Family Dispute Resolution
University of Technology Sydney

The Grapes of Wrath

Aspects of Family Dispute Resolution

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In love's dances, in love's dances
One retreats and one advances.
One grows warmer and one colder,
One more hesitant, one bolder.
One gives what the other needed
Once, or will need, now unheeded.
One is clenched, compact, ingrowing
While the other's melting, flowing.
One is smiling and concealing
While the other's asking, kneeling.
One is arguing or sleeping
While the other's weeping, weeping.

And the question finds no answer,
And the tune misleads the dancer,
And the lost look finds no other,
And the lost hand finds no brother,
And the word is left unspoken
Till the theme and thread are broken.

AJS Tessimond
Black Monday Lovesong

The Grapes of Wrath

Aspects of family Dispute Resolution

We live in a murky ambiguity lit by occasional flashes of utter incomprehension.
Thomas Wharton, *Salamander*

Introduction

We are asked to critically review what distinguishes Family dispute resolution from other forms of primary dispute resolution (hereafter referred to as PDR), together with the mediation models and processes that best support the resolution of disputes in a family context.

Much of the reading and other source material concentrate on the anatomy and dynamics of divorce, and divorce proceedings. For the purposes of this paper, family dispute resolution is defined as dealing with relationship breakdown, including divorce and separation. It applies to the dissolution of any intimate relationship, be it marriage, de facto, or another.

It is so commonplace nowadays[1], almost a rite of passage. But rarely are we prepared for it. And it causes such upheaval.[2]

Family dispute resolution deals, amongst other things, with relationships and children, and particularly with the likelihood, imminence, actuality and aftermath of relationship breakdown. Intrinsic to conflict in this arena are the problematical issues of identity and emotions, centering around grief and loss, and equally challenging issues of interests, power, and the potential for violence.

All these impact differently on the resolution process than in another forms of PDR. This is not to imply that these are less intense or absent in other disputes, in environmental, community, or workplace disputes, for example. Where relationships are involved, where people are socially intertwined, conflict will always arouse emotions and feelings and all that flows from these.

But in family dispute resolution it is so up-close and personal. The depth and intensity of feelings involved, the raw nature of emotions that lie at the heart of family conflict, the intimacy of the relationships at risk, the uncertainly and unpredictability. These distinguish family dispute resolution from others, defining the tenor of the dispute, determining its course, and compounding its resolution.

Furthermore, in no other PDR scenarios are “significant others” so important, so intertwined in the issues and interests of the conflict, and so dependent on the outcome. That is to say, the children. The emotional investment is significant, as is the potential for permanent psychological damage – and indeed physical harm.

Children are not, of course, the only interested parties. Absent parties who may have implicit or explicit influence over one or other of the parties, and a critical interest in its outcome, include new partners of former spouses; grandparents of the children, who have an interest in seeing the children and who might be used for supervised

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[1] Relationships Australia’s The Rest: Relationship Statistics, Vol. 2, April 2003, presents some useful data from the Australian Bureau of Statistics: In 2001, 55,300 divorces, the highest number in twenty years. The divorce rate be 100 of the population has been increasing since 1981, from 11 to 12. Divorced persons in Australia increased by 61% between 1990 and 2000. In 2001, 17% of couples had divorced within the first five years of marriage and a further 26% during the next five years. 53,400 children were involved in divorce in 2001, from 49,600 in 1981.

[2] Mark Goulston, Yes, There’s Life (and even love) after Divorce, Coalition for Collaborative Divorce, California, at www.nocourtdivorce.com/articles.phtml “From affairs to bankruptcy to abuse to irresponsibility to mid-life crises to drug or alcohol addiction. Maybe it's the shock of how adoration turned to repulsion, mutual respect to disdain and love to hate. It's difficult to accept that what you thought was the right thing to do, has turned out to be wrong. Or perhaps the thought of how a divorce adversely affects young children can be an enormous source of worry, stress and guilt. The maternal bond is the strongest attachment there is and when you are a part of something that causes your children so much hurt, it can be of the most upsetting experiences in your life. Finally, the effect of losing all of your passion for the person you once loved can make you feel inadequate. Nothing kills off passion as much as feeling hurt, scared, disappointed, angered, or betrayed. It is the combination of these factors that can have such a profound negative effect on your career, relationships, spirit and soul. You may think to yourself: "If I was wrong about my marriage, how many other things am I wrong about?" or "If I'm screwing up my children's life, what kind of mother am I?" Then as if all of this weren't enough, you start having sleep and concentration problems and become depressed and/or anxious. All told, it becomes extremely difficult to function on the job, in relationships, and to feel hope or optimism about your future”.

contact or as go-betweens; and external advisors or support persons whether religious, spiritual, or emotional, who hold a powerful sway over the parties.[1]

Throughout the process and particularly at the bitter end, there is the potential for violence. At best (as if anything like this merits that word), extreme behaviour, erratic, unpredictable, mood swings, depression, emotional outbursts, and at worst (in the truest sense of the word, this time), eruption into actual violence – psychological, verbal or physical.

Because of this too, not all PDR models suit family dispute resolution. Further, the skills required of the intervener are different.

It is highly recommended that the intervener have a practical, sophisticated knowledge of the psycho-dynamics of relationship breakdown, and a working understanding of child development and the impact of separation on the development of children. The intervener should possess skill in the management of the parties' anger, grief, anxiety and fear during the conflict resolution process. They should be able to use and teach the parties how to use effective communications and problem-solving techniques. Moreover, they need to be aware of their own feelings and prejudices too and maintain as far as humanly possible their neutrality and objectivity.[2]

My paper will look at these in more detail insofar as they distinguish Family dispute resolution from other forms of PDR, and will consider how certain models are more appropriate or effective in handling the issues and outcomes that arise from family conflict.

Part One : The Grapes of Wrath

"For you make everything I dread and everything I fear come true"
Joni Mitchell *Job's Tears*

We begin with the manifestations of feelings and emotions involved in family conflict, which the intervener must address and manage, including loss, grief, and anger, and their emotional and psychological triggers and responses they present.[3] And at the root of these lies identity, a central element of relationships and their sundering.

Being and Believing

Relationship breakdown has many causes, and an examination of these is way beyond the scope and competence of this presentation. But it may be said that a good part of relationship breakdown hinges upon matters of emotional and physical interdependence, trust, and frustrated and disappointed expectations.

Responding to issues of trust, and the feelings that flow from the perception of trust betrayed, is one of the most challenging tasks for an intervener, This is because the parties have experienced a significant and often traumatic breach of trust that strikes at the very core of their being, their worldview, their values, their lives, lifestyle, and livelihood. Their identity.

Identity has been defined as…"the tendency for human beings, individually and in groups, to establish, maintain and protect a sense of self-meaning, predictability and purpose".[4] Self and social identity is inextricable. People perceive themselves as members of a social category, and being so perceived by others. Our tendency to categorize ourselves and others, and the effect this has on human interactions, must also extend to how others perceive us. Moreover, our sense of self-worth (the image we project to the world) is influenced by how we believe others see us, and how much we value ourselves, how much other people seem to value us.[5]

[1] Boulle L, Mediation - Principles, Process, Practice, Butterworths, 1996, at 235. Absent parties include members of social networks, clubs and associations who may criticize, ridicule or otherwise undermine the parties' commitment to a mediated outcome; and outsiders who are funding one of the parties, such as a concerned parent who is paying the costs of the mediation on behalf of their child and who has high expectations of the process.

[2] See, for example, Rachel Fishman Green, Mediator Neutrality: How is it Possible? March 2002, at www. mediate.com. We all have our "war stories". These and other emotional baggage ought to be left at the door.

[3] Appendix 1 provides an Anatomy of Relationship Breakdown, listing many of the emotions and feelings they might be experienced during separation and divorce, their physical, psychological and behavioural manifestation, and needs that need to be met. It is a guide only, subjective, random, claiming to be neither exhaustive nor definitive.

[4] Terrell A Northrup, The Dynamic of Identity in Personal and Social Conflict in: Kriesberg L, Northrup T, and Thorson S: Intractable Conflicts and There Transformation , Syracuse University Press, at 63.

