things we need to know about children in separated families.

- They generally want to be with both parents.
- They almost always will not be able to live with both parents – at the same time.
- Healthy development is generally facilitated by strong relationships with both parents.
- Long term adjustment and achievements are often detrimentally affected by the absence of one or both parents from children's lives.
- Children do not cope well with being exposed – in one way or another – to ongoing conflict between their separated parents and are more inclined to leave home prematurely if such conflict is not resolved.
- Ongoing contact with a parent will not necessarily be in the child's best interests – such as when there has been child abuse or severe domestic violence.
- Many parents who do not maintain residence of their children after separation, have progressively less and less contact with them over time and are less likely to provide for them financially.

- There is a strong correlation between unsupported single parenting and poverty, with obvious negative consequences for the children who live in those homes.

Why change the way we do things? Won't the intractable disputes remain intractable no matter what we do?

So what can we do to make Australia a better place to live? To reduce the simmering well of anger that is spilling over in so many ways – on our roads, our beaches, in our courts and in our schools? To help our children grow up feeling positive about themselves and their world and not looking for someone else to blame?

I see the legacy of poorly handled post separation parenting issues every day in my therapeutic contact with adults who still bear the scars of being alienated from a parent, witnessing conflict and violence between their parents or simply feeling hard done by as a result of emotional deprivation, their parents having been so consumed by despising each other that they lost sight of their children. Depression, anxiety and anger resulting from these unresolved childhood issues can be debilitating and impact on our society in most costly ways.

The cynics say that the government's push towards less destructive methods of dispute resolution will not work. It is obvious that there will be teething problems and that the system will continue to evolve. Family lawyers need never fear that they will be out of a job. However, the challenge to us all is to do our bit towards breaking the cycle of anger and dysfunction which not only threatens families but also the fabric of our society. *Couples should be encouraged to decide the issues incident to their divorce based upon the same commonsense considerations that they used in their marriage, not on the fear and anger that are the byproduct of their divorce; and they should be encouraged not to make the most of it, but rather to make the best of it. (Marlow, 1985)*

We need to be honest about what happens to most families who follow the litigation route to its ultimate conclusion (or conclusions in the case of children's matters which of course can continue until the child is well into adolescence). Well may we argue that these people are going to be in conflict indefinitely no matter what we do, and although some preliminary

research (eg that of Rhoades et al., 2000) suggested that the success of alternatives to litigation is largely a corollary of the nature of the couples seeking such methods rather than a function of the process itself, subsequent research has not supported this view.

The Family Law Council (1992) found that blunt edged solutions of the adversarial system militated against parents' capacity to take responsibility for their children's welfare. Fehlberg et al (2000) further found that separated parents generally saw the seeking of legal advice or the intervention of the courts as increasing levels of contact, whereas alternative and less combative forms of dispute resolution were viewed as reducing conflict. A literature review by Webb and Maloney (2003) provides evidence that skilful interventions which occur early in the dispute will often defuse disputes to the extent that they do not become entrenched, enabling parents to make parenting arrangements which are child focused and child friendly.

Who does what these days in family law?

Many lawyers and mental health professionals / social scientists / counsellors (the names seem to be used interchangeably in this field) have taken up the challenge to promote the use of more conciliatory and less destructive alternatives to litigation.

Because of a lack of role clarity it can be difficult to remember which role we are playing at any particular time. Sometimes mediators are lawyers in real life. Sometimes they are counsellors. Sometimes they are both and sometimes there is one of each - mediating in a co-mediation model. Sometimes the social scientist is treated like a lawyer –especially when they write a report that is not received well by one or both of the parties. The best family lawyers also have the "people skills" which used to be the stock in trade of the psychologists and social workers. There are some counsellors who see themselves as advocates for one of the parties. These people tend to be from the same group as those who believe that assessment and counselling are one and the same. Then we have the many social scientists who have become lawyers or at least studied some law and a significant number of lawyers who have joined the ranks of the social scientists.

What has this got to do with acting for parties in the family court arena?

How does the conscientious and socially responsible family lawyer make sense of all this and most importantly, how do you fulfil your duty to the court and to the fundamental principles of the Family Law Reform Act – that is to serve the court first and foremost, with the best interests of the child remaining paramount in children's matters, whilst also faithfully representing your client? These questions raise very difficult philosophical and ethical dilemmas for most family lawyers whereas sadly, for others there is no dilemma at all, this small and diminishing minority still seeking enthusiastically to apply to family law the black letter law practised by their commercial brothers and sisters.

The Law Council of Australia spelt out in 1998 that the lawyer's duty to the court was *paramount* and *must be performed, even if the client gives instructions to the contrary.* Webb and Moloney (2003) point out that in the light of the importance of the child to the court in family law, the legal representatives for parties in children's matters also need to be mindful of an implicit duty to the child. Appropriate referrals to mental health professionals, including counsellors, is something you can do which allows you to practise in a manner which takes into account the conflicting aspects of your very difficult role.

What is a counsellor?

In Queensland and in fact in most if not all states of Australia, anybody is able to hang a shingle with the word "COUNSELLOR" on it and establish a business as a purveyor of psychological and interpersonal wisdom – sometimes of dubious value, but sometimes no doubt of great benefit - depending on the life experience and natural interpersonal gifts of the "counsellor". Some of these counsellors will be four year university trained Social Workers. Some will call themselves Social Workers and not be trained at all. Some will have other Social Science degrees or diplomas. Some will not. Some will be general medical practitioners with a leaning towards counselling. Others will be Psychologists who cannot legally practise as same without being suitably qualified and registered with the Psychologists Board of the state in which they practise. This guarantees the user of their services at least six years of training – at university or combining university and practical experience. There is also a guarantee of a period of supervised practice.

It pays to go for qualifications if you are looking to refer to an effective counsellor. Membership of the Australian Association of Social Workers or registration as a psychologist are two of the criteria which can be relied upon to guarantee that the professional in question has at least the basic training necessary to be a competent counsellor. Of course professional experience will differ markedly but should be clearly outlined in the counsellor's CV.

Counsellors can operate within a variety of theoretical frameworks. Their orientation might be psychodynamic (as in Freudian, neo-Freudian and Jungian types) with a focus on clients' past experiences before helping them to cope with the present and move on to the future. They might be proponents of Cognitive Behaviour Therapy, which largely takes people as they are and looks to very practical and teachable strategies for becoming masterful over their environment, as well as measurable outcomes. There is Rational Emotive Therapy, Gestalt Therapy, Rogerian and Client Centred Therapy, Brief Solution-Focused Therapy, Transactional Analysis, Neuro Linguistic Programming, Rapid Eye Movement Desensitization and Reprocessing, Couples Therapy, Family Therapy, and the list could go on endlessly. Most of us in private practice have "done the course" for more therapeutic techniques than we care to remember. Then there are those of us who are classed as "eclectic" in our choice of therapeutic methods. Eclecticism is sometimes frowned upon as indicating one is a theoretical slouch, but most of the psychologists I know with busy practices are in fact eclectic in their therapeutic style and have a "tool bag" of techniques which experience teaches them how and when to use – much like any experienced artisan.

What to look for in a counsellor for family law clients and their children:

"Counsellors" or metal health professionals in the family law arena should:

- Have specialised skills and experience in working with couples and families – both intact and separated
- Know how to talk to and (more importantly listen to) children.
- Possess a broad based knowledge of human behaviour, mental illness, social interaction, social trends and change agents, cultural differences, domestic violence, and substance abuse and other dangerous and addictive behaviours.
- Understand personality disorders and how individuals' unique personalities impact on all aspects of their lives, including their capacity to negotiate.