[5] Postle D, The Mind Gymnasium (,McGraw Hill, 1988) at 47. How one is defined by others both influences our self-identity to some degree, and has group affiliation effects in its own right (i.e. independent of one's self-definition. Nkomo S &Cox T, Diverse Identities in Organizations , in: in Clegg S, Hardy C, & Nord W, Handbook of Organization Studies , Sage Publications 1996, at 341.

At the centre of the sense of self, of "identity" are beliefs. These cannot be changed significantly without disturbing the very roots of our being: "The whole of human reality is constructed out of accumulated beliefs - we can never be free of them…. And beliefs are not about facts but about perceptions! And what you experience is a matter of belief too. Your mind draws on what it has learned to believe over the years and recreates in every living moment the outer world that you see and hear, and the inner world that you feel…"[1]

There are long established coping mechanisms associated with marriage, motherhood, with relationships generally. For example, one's self-image as a provider, as a capable and competent person, as a valued individual. And our sense of empowerment, of being able to handle things, of not being a victim.[2] Then there is the emotional and financial security, that is threatened by the impeding or actual loss of livelihood and domicile.

So, Questions of identify are therefore critical in relationship breakups. The loss implicit in the breakup creates a threat to the foundational view that a person has of himself or herself, beliefs, sense of self, self-esteem, and self-confidence.

We recognize the critical central role of identity, beliefs and values in our lives, both personal and shared. And with these come emotions. Emotions run through everything, colouring what we think and what we do, how we interact with others.

Tired and emotional

Emotions and feelings are part and parcel of perception: how we interpret and 'feel' about things. "We have feelings about what we want, and what we want is infused with feelings; and that is intrinsic, not residual, to individual, interpersonal and group functioning".[3] Everything we do, we feel and shape by our feelings. Everything has an emotional content.[4]

We may be lost in our feelings,' fall victim' to our feelings, get stuck in feeling traps, get overcome by our feelings. Become hostage to our feelings and those of our group or cultures. Emotions challenge, interfere with, and intertwine with rationality, that process of thinking, cognitive, cool calm and collected calculation. Impulsive, emotional, desiring, needful qualities are antithetical to rationality and cognition. Sometimes it is hard to work out where one ends and the other takes over.

And so, we may fail to 'think straight' when feeling threatened, when under stress, when over-wrought. We may rush into defensive actions, justifying previous behaviours. Notionally rational individuals and their dreams and schemes may be obfuscated by the unwitting defensive reactions of anxious, emotional actors.[5]

Oscar Wilde said that the advantage of the emotions is that they lead us astray. But in the debris of a breakup, there are few advantages and plenty of wandering around. People are hurt, angry, and things seem out of control. And much of it is to do with loss, and what in reality amounts to…

The Sum of all our Fears

Loss, potential or actual, is a potent driver. It triggers emotions and feelings, it leads to grief and mourning, it can manifest in either withdrawal or anger. The issue for the partners, and for the intervener who is working with them, is how to cope with, respond to, come to terms with the imminent and actual loss.

Grief arises as future uncertainty, and the threat of loss of an identity or a relationship to which we are committed, increase. And the potential for grief is proportionate to the depth of a relationship (perceived investment made by the participants), breadth (longevity), and the commitment to the ongoing relationship. As they move towards deadlock and possible dissolution, the anticipation and experience of grief expands.[6]

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[1] Postle op cit. at 102. He continues: "And what you believe is coloured by what you have experienced, what you have learned, how you have been treated as you go though life…the perceptions, the prejudices…the giving and the receiving end of human interactions, discriminating and being discriminated against, judged and judging, victimizer and victim, patient and nurse".

[2] Michael J Evans, Marcia Tyler-Evans, Aspects of Grief in Conflict: Re-visioning Response to Dispute, The Conflict Resolution Quarterly, Vol. 10, No.1, Fall 2002.

[3] Fineman S, Emotion and Organizing, in Clegg S, Hardy C, & Nord W, Handbook of Organization Studies, op cit. at 550.

[4] Id. at 543 and 547: "Feelings and emotions…are the quintessence of humanness, social functioning, and social order. Feelings connect us with our realities; they provide an experiential personal readout on how we are doing, where we 'are', what we want, what we might do next. In this sense, most feelings are mobile; we interact with them, work them over. We have feelings about our feelings, guided by existing social scripts or stocks of knowledge e.g., 'how should I really feel in these circumstances'?"

[5] Id. at 550.

[6] Michael J Evans, Marcia Tyler-Evans, op cit.

"When a griever is not allowed or encouraged to express feelings of emotional loss, the emotions linger...the grief goes deeper into the person's emotional makeup, often amplifying other emotions such as anger, frustration, bitterness and despair. With the escalation of the emotional aspect of the conflict, our ability to promote interactive problem-solving resolution weakens. As the cycle of anger, despair, and sadness becomes magnified, cognitive examination of the ongoing problem becomes of secondary importance for the person. Accompanying the magnification process is growing resistance to resolution, as the person becomes more entrenched in self-protection and even a desire for retribution".[1]

In family dispute resolution, the intervener, whether lawyer, mediator, or counselor, must work out what the partners, each of them, are afraid of, what they fear the most. For example, the loss of self-identity, the loss of financial security, the threat to a stable lifestyle, what others might think, and, of course, what is to happen to the children.[2]

Identity and belonging, feelings and emotions, memories and loss, legends and lies. The sum of us: "…an abiding sense of self and of the relationship of the self to the world. `It is a system of beliefs or a way of construing the world that makes life predicable rather than random".[3]

And when it all seemingly falls apart, when all we believed in, held on to, identified with, is in tatters, we feel that we are in…

A World Turned Upside Down

Amidst the emotional turmoil, the torrent of feelings, the uncertainty, the instability, the unpredictability, there is confusion, dislocation, and disorientation. There is loss of control over one's environment. There are questions demanding answers that are not immediately forthcoming.[5]

Moreover, relationship breakdown, separation, divorce are not events but an ongoing, evolving processes. And the participants do not go through these processes at the same pace and the same time.

Michael Evans and Marcia Tyler-Evans illustrate it thus: the spouse who has just been informed that divorce is approaching is faced with ongoing and future loss; for the spouse responsible for announcing the decision, the loss and grief experience is already present.[6] They chart this process of reeling and dealing through Kubler Ross' five stages of grief (denial, anger, bargaining, depression, and acceptance); and Bowlby's phases of mourning (numbing, disbelief, trying to reverse the outcome, disorganization, and reorganization).[7]

This is not denying the existence of a situation. Rather, it is expressing a mental difficulty with accepting it. This sense of numbing and disbelief reflects an inability to cognitively process the concept of the factual future. Being stuck at the stage of discovering that the conflict exists may delay or derail effort to move towards resolution.[8] Whilst anger and frustration are common expressions of underlying grief, expressing such emotional responses to loss may actually lessen the sense of loss.

The sense of loss, the hurt and the grief that derives from it, and the manifest dislocation and turmoil that accompanies it are uniquely personal. The intervener cannot profess to know, feel or have experienced all that is going on in the heads of the parties, but he or she should at least be able to empathize, to offer a degree of understanding. To this end, one must be aware the stages of grief and loss, of anticipatory and actual grief, and the stages of "dealing".

And it is no easy task. It may be the sense of being psychologically and socially cast adrift, to the physical and mental stress of being tired and emotional, but often, both sides of a conflict lay claim to the victim's mantle.[9]

Victimization makes people lose the locus of control in the sense that they project all their anger on the outside world. They blame others for their tragedy, and that doesn't allow them to look inside and take control of their lives. Victimization is a serious psychological problem because it exposes people to a state of dependency and

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[1] ibid.

[2] Such as: "being out of the children's' life", 'turning the children against me".

[3] Gabrielle Lord, Weekend Australian, Sept 29/30 2001.

[5] Like: "This isn't this happening to me!" "Why is this happening to me?" "How can this happen to me?" "I don't know what to do!" "Where is it all going to end up?"

[6] Michael J Evans, Marcia Tyler-Evans, op cit.

[7] id. Referring to: Bowlby J, Sadness and Depression, Vol. III of Attachment and Loss, Penguin Education, Penguin Books, 1981; Kubler-Ross E, On Death and Dying, Colliers Books, Macmillan Publishing, New York, 1969.

[8] Michael J Evans, Marcia Tyler-Evans, op cit.

[9] The phrase is borrowed from by Tony Walker of The Australian Financial Review

helplessness. As victims we do not sympathize, or empathize. We become so preoccupied with our own victimization.[1]

"Divorce raises all kinds of hurdles, as you restructure and begin to figure out your new life – and also raises all kinds of complex emotions. When you are navigating the maze of these changes, the last thing you might want to hear is that your spouse's position has some validity…These feelings are especially intense where the impetus for the break-up of the marriage is a situation with deep emotional effect – for example, where one person has a new lover, or where one person walked out on the other very suddenly and without warning. The "right" spouse might find that the new identity as a wronged person becomes intensely compelling and attractive. The answer is that neutrality will bring you closer to the truth, and the truth will help you to move on with your life".[2]

Meanwhile, the real victims may become collateral damage, caught in the crossfire as their parents yell…

Back off or the Kid gets it

"Far too often, parents go into the terrorist business, and sign up their own children for hostage duty. They engage in the indefensible practice of using their own children as pawns, with which to extort domination, manipulation and control over the other parent, with utter disregard to the devastation this inevitably causes the child".[3]

We have highlighted the pressures that beset adults enmeshed in relationship breakdown, but it should be noted that their children feel these pressures too. Their world is also being rent asunder, their self-esteem and identity challenged, their feelings and emotions rocked and buffeted by the waves of their parents' storms.[4]

"Parents going through the process of a divorce also go through great stress, anxiety, grief and loss. How they work through these emotional issues presents an unspoken message to the child, who is also going through his/her own issues of loss, mourning, fear, and the reality of having no control over his/her own circumstances. Particularly in times of great stress and anxiety, the parent who can own his or her own feelings, model responsible behavior and separate marital from parenting issues sends an unspoken message of safety and security to the child".[5]

The intervener must recognise that children are not mere bystanders, that they too have critical issues and interests that must be considered if there is to be a satisfactory resolution[6], and that their future depends very much on the outcome of the process. And it is the intervener's task and duty to impart that to the parties and to steer them in this direction.

"…if the parties have children of any age, the parties must consider more than just reaching a settlement. The parties need to recognize that a relationship will exist between them after the divorce. This relationship will be tested time and again, even after the children have left the nest and are out on their own. There will be birthdays, graduations and other school-related activities, weddings, grandchildren, funerals and other important events that will require some contact between the parties. Co-operation between the parents will go a long way in reducing the stress and anxiety in the lives of their children. As parents cope better, their children do so as well".[7]

Finally, a brief word on violence, and the dangers of going over to the dark side…

The Grapes of Wrath

Therapists have written of the how anger helps us cope with threat, hurt, violation, or frustration. Whilst acknowledging that anger can lead to violence, they maintain that properly managed, expressed, vented, it can have a positive, even therapeutic side. It can lead us towards empowerment, assertiveness and self-confidence. We are advised therefore to learn how to manage it in ourselves and in others.[8]

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[1] Tony Walker, A Battle To Claim The Victim's Mantle, The Australian Financial Review. Jan 25 2002.
[2] Rachel Fishman Green, op cit. She adds: "And that is one of the appeals of the adversarial system. When you are hurt, angry and shaken up, who would not want to hire an experienced warrior, who will tell you that you are right and that your evil spouse should make amends – usually monetary – to avenge these wrongs?"
[3] Dean M Shrayer, Using Children as negotiating Tools , Collaborative law Group, at http://www.collabgroup.com/
[4] This applies to children of all ages. These events have an impact on children at very early age - when their brains are developing, they are very vulnerable. Likewise teenagers, who have to cope with family breakup at a time when they themselves are going through the emotional and physical roller coaster that is puberty.
[5] Charlene Gelt, Communication and Parenting Style Critical to Child's Self-Esteem During Divorce, Collaborative law Group, at http://www.collabgroup.com/
[6] The Family Law Act provides for parents to have shared duties and responsibility for children, and for children to have a right to know and be cared for by both parents, and have regular contact with both them.
[7] Norman Pickall, In Family Law, How is Mediation Different from a Settlement Meeting, at http://www.mediate.com/
[8] Refer, for example, to such self-help books as: Gael Lindenfeld, Managing Anger, HarperCollins, 2000; and Harriet Lerner, The Dance of Anger, HarperCollins, 1997.

There is no doubt that in the daily rough and tumble of what passes for normality, this is true. But in the pressure-cooker, time-bomb milieu of relationship breakdown, where emotions and fears are at fever pitch, and where, in effect, senses are working overtime, the therapeutic benefits of properly managed anger become somewhat academic, as the potential for anger to escalate into violence increases, be this psychological, verbal or physical.

This is not just in respect of relationships in which there has been a history of abuse and violence. People who have not had a past history of violence have been known to react unexpectedly under the stress of a family breakdown – whether during its unraveling or during attempts at resolution, including mediation.[1]

Breakups are believed to be more commonly instigated by women, and can sometimes be attributed to women's changing expectations of men and of intimacy. Men's anger and bitterness can therefore boil over into violence. Fights over access to their children only deepen their despair. And there is also the propensity for self-harm. It is believed that men find it more difficulty than women to cope with divorce and separation, with separated men nine times more likely to commit suicide than women.[2]

These are realities that have occupied the thoughts of many practitioners.[3] "…while it is never ideal to mediate where there is a history of violence, it may be the only realistic option for parties with scarce resources who need to make practical arrangements over children and property. The focus is therefore on ways in which this reality can be best dealt with by modifying and adapting the mediation process".[4]

Violence greatly exacerbates the power imbalance between the parties. The intervener must deal with this in a way that protects the parties and yet works towards an agreement. It is no easy task. Astor & Chimkin capture the conundrum: "Mediation asks a great deal of a woman who has been the victim of domestic violence. It requires her to be in the same room as the person who has been violent to her. It requires her to explain and assert her needs in relation to the perpetrator and to attempt to construct a mutually satisfactory way of resolving differences with the perpetrator. She must do this in the context of a relationship where her previous attempts to do these things may be exactly what has resulted in her being beaten".[5]

It is recommended that Interveners be able to understand and read the indicators of violence, and therefore be trained on the nature of domestic violence and its consequences for both victim and perpetrator.[6] In the light of this understanding and heightened awareness of the difficulties surrounding family violence, the mediator is equipped to handle potentially violent situations, and to adapt and modify the resolution process to suit the circumstances.[7]

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[1] Astor H and Chinkin C, Dispute Resolution in Australia, Butterworths, 1992, at 259: "The fact that there has been no incident of physical violence in a relationship does not mean that it is not feared or is not possible".

[2] Miranda Devine, The Pain of the Modern Male Eunuch, Sydney Morning Herald, 18th Sept 2003, quoting Terry Melvin, manager of the Men's Line Australia counseling service. Also, refer to Appendix 6, a selection of articles on recent and past murder-suicides.

[3] Boulle L, Mediation –Principles, Process, Practice, Butterworths, 1996, at 228; Astor H and Chinkin Cop cit. at 257-260; and Rene Rimelspach, Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program, Winning Essay in the Law Student Category, 2001 James Boskey ADR Writing Competition. http://www.mediate.com/

[4] Astor & Chimkin, op cit. at 260: The reluctance of the formal legal system to deal with domestic violence has always been based on the notion that such disputes are 'domestic', belonging to the private world of the family, and not suitable for the intervention of the courts or law enforcement agencies. Boulle, op cit. 228. In a useful essay, Rimelspach, op cit. weighs up the arguments for and against mediation in the light of the prevalence of domestic violence, concluding that whilst not all families are appropriate candidates for mediation, with adequate safeguards in place, it can indeed be a suitable model. Astor & Chimkin likewise consider the matter.

[5] Astor & Chimkin, op cit. at 260.

[6] id. 230 The victim may continually wait for the other to speak; glance timidly at the other party; always try to smooth over points of conflict. The perpetrator my dominate the airways; aggressive body language; o impatient or threatening tone of voice,

[5]Rimelspach, op cit. and Boulle, op cit. at 29: The mediator must consider the ability of any party to negotiate freely in the dispute is affected by any of the following matters: history of family violence; the likely safety of the parties; the equality of bargaining power; the risk that a child may suffer abuse; the emotional, and the psychological and physical health of the parties. And other matters the mediator considers relevant to the proposed mediation, e.g. undue pressure from outsiders, interested third parties.