- Know about the potential impact of power imbalances on dispute resolution,
- Have superior linguistic skills which allow for a high level of communication and the facilitation of change in others – especially that which promotes cooperation between warring parents, in the best interests of their children.
- Have training and experience in dispute resolution and an understanding of how all of the above factors can serve to exacerbate or even entrench disputes over children, with dire consequences for the children.
- Be capable of integrating the children's experiences of the dispute into the dispute resolution process.
- Be able to collaborate with lawyers, fellow mental health professionals and other helping agents.
- Recognize the matters which are unlikely to respond well to mediation or other forms of primary dispute resolution and which need the intervention of a decision maker.

My advice then is to start by looking at the prospective counsellor's qualifications but to treat those as the basic criteria. Then do what lawyers do best. Do your research and benefit from the experience and recommendations of your trusted colleagues.

Assessment Vs Counselling:

You can be forgiven for being a tad confused about what mental health professionals really do and how they can help you do your job better. Many of us do not know what we do either and what is worse, we don't know how to maintain boundaries between the various legitimate activities that our qualifications and experience allow us to engage in.

Problems can arise when there is a blurring of boundaries – for instance, between therapy and assessment. There are strict guidelines which govern forensic practice for psychologists. There are also strict rules governing the giving of expert evidence in the Family Court. Be wary of any expert who commences as a provider of counselling or therapeutic services and moves to writing a report which purports to be independent, but does not qualify the conclusions and recommendations in the light of the obvious fact that the report writer may, as a treating professional, have identified with the client and have a biased view - especially in cases where only one of the parties has been seen. The need to use the "therapeutic

relationship" as a tool in counselling and psychotherapy of all kinds creates a kind of intimacy which is generally avoided in cases of pure assessment, where a certain level of detachment and objectivity is deliberately maintained by the best evaluators. Remember that one sided reports which do not carry clarification of their limitations, are frowned upon by the courts and in the end will most likely not be to the benefit of your clients.

Counselling Vs Mediation:

There is a great deal of controversy about the desirability of using therapeutic techniques in mediation. The debate over the appropriateness of this blurring of boundaries for the "counsellor mediator" is similar to that over the "lawyer mediator" using legal knowledge to direct the course of the mediation, even though not giving "legal advice" as such.

On the one hand, there is a strong view in the mediation community that the mediator's role is to facilitate resolution of disputes and not to advise or offer any form of healing. It is to take a forward looking perspective rather than (as required by most forms of therapy) to take an historical perspective – at least in the first instance. (Dingwall and Miller, 2001-2002).

On the other hand, one of the accepted models of mediation is the "therapeutic model" which aims to improve relationships between parties by dealing with underlying causes of conflict. (Martin, 2000). This model is particularly effective in disputes between family members who wish to continue to have a relationship. Also, there is general acceptance within the ranks of the "counsellor mediators" that we were "doing mediation" long before lawyers ever thought of becoming involved. We were taught many of the skills used in mediation when we were trained in our professions, only to be re-taught years later by lawyers. (I say that we have no one to blame but ourselves, good luck to them for thinking of it first, but although we might be slow starters we are stayers.)

The skills common to both counselling and mediation include active listening, non-verbal communication, reframing, empathy, questioning, probing, paraphrasing, normalising, education, challenging, unblocking, uncovering "hidden agendas", clarification and negotiation – of course with a twist which gives them a special flavour peculiar to mediation

and which focuses on conflict resolution and future management of relationships, counselling focusing more on personal and relationship development and enrichment.

Solution-focused brief therapy is a form of therapy which developed in the 1980s as a means of providing affordable psychological therapy to the masses rather than (as was the case with techniques such as psychoanalysis which seem to go on indefinitely) only to a relatively affluent and elite few. It is a technique which is currently in common use, having taken from crisis intervention counselling and family therapy. Those of us who counsel employees through their employee assistance schemes do so according to a brief therapy solution-focused model.

Brief therapy's features in common with mediation include that it has a future orientation, focuses on the positive rather than the negative, and is practical rather than theoretical in its approach. Just as it is not the solution-focused therapist's role to solve the client's problems, but rather to *ask the questions that help the client find his or her own solutions.* (Dingwall and Miller, 2001-2002) it is not the mediator's role to resolve the dispute. The fledgling profession of mediation has much to take from the practice of solution focussed brief therapy – especially the linguistic devices which are effective in helping clients identify within themselves the means by which to resolve their dispute. For instance, even where clients appear to be caught up in extreme conflict, asking each of them to articulate the process by which they came to agree on attending mediation, can facilitate the resolution of other issues.