[7] Rimelspach, op cit. and Boulle, op cit. at 29: The mediator must consider the ability of any party to negotiate freely in the dispute is affected by any of the following matters: history of family violence; the likely safety of the parties; the equality of bargaining power; the risk that a child may suffer abuse; the emotional, and the psychological and physical health of the parties. And other matters the mediator considers relevant to the proposed mediation, e.g. undue pressure from outsiders, interested third parties.

Beyond the Bitter End

Psychologists say that when you are depressed, the last thing you want to do – or should do – is make important decisions. Yet, many people go through relationship breakdowns in a state of, if not clinical depression, then certainly, the 'blues".

But when emotions are fraught, when stress levels are high, when all things are falling down, partners have to negotiate their way forward – think of their future and that of their children, identify and defend their best interests. Someone has to help them clear the tangle, see straight, perceive clearly the road ahead.

"Constant fighting, arguing and blaming in a marriage or similarly committed relationship generally leads to more of the same while dissolving it. Unfortunately, the consequences of continuing this behaviour can be dramatic, including protracted litigation, escalating costs, and significant damage to the parties' children's emotional well-being. By the time the parties are in their lawyers' offices, they usually dislike each other, are very poor communicators, are highly distrustful, and are fearful of being hurt again".[1]

The nature of family dispute resolution, as outlined above, is such that "settlement" is only one of the purposes of dispute resolution. "Reconciliation" does not mean "getting back together." It means helping the parties negotiate a workable way of living apart".[2] In effect, trying to create a "good ending".[3]

Which brings us back to our brief: to critically review what distinguishes Family dispute resolution from other forms of PDR, together with the mediation models and processes that best support the resolution of disputes in a family context.

Laurence Susskind has said: "The most important insight to date is that there is no predictable pattern that successful mediation must follow".[4]

And certain PDR models are indeed more appropriate than others for addressing the emotional side of relationship breakdown, doing it in a constructive, less adversarial, and less confrontational way. This is particularly important where children are involved because the parties have to have a continuing relationship with each other. Likewise, as we have seen, dealing with relationship breakdown requires the intervener to possess particular skills.

The following pages examine these statements in greater detail.

Part Two: The Road Less Travelled

Two roads diverged in a wood, and I, I took the one less traveled by,
And that has made all the difference.
Robert Frost, *The Road Not Taken*

We are looking for models which can best answer the needs outlined in Part One. Namely those which best manage the manifestations and outcomes of identity and emotional issues, which serve the best interests of the children caught up in the conflict, and which address, and ideally, manage the potential and actuality of violence.

We are looking for a model or models that:

1. Allow for the expression and resolution of feelings rather than the assertion of rights;
2. Calm, stabilize, and diffuse emotions, fears, and resentments;
3. Enable communication between parties in conflict, including the importance of 'venting" on one hand, and "listening" on the other;
4. Model "good" behaviour vis a vis communication and cooperation;
5. Explore interests rather than contentious and perhaps irreconcilable rights and positions;
6. Enable the consideration of options and solutions, and provide opportunities for reality checking these;
7. Rebuild trust in a cooperative, problem solving relationship, a new, different, less dependent relationship;

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[1] Pickall, op cit.

[2] ibid.

[3] The term is borrowed from New York novelist and journalist Melanie Thernstrom who writes: "…is there the possibility of dialogue even after separation? Can two people come to a shared understanding of fractured love? And if so, if that is so valuable, what is the good of a good divorce? …There is a growing interest in the concept of the 'good divorce' – a phrase that once would have sounded not only oxymoronic but also unseemly – something that implies permission instead of punishment, like "happy hooker". Melanie Thernstrom , Untying the Knot, Sydney Morning Herald Good Weekend, 18th Oct 2003.

[4] Susskind L, Multi-Party Public Policy Mediation: A Separate Breed, American Bar Association, http://www.abanet.org/dispute/magazine/f97suss.html

8. Strengthen and up-skill the parties in dealing with future problems;
9. Address and redress power imbalances that may intimidate and silence either party;
10. Address and mitigate the risks of abuse and violence;
11. Look towards after the children's' best interests;
12. Address and accommodate the needs of "absent parties" who have an active interest in the outcome;
13. Rebuild relationships between family members as a basis for the future;
14. Provide a framework for arranging the family's affairs for the future.

In short, provide comfort, build trust, establish communication and cooperation, enable principled negotiation, accommodate the need of children and absent parties, and look towards the future. It is a big ask, requiring an approach that is at once pragmatic, flexible, and therapeutic, and interveners who combine a hard-nosed, realistic outlook, and "soft' skills that acknowledge and work with the emotional fall-out .

Laurence Boulle has developed a useful table that summarizes their principal features, their strong points and shortcomings. It is reproduced in Appendix 2, adapted to include collaborative law, succinctly highlighting how certain forms of PDR are not suited to family disputes.[1]

There are several paths to handling relationship breakdown. These include the conventional adversarial, legal process, the mediated settlement, and a newer collaborative approach.

The appendices provide a more detailed exposition what the two major "soft' models offer: the promise of mediation, and the attractions of the more recent collaborative law. Both avoid the adversarial, rights-based avenues of litigation and adjudication, and which may poison the present and future emotional landscape with their potentially "win-lose", or "lose-lose" outcomes. The feeling of being dictated to or coerced into an agreement or arrangement through settlement or evaluative models is avoided.[2]

This paper does not examine the finer detail with respect to the various models. The appendices go some way to doing this. Rather, it concentrates on those elements that distinguish these models from others. The debate about the optimum model for family dispute resolution generally reduces to question of whether or not the adversarial litigation approach is unsuited to, and perhaps even damaging and debilitating, with respect to addressing the unique features of family disputes identified in Part One.

The Culture of Argument

For many practitioners and counselors working in the field of family dispute resolution, it comes down to what is perceived a general dissatisfaction with what has been described as the culture of argument.[3]

They maintain that in our culture of critique, opposition and debate are the preferred methods of resolving conflicts and of solving tough problems. We are said to engage in debate rather than dialogue, using war metaphors to describe disagreement over policy. Generally, we have come to enjoy a good fight and to regard politics as a spectator sport. By encouraging debate rather than dialogue, the culture of critique leads us to believe that every issue has two sides; no more, no less, and ignores the fact that "often the truth is in the complex middle, not the oversimplified extremes". When "the middle ground, the sensible center, is dismissed as too squishy, too dull", and when nuanced views are denigrated and the policymakers who support nuanced, middle ground positions are regarded as "two-faced", compromise is often sacrificed in favor of polarized, rigid ideology.[4]

It is an idea echoed by Susskind: "When two sides are locked into an apparently intractable conflict, Susskind maintains that you must *engage the constructive middle. When you lose the constructive middle, extremists on all sides are empowered.* The constructive middle, representative of the conflicting parties, must get together, often in an informal dialogue, producing detailed proposals on all the substantive issues that are to be addressed (even if these do not become part of the formal negotiations. The key is establishing and keeping open communications, ongoing dialogue, collaborative addressing of issues and working on possible solutions.[5]

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[1] For example, settlement mediation, closely aligned with litigation, and evaluative mediation, closely related to arbitration and adjudication, are deemed best suited to commercial and industrial disputes trade practices, anti-discrimination, sexual harassment, personal injury, and the more cut-and-dried matrimonial property disputes.

[2] Appendix One drawing upon David Augsberger and Lawrence Susskind, focuses upon difficulties facing cross-cultural mediation and the skills required. But it is equally applicable across a broad range of conflict scenarios. Appendix Two crystallites the difference between Settlement meetings (essential, the path of litigation) and family mediation – Collaborative law. Appendix 3 presents a client-focussed Q&A about Collaborative law.

[3] David B. Wexler, review of Deborah Tennen's The Argument Culture: Moving From Debate to Dialogue, Random House, 1998, at www.colabgroup.com

[4] ibid.

[5] 7.30 Report ABC TV, 22nd March 2001

The culture of argument leaves the parties sense of self-worth, their financial stability, and their children amongst the victims of the conflict.

This dissatisfaction with the culture of argument as manifested in the adversarial legal system. The quest for a better, more 'people-friendly", "family friendly' way, brought the classic mediation model to the forefront as a means of moving away from rights-based, positional bargaining and towards interest-based, principled negotiation as an optimum model for family dispute resolution.

The Promise of Mediation

The promise of mediation can be encapsulated by Cloke: "The law [adjudication] is designed to contain and control conflict, not resolve and transform it; to terminate disagreements not to learn from them; to suppress emotions, not complete them; to settle cases, not search for underlying issues; a third party decision, not facilitate consensus"[1]

Cloke believes that the new roles for mediation will break the paradigm of law and return it to its original purpose, "which was to resolve conflict".[2] "Mediation is justice coming full circle, a return to the ancient tribal principles of wisdom, compassion, honesty, self-revelation, healing and forgiveness".[3]

Baruch & Folger argue that mediation is one of the many branches of facilitation and it values the transformation of the individual involved in disputes over the public resolution to conflict. "Mediation's greatest value lies in its potential not only to find solutions to people's problems but to change people themselves for the better, in the midst of conflict".[4]

Paradigm Shift

This is the entry point for the "paradigm shift" that is Collaborative law, wherein lawyers doff their gladiator mindsets and assume a collaborative ethos and demeanour. Basically it is a transformation first of attitude and education, and then of process and practice.[5]

"The emotional consequences of the breakdown of relationships in family disputes cannot be overstated. Lawyers, for example, working hard to advocate for their clients, may miss the emotional significance of some of the matters that cause the most grief and about which a person becomes most intransigent. Family mediators consider the emotions and the feelings that the parties are experiencing which can be a significant obstacle to settlement.[6]

Pauline Tesler notes how family relationships become shattered in divorce, and "that there are times when clients are consumed with anger, fear, remorse and depression and are a "shadow" of their high functioning collaborative selves. The collaborative lawyer must guard against falling back into the behaviours of adversarial practice. The client and lawyer need to recognize the client's "shadow" self and agree not to make decisions in that frame of mind". [7]

Chip Rose observes that " The more fearful and anxious the parties are about what they are going through, the more they tend to shut down. The more they shut down, the more clients tend to rely on the projected legal outcomes as their attorneys predict them and the less they are willing to entertain any variations from the

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[1] Ian Simpson, The Role of Law in Conflict Management, at www.mediate.com quoting Cloke K, Mediating Dangerously, Jossey Bass Publications.2001 at 168.

[2] Cloke op cit. at 173

[3] id. at 173. Simpson tries to claim the high moral ground, clawing the law back from opportunists: "… in many court cases, it is not always the pursuit of truth or the dispensing of justice that gains the focus of the interested parties. Individuals are mostly concerned with who will win or lose and how much will it cost? Or how much can I get… What is it in the adjudication system that perpetuates this mindset? Will the rising practice of facilitation be endangered with the same malady?"

[4] id. quoting Baruch & Folger, The Promise of Mediation, Jossey Bass, 1994 at 13-32, and (xv). Simpson argues that adjudication and facilitation are two branches from the same tree, the trunk of which is law and the roots of which are the values of law. Adjudication "is thought to serve important values such as rationality, impartiality, fairness and consistency" (Lyons, 1984, p.61). Facilitation, on the other hand, may appear to be irrational at times. But this is not the case. It is simply alternatively different in approach and style.

[5] The idea that all lawyers are by training and habit gladiatorial is perhaps an oversimplification, a stereotype that is perhaps reinforced by apocryphal "war stories" and television dramas. Astor & Chimkin, op cit. at 252-253, challenge this stereotype. At 244: "Attributing to lawyers the responsibility for creating or exacerbating conflict in family cases is correct only in a minority of practitioners". At 252: "The opinion is widely held that it is possible for lawyers to avoid emotional issues in their handling of disputes; they can isolate the legal issues and concentrate upon them…despite the general ambivalence of he legal profession about the need for lawyers to develop people skills, an experienced lawyer may be efficient at identification and referral of clients who need help with emotional issues".

[6] Pickall op cit.

[7] Pauline Tesler, OCLF Conference Report, 2002, the Collaborative family Law Association's website, at www.collaborativefamilylawassociation.com

adversarial model out of fear an suspicion of the other side's motives." It is the job of the collaborative lawyers to work together to create a sense of trust for their clients in the process (if not in each other), and to build a safe environment.[1]

So what is collaborative law offering that cannot be provided by mediation? There are many similarities, as may be seen from the Appendices. Toronto lawyer Victoria Smith writes: "We know that individuals experiencing separation and divorce often feel hurt, angry and out of control. Collaborative lawyers help clients learn to manage strong emotions, communicate effectively, express their views and objectives, listen to and appreciate the perspective of the other spouse, and take a long-term view of the issues".[2]

But then so do mediators.

There is the "open-page" approach to mediation that says that mediators do not need such "soft skills". But there is no doubt that there are skills that any intervener must acquire in order to manage family dispute resolution, particularly those for dealing with highly volatile, highly charged, highly unpredictable issues like emotions and feelings and children.[3]

Chip Rose notes that the paradigm shift of collaborative law requires the clients to be empowered, helping themselves to change behaviour, focus on their interests, find solutions, make decisions, and create an agreement acceptable to both for which they will both be responsible. The collaborative lawyer facilitates the task, managing but not controlling the process, creating a safe environment in which to gather all necessary information, and then consider options available, along with the consequences. Unlike in litigation, nothing will happen unless they agree to it. No solution will be forced upon them as it would in a court or arbitration situation, an no solution will be reached, if it does not work for both of them.[4]

But then so does mediation..

Is Collaborative law a "middle way"? Cynics may argue that it gives lawyers entry into the mediators' paddock. It uses the words and philosophy of mediation, including the commitment to principled negotiation whilst giving lawyers a prominent place at the table. It goes for "win-win" outcomes that the parties can live with, and emphasizes that they, not the lawyers, own the process and the outcome, that the lawyers do not control the process, but must manage it.[5]

Yet, whilst avoiding the cost of full-blown litigation; it is still much more costly than mediation, requiring both parties to hire lawyers and chalk up many billable collaborative session. .

On the other hand, it provides mechanisms and protocols for bringing in essential technical expertise, be these financial, legal, or psychological.[6] This information can be brought in objectively, not subjectively as in legal settlement, wherein expert advice is sought by lawyers to bolster their client's case rather than put it into the cooperative mix.

It is an alternative to mediation, particularly where one or both parties are unwilling or unable to negotiate face to face without the backup, support, and professional advice that is not available in mediation. The assurance that mediation manages power imbalances and hence preserves a level playing field may not suffice.[7] In a collaborative session, if one partner is more strident and dominating, the other weaker party will still have a forceful advocate.

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[1] Jennifer Jackson, with Pauline Tesler And Chip Rose , First Four Way Meeting: Do's And Don'ts , at www, collabgroup.com

[2] Victoria Smith, Collaborative law: More of the Same or A Quantum Leap? at www.collaborativefamilylawassociation.com

[3] Mediation is not exclusively or inevitably a therapeutic exercise. There is a continuum of mediation models that range from the agreement focus at one end and change focus at the other. Astor & Chimkin, op cit. at 253: "Mediation models at the agreement focus end of the continuum are highly task-orientated, do not attend to the emotional issues and concentrate predominately on rational discussion of the issues in dispute and on attempts to gain agreement". Somewhere in the middle is the mediation that enhances "the best issues f the children and adults by improving relationships and bringing about personal change in behavior". At 253.

[4] See Chip Rose , OCLF Conference Report, 2002, at www.collaborativefamilylawassociation.com

[5] James C. MacDonald, President of the Toronto Collaborative Family Law Group provides a good summation of the principles of interest based negotiation. on the paradigm shift from gladiator to collaborator, and on integrity and good faith bargaining (credibility and disclosure) in paper presented at the National Program on Family Law held in Kelowna, British Columbia in July 2002. At: www.collaborativefamilylawassociation.com He writes: "To the collaborative lawyer, legal rights are only the tip of the iceberg. Spreading down below the tip in ever widening circles is an assortment of needs, concerns, desires, fears, and preferences that can be lumped together as "interests".