Favaloro (1998-1999) refers to the overlapping and merging of mediation and therapy which can occur when an experienced family therapist is also the mediator. He suggests that the mediation process alone may be inadequate when there is *a complex of interrelated and underlying emotional factors needing exploration and resolution.* He also opines that in cases of power imbalance it might be necessary at times to abandon notions of neutrality in order to, in effect, provide a *neutral or level playing field overall.* In fact, it is his view that neutrality is in all cases *a myth,* but that impartiality is nonetheless an important goal. What is suggested is that there might need to be a break in the mediation process at times for counselling to deal with blocks to mediation, with a later resumption of mediation possible. Although Favaloro also suggests that the mediator can become the counsellor, but such a "dual role" has the potential for serious problems and in such instances I believe there should

be referral out to a counsellor, so that the same mediator is able to resume mediation later if required.

When to refer to a counsellor / mental health professional:

My own referrals from family lawyers are very diverse.

Family report assessments still represent the bulk of my work in this arena – commissioned by child representatives, the courts (especially directly by the Federal Magistrate's Court) and privately by disputing parents – sometimes ordered by the court, but often initiated by their lawyers. In some cases, I believe that the motivation of the lawyers is to use the family report as a resolution tool which will protect their clients from the financial and emotional destruction of ongoing litigation. At other times it is clearly hoped that the family report will provide the missing link in the evidence, so that success in court is more likely. From my perspective – and I tell the disputing parents this at the outset – my hope is always that the family report will be a catalyst for some real discussion about settlement and that in some way it will be used for a healing purpose rather than to further dismantle the self respect of the parents and the emotional security of the children.

Individual counselling of one party is something which is often requested by intuitive and responsible lawyers who recognise a client who is not coping at all well with their separation and might be presenting with any of a number of problems which militate against good legal representation. The client may, for example, be a woman who is so incensed at having been left by her long term partner that she sees him as having no place in their children's lives from that moment on. The sensitive lawyer (except in the most extreme cases of domestic violence and / or child abuse) will not see this as a sustainable argument before the court and will refer their client for some grief counselling to assist with detaching emotionally from their former partner and "moving on".

Individual counselling of children who are not coping with parental separation is something which can be of enormous benefit to their adjustment if parents can accept that this is purely a therapeutic process and should not be reported on and used in court. Where there has been a child representative appointed and I am aware of this, I would always request approval before

undertaking such counselling. Otherwise, I would require the presenting parent to sign a consent form which states that no report will be provided as a result of the sessions. Of course, this does not protect the child from having my records subpoenaed and I believe that family lawyers need to look carefully at what they subpoena and why. None of us would like to think that when we go to a doctor or professional counsellor our innermost thoughts and secrets could in effect be "out there" for the world to see. This is, I believe, even more the case for a vulnerable child whose world has fallen apart and who is at risk of being placed in the middle of a tug o' war between the parents. They deserve a safe haven where they can share their thoughts and feelings with someone who is outside their parent's dispute.

Individual assessment of parents is something that I am called upon to undertake from time to time. Since I am a psychologist, these assessments will usually include both a clinical and a psychometric element. I have been asked to assess the cognitive or emotional capacity of a parent where it is thought that they might not possess the necessary skills to parent and to assess women who claim to be the victims of domestic violence and to be suffering residual problems which prevent them from supporting themselves. At times there is a need for a full vocational assessment or for an alleged perpetrator of domestic violence or child abuse to be assessed in relation to potential risk to the children.

Psychological assessment of children is occasionally required and can be for any of a number of different reasons. Sometimes there is a dispute between the parents over whether or not the child has special needs and a report is requested to assist in determining those needs and how best to meet them.

Shadow advice regarding children's issues - such as the appropriate residence and contact regimens for children of various ages - is another way that family lawyers and their mental health professional colleagues can work together for positive outcomes for all concerned. Whether your client genuinely wants to do the best for the children or is totally unrealistic and driven by personal or unresolved spousal issues, he or she can benefit in the long run if you seek the timely advice of an expert as to what would be a reasonable proposal to present to the other side and, if necessary, the court, considering the specific needs of the children and the circumstances of the parents. Shadow experts can also advise as to the problems (or

advantages) of the other side's proposal, although we are ethically bound to do so in a professional and impartial manner.

Separation counselling and therapeutic mediation have been somewhat interchangeable terms within my professional group. Definition and refinement of the process is currently occurring alongside the parallel evolution of mediation in the legal world. Psychologists and social workers have counselled couples who are trying to avoid separation and those who have decided to separate for as long as I have been doing this work – and that is a long time. However, it is a relatively new thing (mainly within the last ten years) for us to instead be asked to conduct a mediation – to assist, for instance, with preparing a parenting plan. The latter process is somewhat more formal than the former, but in most respects, in my practice at least, the two are very similar.

The classic way the therapist or counsellor has engaged couples in counselling / mediation has been over a course of sessions, spending time with them both individually and jointly to work through issues one by one and ticking them off the list as done. At times it might have been necessary for the couple to arrange for external input – for example, from lawyers or accountants. Financial matters have not been taboo in my practice, but some social scientists do prefer to focus only on children's issues.

Once an agreement has been reached, this would typically be sent to the parties' respective referring lawyers who would skilfully convert it into consent orders, the couples in question then being able to resume their lives, having suffered a minimum of collateral damage. However, these agreements do have the potential to break down at the point of conversion into a legally enforceable document – particularly if the lawyers are not both attuned to the delicacy of the agreement and the emotional vulnerability of their clients. There is a risk that their grief over the loss of the relationship will again be converted to anger and they will again find themselves back at square one.

Co-mediation with a lawyer and a mental health professional is what has grown out of the former and this is a model which I am particularly inclined towards as a tool which can be both therapeutic and also able to produce an enforceable agreement. With the right co-mediating pair, this process works exceedingly well and utilises the training, skills and

interpersonal sensitivity of the mental health professional or counsellor as well as the legal knowledge and negotiating and drafting skills of the family lawyer. This is a process which has a role for the parties' lawyers – either present at the mediation or available by phone to advise their client on "sticky" issues or where the mediators are concerned that one or the other party risks jeopardising their legal rights. There is a growing body of information on co-mediation.

There are many advantages of co-mediation of this type. In my experience some of these are:

- Co-mediators are able to undergo constant supervision and training as a result of the opportunities for observation and positive and negative feedback from their partner mediator.
- Mediating parties are more likely to feel that the process is impartial – for instance, in heterosexual post separation mediations where there is both a male and a female mediator.
- Mediation is a dynamic and evolutionary process and with two mediators there is more opportunity to assess the body language and linguistic nuances which point to "hidden agendas", unresolved emotional conflict, and blocks to resolution.
- The options which are explored and "tools" – both personal, skills based and according to professional training – which are brought to the mediation table are more diverse and creative and more likely to break through impasses in negotiation than where there is a single mediator.
- There are two people to do the demanding work of mediating – the observing, generation of ideas, recording of concerns, issues and options, the calculations, the individual caucusing, drafting and typing of the agreement and even making the coffee and collecting the sandwiches – all important elements in successful mediations in my experience.
- There is less likelihood of one party feeling excluded as a result of triangulation during private caucuses with the other party, as one mediator can go back and forth, keeping that person informed of progress..
- When progress grinds to a halt and the mediator and parties tire, there is someone to consult and with whom to revise strategies.
- Showcasing of the interaction and problem solving strategies of two mediators can provide a model of cooperative decision making and conflict management for

disputants to follow. When the mediators decide the process in a consensual and transparent manner this often facilitates more conciliatory interaction between the disputing parties.