[6] Accountants, financial planners, child counselors, and the like.

[7] Pauline Tesler, The Good, The Bad and The Ugly: Collaborating With Anyone Who Shows Up: An Interview with John McCall, at www.collabgroup.com

Mediation may lead to emotional exhaustion, may not reach an outcome, can be lengthy, and requires skills from the parties that they may not and cannot possess. There may be difficulty in achieving objectivity, and there may not necessarily be a level playing field. One party may be to passive. A person may be too ' fraught' to sit down in a mediation milieu. A collaborative lawyer may provide support, advocacy, and "backbone".

Moreover, a client may want more input, more Information, expertise, ideas, options, and solutions than a mediator is trained to, or expected to provide. The client may want to be guided and influenced (although not necessarily controlled). And from the intervener's point of view, this may be their own preferred modus operandi. Pauline Tesler interviews Californian matrimonial lawyer John McCall. His is an interesting insight on the controversial issue of mediator neutrality.

"My problem is the considerable influence that the mediator's sense of fairness can have over the clients in such situations, and on the other hand I know the difficulties that can arise if the mediator expresses no opinions. I just don't feel comfortable in that role. I don't have any problem bringing my own sense of fairness to the collaborative table, however. My opinion in that situation is as legitimate as anyone else's, and there are structural elements of the collaborative approach that prevent my personal sense of fairness from having disproportionate power in the process."[1]

In short, lawyers who can handle the impartial, objective, neutral approach, can do mediation. Those who do not wish to do so, but can trust in their own values and integrity, can do Collaborative law.

And out there in the world of souring relationships, and sundering families, where parties involved have diverse and differential coping and managing skills, there is a ready market for both.

Soft Centre

Pauline Tesler expounds on the "soft" centre" of Collaborative law: "Traditionally, we see our role to be one of solving our client's legal problems, rather than one of recognizing and preserving our client's relational and inner values once their marriage breaks down. Our clients need us to assume a larger role. They want to be able to hold on to what was positive from their past life and create a future life with a sense of integrity that is not destroyed by the divorce process".[2]

Tesler provides a matrix graphically grading parties who need more or less professional help in divorce dispute resolution.[3] At one end of her continuum are "high functioning, low-conflict spouses" who need little or no help. Her, mediation would work well, with the parties doing more of their own problem solving. In the middle are those who would reach agreement with the help of collaborative lawyers. And at the far end, are "low functioning, high-conflict spouses" who may reach agreement "on courthouse steps", with traditional legal counsel, or who are incapable of reaching agreements and require third party decision-making.

She considers ways of identifying clients who will benefit from collaborative representation.[4]

There are those who are ready, willing and able to cooperate face-to-face in reaching agreement, and those who express strong commitment to co-parenting. Then there are those still in the early stages of the grieving and recovery process, who are not ready for cooperative problem solving, those who need to blame others and not take personal responsibility for the situation; and those who have great difficulty in managing their emotions and who would not withstand the stress of a collaborative session. And out on the fringe, parties to domestic violence, character disorders, and serious psychiatric diagnoses, who would tend to do poorly in any cooperative milieu.

Quite apart from these criteria, Collaborative law isn't right for every case. If either party is operating in bad faith, it won't work. Nor is Collaborative law appropriate when a relationship involves abuse – or when parties just don't want to cooperate. Likewise, both lawyers must trust each other's integrity, professionalism and commitment to the process.[5]

There is not much difference in these analyses to criteria as to whether or not mediation is appropriate in a particular situation.

But whether one is considering mediation or Collaborative law, one thing stands out from the effectiveness and appropriateness of the two models, one, which unites rather than divides them. It helps if the parties are moving on.

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[1] ibid.
[2] Tesler, op cit. at www.collaborativefamilylawassociation.com
[3] Tesler P, Collaborative law: Achieving Resolution in Divorce Without Litigation, American bar Association, 2001, at 14.
[4] id. at 94-95
[5] Elaine McArdle, Divorce Without the Bloodshed: The 'Collaborative law' Revolution Is Making Life Better for Clients and Their Lawyers, Lawyers Weekly USA, at http://lawyersweeklyusa.com/alert/usa/divorce.htm

In utilizing and benefiting from both cooperative models, it helps if the parties have come to accept the realities of their situation: that the naming and blaming is limited if not actually over, that the emotional roller coaster has slowed down. That they have begun, verbally at least, to accept their responsibility, their contribution towards the breakdown. That anger and bitterness, if not gone, then at least subsided somewhat, even though they might still be hurting. That a sufficient amount of trust has been restored to enable them to see themselves as collaborators in the process. That they have agreed not to use the children as hostages in their conflict. That they are willing and able to communicate with each other. And indeed, there has to be a degree of "letting go" before you can tackle substantive issues like money, property, assets, and parenting.[1]

In short, if one or other partner remains immobilized by the emotional impact, the process will be enmeshed in that out-of-step reeling and dealing described in Part One. If one partner holds on to rigid positions, keeps making demands, and resisting counter offers and options, the other will keep standing form, resisting, fighting back (or simply surrendering).

The outcome: a perpetuation of their relationship's downward spiral. And, in all likelihood. Their day in court. In short, any one of the people around the mediation or collaborative table can sabotage the process.

If they are to move on with their lives, the tug of war has to cease. Even for no other reason than to safeguard the interests of those whom we identified as the innocent victims caught in the crossfire

It is this issue above all which best differentiates the cooperative modes from the adversarial approach, and it is here that practitioners of both mediation and Collaborative law nail their credentials to the mast, both as a matter of principle and practice, and also as a marketing tool.[2]

"Because of the importance to the children of keeping the level of inter-parental conflict low and the level of mutual support high, mediation needs to be a first method attempted for resolving differences in divorce. As a society, we need to help divorcing families develop the emotional and financial support systems for maintaining a high quality of continued co-parenting through the divorce process and for the years after".[3]
Children therefore must be in the loop. But they should be involved with care. If they are at an age to understand, and cope, they should be consulted about their preferences. Not to do so could be folly. Adolescents can cause the breakdown of a carefully crafted parenting regime. There is a therefore a good, practical reason for them to be involved in some way in making the arrangements. But children should never have adult responsibilities thrust upon them, and should not feel that they are choosing between their parents.[4]

Score Card

So how do the two cooperative models bear up with respect to our demanding shopping list?

1. *Allow for the expression and resolution of feelings rather than the assertion of rights.* This is central to the 'vision statements' of both models. But its effectiveness is relative to the training and the skills of the interveners.

2. *Calm, stabilize, and diffuse emotions, fears, and resentments.* This too is relative to the skill sets of those involved, and depends very much on the intensity of emotions and feelings at play. As we have noted, if the wounds are still raw, no amount of dressing will enable healing.

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[1] See Barry Simon, The Not So Gentle Art of Letting Go, Divorce magazine, Winter 2001, at www.mediate.com, on the steps of "letting go", of facing reality, coming to terms with 'disillusionment over unfulfilled expectations, self-anger for "being such an idiot", and grief over the loss of the imaginary relationship that never was and the real one that took its place ". Also, Mark Goulston, op cit. on "positive and negative coping behaviours".

[2] Astor & Chimkin, op cit. at 255: "The prevailing ideology of family mediation is one of child protection and a commitment to ensuring an agreement between the parties which protects the best interests of the children".

[3] Donald Saposnak, How Are The Children Of Divorce Doing? Feb 2002, at www.mediate.com. Also, Rachel Fishman Green, op cit. at www.mediate.com: "Children perceive their parents neutrally during a divorce. As much as you might want your child to side with you against the other parent – it won't happen – and it shouldn't happen. A child will never thank you for taking away his mother or father. The children each contain a little bit of each parent, and they are able intuitively to understand both parents' points-of-view. The children understand the limitations and strengths of both their parents and love them".

[4] Boulle, op cit. At 236, he lists four approaches: no involvement with parents responsible for communications to them about the process and the outcome; post mediation involvement with the mediator informing them or the outcome and its practical implications for them; partial involvement joint or separate sessions, allowing them to listen to their parents view without any role in decision-making; full involvement in all stages and aspects (rare in practice and can only operate with older, more mature children). It all depends on the children's age, maturity, understanding and ability to cope. At 238, he cites Folberg and Taylor on the option of using children as an 'advisory panel' to reality test a proposed parenting arrangement. Seeing the children; reaction, maintains the parents; obligation to make decisions whilst allowing the children a sense of involvement in reviewing and commenting on the scheme.

3. *Enable communication between parties in conflict, including the importance of 'venting" on one hand, and "listening" on the other.* Separating partners have serious communication problems. Both models foster constructive communication and seek to assist parties and coach them in new and better ways of communicating with each other, and then to actually get them communicating.[1]

4. *Model "good" behaviour vis a vis communication and cooperation.* This is implicit in the mediator or collaborative lawyers' 'job description'. This too is relative to the skill set of the intervener, and also to the receptiveness of the parties to such modeling. Emotions, grief, anger, and other "interference" may impede "reception" of positive messages.

5. *Explore interests rather than contentious and perhaps irreconcilable rights and positions*. The emphasis in both models is on interest-based, principled negotiation. Again, its effectiveness is relative to the training and the skills of the interveners, and also, the psychological state of the parties and their readiness to participate cooperatively and constructively.

6. *Enable the consideration of options and solutions, and provide opportunities for reality checking these*. As above, together with an ability and willingness to cooperate, work through options and solutions, reach agreement, and hold to that agreement.

7. *Rebuild trust in a cooperative, problem-solving relationship – a new, different, less dependent relationship.* This depends very much how effective the cooperative models are in addressing the preceding points.

8. *Strengthen and up-skill the parties in dealing with future problems*. As above, the parties have to be a frame of mind conducive to learning outcomes.

9. *Address and redress power imbalances that may intimidate and silence either party*. This has concentrated the thoughts of many practitioners and academics in the area of PDR. Both models profess to do this satisfactorily, but Collaborative law may have the edge Much depends on the skills and authority of the mediator, and of course, the circumstances of the mediation, but at least in collaborative contexts, weaker parties will have a forceful advocate who it is to be assumed will stand up for them.

10. *Address and mitigate the risks of abuse and violence*. The problem of mediating or engaging in a collaborative process where there has been past or continuing violence has invited much intense discussion, centering on whether either model is appropriate in such circumstances. The consensus is that provided certain stringent safeguards are in place, neither model should be ruled out.[2]

11. *Look towards after the children's' best interests*. As noted above, is this issue above all best differentiates the cooperative modes from the adversarial approach.

12. *Address and accommodate the needs of "absent parties" who have an active interest in the outcome.* Both models address this.[3] Interveners should ensure that the relevant parties are confident of dealing with their 'absent parties', and work with these where feasible and practicable.

13. *Rebuild relationships between family members as a basis for the future*. This hinges very much on how the models deal effectively with the questions of children and significant others such as new partners and grand-parents.[4]

14. *Provide a framework for arranging the family's affairs for the future*. This depends on a satisfactory rendering of all the above.

On the basis of the literature, and material published on a host of Websites, and summarized in the appendices, the mediation and collaborative law models would appear to satisfy the aforegoing criteria.

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[1] In mediation, it is the mediator. In collaborative law, it is the lawyer. In other non-interest-based processes, it is the intermediaries who do the communicating.

[2] See above, at page 5-6. Also, refer Rimelsspach, Boulle, and Astor & Chimkin, op cit.. Astor & Chimkin, at 257: whilst the abuse itself is no mediatable, issues such as housing, maintenance, and child access and contact are in fact mediated. The quality of intake procedures is viewed as essential in determining the appropriateness of mediation in cases where violence or abuse is suspected.

[3] Boulle, op cit. at 236, suggests that the mediator should work with the absent party where feasible/practicable on options for dealing with the problem: identify interests, priorities, options and choices for that party. And also to deal with the 'external ratifiers", be these lawyers, accountants, professional advisers (therapists, counselors, etc). or church bodies or whatever. The mediator must ensure that the relevant parties are confident of dealing with their 'absent parties'.

[4] Refer Boulle, op cit.

Reality Check

In conclusion, let us play devils advocate.

All third party interventions in conflicts are about change and changing – asking people to change how they think and feel about each other, about resolving what has happened, and about moving onto what will happen. Ideally, there will be a degree of closure, an intention to put the past behind, to let go, to move forward.

In reality, however, this may not be a realistic expectation, particularly when people are asked to abandon, forgive, and forget. Often a conflict is never fully resolved to the satisfaction of all parties, and whilst people may be prepared to bury the hatchet under immediate circumstances and pressures, there are some among them who will always remember where it is buried.

But, even if ostensibly unsuccessful, even if outcomes are inconclusive, a mediation or collaborative law process may actually achieve goals of bringing people together to resolve their differences, of improving communications, and of increasing their awareness of their own and others' needs and interests. Parties discover each other's concerns and interests. They vent emotions in a positive environment, with a consequent lowering of hostility and antagonism. They define the dispute more clearly, prioritizing issues in dispute, generating a range of optional 'solutions', and agreeing on procedures or methods to resolve substantive issues. They are forced to confront the conflict and not abdicate responsibility of settlement decisions.[1]

But much can go wrong beyond the mediation or collaborative session. Once an agreement has been finalized (or not, as the case may be), and a transformative process has occurred)(or not, again as the case may be), the participants are in most instance requred to return to an environment that has not changed. Will the emotional whirlwinds be stilled? Will the grieving, the anger, the sense of loss, be lessened? Will the lives of parents and children enter calmer waters? Will there be adequate support in the short term and beyond to enhance the likelihood of sustained behavioural change and the development of dispute resolution skills?

One should be cautious about overstating the therapeutic and other benefits. Astor & Chimkin write: "The process of separation in a divorce is inevitably painful for the parties and the children. Family mediation is not a panacea. Divorce cannot be made painless by procedural change".[2]

It will still hurt. It will still be hard. But at least there exists a less difficult, less painful path. And this path, that of a practical, sympathetic and effective model, should be available and accessible to all who may wish – or need to use it.

Yet, neither model will be of use to those still lost in their feelings, caught in the mesh of emotions, racked by grievance, resentment, and unresolved anger, unable to go back and unable to move forward. Or to those locked into abusive relationships or social straitjackets of cultural and religious norms, conventions and restrictions. And neither would the models be readily available, accessible, economical, conceivable, even, to the more disadvantaged of society, the down and the desperate, battered and broken by lack of education, by poverty, or by isolation.[3]

There is scope here for another paper. Or several.

But friendships, kindred, and love's memory
Die, cool, extinguish, hearing or beholding
The vice of woe or face of misery
Sir Walter Ralegh

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[1] David Augsberger, op cit, at 91: "Mediation is not only the ability to define and clarify, to separate and discern, to link and reconcile opposites; it is also the capacity to absorb tension, to suffer misunderstanding, to accept rejection, and to bear the pain of other's estrangement".

[2] Astor & Chimkin, op cit. at 254.

[3] Notwithstanding the fact that assistance is indeed provided by the Family Court and agencies such as relationships Australia. Sometimes this is not enough to bind the wounds ..Refer to Appendix 6: "Shattered Lives".