Representing children at a mediation:

Counsellors can in some cases be involved in mediations over children's issues as an expert participant along the lines of - but still different from - the role of the expert witness in court. As a result of interviews with children prior to or even during the course of a mediation, the children's wishes can be incorporated into the mediation and brainstormed solutions can even be presented to the children for comment and then taken back to the mediation table by the counsellor. This process is in its infancy and needs to be refined and further developed, with all professionals involved needing to set their own criteria and role definitions in order to ensure predictability of process and reduce the risk of blurring boundaries.

Contraindications for Mediation:

Mental Health professionals have long been used in the Family Court system to advise as to the likelihood that particular disputing couples will resolve their issues without resort to litigation. As we all know, the primary purpose of mediation is to allow parties to be involved in the decision making process, and to thereby "own" the solution and hopefully be more likely to comply with the agreement. There is, however, an implicit assumption that each of the mediating parties possesses certain intellectual abilities and sufficient psychological stability to understand the issues and the process, to negotiate, and to make decisions on their own behalf.

There are various psychological factors which contra-indicate successful mediation and there are others which, with the benefit of prior knowledge and special preparation after intake sessions, do not necessarily predict failure. Some examples are:

- **Illiteracy** clearly disadvantages a party from the outset. Illiteracy may also be an early indicator of problems with intellectual capacity – that is, of a low IQ – and this may flag the possibility that the person is not capable of comprehending the issues and will be disadvantaged by mediation. If legal representation at the mediation is not

possible, then a more traditional process, whereby a decision is imposed by a benevolent and fair arbitrator, may be a better solution for such a person because of the power imbalance created by their mental disability.

- **Mental Illness:** If a disputing party is significantly **depressed** and/or suffering an **anxiety disorder**, their concentration is likely to be poor, they might have difficulty reading documents, they are likely to be somewhat dithery and disconnected, and may even give the appearance of having an intellectual handicap ("pseudo-dementia"). Psychotropic or mind-altering medication might have a sedating effect. All of these features can contribute to a power imbalance during a mediation.

- Should a client indicate that they or the other party suffer from **schizophrenia, bipolar affective disorder, or another form of psychotic disorder**, then it is most important that there be some medical information supplied to the mediators prior to intake sessions with the parties. Some of the modern medications for treating these types of disorders are very effective and have minimal side effects. If a person's psychosis is controlled on one of these medications then the chances are that they might be able to negotiate quite effectively on their own behalf or with a solicitor. They are just as likely to be of normal or above average intelligence as anyone else in the community. However, if they are not reliable with taking their medication, the medication does not suit them, or they are on one of the older types of anti-psychotic drugs which can cause sedation, then they could be at a very grave disadvantage in a mediation - especially if attending without a lawyer. If they are undiagnosed and/or untreated, they might be out of touch with reality to the extent that they do not talk sense, believe strange and outlandish things are happening or even that their ex (or anybody else at the mediation for that matter) is out to harm them. In the latter situation, they could be dangerous.

- **Post Traumatic Stress Disorder:** If there is a history of domestic violence, then the victim of that violence is likely to have been emotionally traumatized and could well be suffering Post Traumatic Stress Disorder. If this is the case, then they are likely to feel highly anxious in situations which bring back memories of the domestic violence. Seeing their ex-partner or even attending a conference where that partner is present but

in another room, can be sufficient to overwhelm them with anxiety and panic. This, of course would represent an extreme power imbalance. It is the classic situation in which conducting the conference in separate rooms is likely, but this might still not be sufficient to ensure an equitable process. Remember, however, that going to court is extremely distressing for most highly anxious parties.

- **Personality Disorders:** Much is said about personality disorders – particularly in Family Reports. You might be briefed with a copy of a Family Report in which a psychologist or psychiatrist has suggested a diagnosis of personality disorder for one or the other or both parties. The main thing to remember about people with personality disorders is that they have great difficulty experiencing empathy – that is, placing themselves in the position of another person and trying to see and understand that other person's point of view. People suffering with these disorders are classically difficult to relate to – whether, for instance, they have a narcissistic personality disorder (extremely egocentric and seeing everything only from the perspective of their own needs or wants) or an anti-social personality disorder (causing them to behave in destructive ways which do not take account of the other members of the community or society). There is a wide range of personality disorders, but they all translate into "difficult" people. These difficult people may not respond well to mediation.

- **Brain Damage:** If there is some indication that a party has suffered brain damage as the result of a head injury, brain tumour, or some other organic cause, then slow cognitive processing, fatigue, poor comprehension, poor verbal expression, or even lack of impulse control could disadvantage them at a mediation and also provide an insurmountable hurdle to resolving the dispute. There may be a need for authorisation of the mediators to speak to treating health professional before making a decision as to whether to mediate or not.

- **Other Early Indicators:** One of the most obvious indicators that a person is not a good candidate for alternative dispute resolution is their being explosive or aggressive towards the mediator - in writing, on the telephone or in person. Poor impulse control and excessive aggression can serve as warnings that the person is not likely to possess

the personality features necessary for them to be objective about issues and to contain unresolved emotional conflict in the interests of attempting to reach a compromise solution.

Where there is warning about contra-indicators, a **shuttle conference** is one way to ensure that people suffering any of the aforementioned impediments to mediation are not disadvantaged by a power imbalance. If it is considered that coming together in the one conferencing room is advantageous, it might be necessary to instruct a party to indicate to the chairperson or their solicitor if and when feeling overwhelmed, so that the conference can resume in separate rooms. Ensuring that all persons involved are not constrained by a tight time schedule so that **frequent breaks** can intersperse the conferencing process, might also help.

Collaboration between the lawyer and the counsellor:

The potential for collaboration between family lawyers and family counsellors is limited only by the nature of the issues presented by our clients and by our own imaginations. The capacity of our clients to present us with novel challenges never ceases to amaze me no matter how long I work in this area. As for the combined intelligence, ingenuity and creativity of the people who work in this field – both lawyers and counsellors – we are only just beginning to find ways of working together for the benefit of our clients and their children.

We have a catch phrase at Brisbane Mediations:

> ***Things work out best for the people who make the best of the way things work out. (Linkletter)***

Considering the current rate of change in the family law arena, those of us who survive professionally will be the ones who take a lesson from this motto. Increasingly, we are being told to view the litigation trail as a last resort option in conflict resolution and the momentum is gathering in the direction of less adversarial processes. No matter what your view of primary dispute litigation, there is no point in "flogging a dead horse".

References

1, Family Law Council (1992). *Patterns of parenting after separation.* (Report to the Minister for Justice and Consumer Affairs), Canberra: Australian Government Printing Service [http://www.law.gov.au/Flc/reports/patterns.html]

2. Dingwall, R., and Miller, G. *Lessons from Brief Therapy.* Conflict Resolution Quarterly, Vol. 19, 2001-2002.

3. Favaloro. G. *Mediation: A family therapy technique.* Mediation Quarterly, Vol. 16, 1998-1999.

4. Fehlberg, B., Sheehan,G., and Kelly, F. (2000). *Family law pathways and processes: Case studies.* (Report to Family Law Pathways Advisory Group). Melbourne, Victoria; Australian Institute of Family Studies. [www.law.gov.au]

5. Marlow, L. *Divorce mediation: Therapists in the legal world.* The American Journal of Family therapy, vol. 13, No. 1, 1985.

6. Martin, J. *Social workers as mediators.* Australian Social Work, December, 2000, Vol. 53, No. 4.

7. Rhoades, H., Graycar, R., and Harrison, M. (2000). *The Family Law Act 1996: The first three years.* Executive summary at [http://www.familycourt.gov.au/papers/html/fla 1 summary.html]

8. Webb, N. and Moloney, L. *Child-focused development programs for family dispute professionals: Recent steps in the evolution of family dispute resolution strategies in Australia.* Journal of Family studies, Vol 9, No 1, April 2003, pp23-36.