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Appendix 1: The Anatomy of Relationship Breakdown

Environment	Feelings	Manifestation	Needs
Adventure	Abandonment	Acting out	Acceptance
Beliefs	Anchorless	Anger	Change
Boredom	Anger	Apathy	Change
Ceremony	Anguish	'Bad' Attitude	Closure
Chain-reaction	Anxiety	Bitchiness	Comfort
Change	Betrayal	Blaming	Compensation
Complacency	Bitterness	Change Of Behavior	Completion
Contentment	Blame	Change Of Habits	Empathy
Difference	Confusion	Change Of Lifestyle	Explaining
Diversity	Confusion	Clouded judgement	Feedback
Honour	Cynicism	Competitiveness	Finality
Identity	Dealing	Condescension	Focus
Instability	Denial	Defiance	Forgiveness
Laziness	Depression	Denigration	Friends
Loss Of Control	Desperation	Dependence	Healing
Opportunity	Directionless	Depression	Independence
Memories	Disillusion	Discomfort	Letting Go
Preparation	Dislocation	Disloyalty	Moving On
Right of passage	Distrust	Disrespect	Normalization
Ritual	Excitement	Distraction	Patience
Roller coaster	Fixation	Distrust	Reappraisal
Self	Frustration	Emotional Outbursts	Reassurance
Self-esteem	Grief	Fatalism	Reconciliation
Silence	Guilt	Fatigue	Relations
Spiritual	Hatred	Hurtfulness	Release
Symbolism	Hostility	Hysteria	Resolution
Turmoil	Insecurity	Illness	Restitution
Uncertainty	Loneliness	Impatience	Revenge
Unpredictability	Low self-esteem	Impulsiveness	Solace
Values	Misogyny	Infidelity	Solitude
	Mourning	Insomnia	'Space'
	Negativity	Intolerance	Venting
	Numbness	Leaning	Transformation
	Obsession	Letting it out	Understanding
	Opportunity	Listlessness	
	Pain	Losing it	
	Paranoia	Meanness	
	Pity	Melancholy	
	Powerlessness	Medication	
	Questioning	Myopia	
	Raw emotions	Naming	
	Reeling	Negativity	
	Regret	Nervousness	
	Rejection	Prejudice	
	Relief	Questioning	
	Remorse	Rage	
	Resentment	Rebelliousness	
	Resignation	Recklessness	
	Self-criticism	Restlessness	
	Self-Loathing	Sarcasm	
	Self-obsession	Self-Injury	
	Self-Recrimination	“Seeing red”	
	Sensitivity	Shock	
	Shame	Short Fuse	
	Sorrow	Stubbornness	
	Stress	Substance Abuse	
	Threat	Suicidal	
	Value	Threats	
	Vengefulness	Transference	
	Victimization	Untrusting	
	Worry	Vagueness	
	Worthlessness	Venting	
	Yearning	Verbal Abuse	
		Verbalizing	
		Violence	
		Vocalizing	

Appendix 2: MODELS OF MEDIATION

The following table is that developed by Boulle but with an additional column that considers the more recent Collaborative Law model, and adds other relevant commentary.

	Settlement Mediation	**Facilitative Mediation**	**Therapeutic Mediation**	**Evaluative Mediation**	**Collaborative Law**
Also known as	Compromise mediation	Interest based, problem solving mediation	Reconciliation, transformative mediation	Advisory, managerial mediation	Family Mediation
Main Objective	To encourage incremental bargaining towards compromise, at a 'central' point between the parties' positional; demands	To avoid positions and negotiate in terms of the parties' underlying needs and interest instead of their strict legal entitlements	To deal with underlying causes of the parties' problem, with a view to improving their relationship as a basis for resolution of the dispute	To reach a settlement according to the legal rights and entitlements of the parties and within the anticipated range of court outcomes	Combines the positive problem-solving focus of mediation with the lawyer-guided settlement conference.
Definition of Dispute	In terms of positions, based on parties' self-definition of the problem	In terms of parties' underlying interests – substantive, procedural and psychological	In terms of behavioural, emotional and relationship factors	In terms of legal rights and duties, industry standards, or community norms	In terms of parties' underlying interests – assisted by external legal and professional advise and guidance
Types of Mediators	High status (barrister, manager)' no necessary expertise in the process, skills and techniques of mediation	Expertise in mediation process & techniques; no knowledge of the subject matter of the dispute	Expertise in counseling or social work, with understanding of psychological causes of conflict	Expertise in substantive areas of the dispute, no necessary qualification's in mediation techniques	Parties represented by and assisted by experienced family lawyers who are responsible for the procedure
Mediator's main Role	Determine parties' "bottom lines" and through relatively persuasive interventions, move them in stages off their positions to a point of compromise	Conduct the process, maintain a constructive dialogue between the parties and enhance negotiation process	Use professional therapeutic techniques before and during mediation to diagnose and treat relationship problems	Provide additional information, advise and persuade the parties, bring professional expertise to bear ion content of negotiations	A form of 'facilitated negotiation" with the pressure to 'settle' and hence lawyers' coercion or pressure absent
Other Characteristics	Limited procedural interventions by mediator, positional bargaining by parties. Shuttle negotiation, posturing	Low intervention role for mediator, parties encouraged to fashion creative outcomes around mutual interests	Decision-making postponed until relationship issues have been dealt with	High intervention by mediator, less party control over outcome	Lawyers assist in eliciting and sharing information, brainstorm options, evaluating alternatives, and offer proposals
Strengths	Understood by parties, culturally accepted, not difficult to do, little preparation needed	Can make most efficient use of negotiation, opportunities, controlled by parties. Can address power - imbalances, stabilize, calm and focus parties, assist reality checks, modeling collaborative behaviour, build parties' competence and confidence in negotiations	Can lead to 'resolution' rather than just 'settlement' of dispute	Mediators' substantive expertise used, outcome within range of likely court verdicts	Controlled by parties. Can address power - imbalances, stabilize, calm and focus parties, assist reality checks, modeling collaborative behaviour, can build parties' competence and confidence in negotiations
Shortcomings	Overlooks parties' needs and	May not reach an outcome, can be	Could be prolonged and terminate	Blurs the distinction between mediation	Could be prolonged, may not reach an

	interests , can be manipulated through initial ambit claims, difficult to cross last gap	lengthy, requires skills from parties. May lead to emotional exhaustion. Not necessarily a level playing field. One party may be to passive	without any agreement, confuses counseling/ mediation roles	and /arbitration, does not teach parties skills for the future, whilst giving additional responsibilities to the mediator	outcome, can be lengthy, requires skills from parties. More costly than mediation.
Area of Application	Commercial, personal injury, industrial disputes, sexual harassment	Community, family, environmental, partnership disputes	Matrimonial, parent, adolescent, family networks, continuing relationship disputes	Commercial, personal injury, trade practices, anti-discrimination, matrimonial property disputes	Family disputes
Other factors	Emotions and post-separation and divorce dynamics rarely factored in. There is one purpose – settlement of the outstanding legal issues involving the clients. Children and future relationship not central to the agenda.	Settlement Meetings do not usually involve communication directly between the parties. In mediation, the parties talk to each other, with the mediator present. Direct negotiation between the parties expedites the resolution of issues.			Can be inappropriate in certain stages of dispute, or where there is active domestic violence, or psychiatric or character disorders, or where people have difficulty in managing their emotions. Lawyers must learn new, non-adversarial habits
Boulle L, Mediation –Principles, Process, Practice, Butterworths1996 at 29-30					

Appendix 3: The Promise of Mediation

In most writing on Primary Dispute Resolution (hereafter referred to as PDR) there us an underlying thesis that most conflict arises out differences between individuals and groups – differences of opinion, world-view, perceptions, directions, access to finite resources, or whatever. That this is caused by (and thence exacerbates) communication breakdown (including non-communication and miscommunication) concerning positions interests and needs. And thus contributes an inability to negotiate these in an objective manner.

Recognizing the need to assist parties in dispute to achieve resolution or reconciliation, and providing processes, procedures, and personnel to facilitate this, PDR is claimed to improve the parties' ability to negotiate with each other, improve their relationship with each other, and to improve their ability to deal with disputes or differences in the future. The claim is made for PDR in general, and classic mediation in particular, that that the parties maintain control of the dispute and its outcome whilst the mediator controls the process.[1]

David Augsberger writes that a competent mediator can assist parties in many ways - in breaking open the conflict, untangling the issues, the behaviour going on between the parties, the conflict that enmeshes them, separating people (and their attitudes and actions) from the problems (the conflict situations): supportive of people as they clarify their own views and values whilst being confrontational with the conflict situation itself - hard on the issues soft on the people.[2]

And Boulle: *Mediation is a system of practical decision making. It sometimes resolves disputes, it sometimes contains them, it sometimes defines them more clearly, but it always provided the opportunity for making decisions, even if only the decision to submit the dispute to a court, the boss, an international tribunal, or some other authoritative decision-maker.* [3]

It is about making choices, about taking control. But it is also about being realistic – realistic choices, realistic decisions. And the mediator's role, in Boulle's view, is to enable the parties to limit their options to those that are realistic and feasible, and to make *practical decisions* in the light of them.[4]

Mediation can be used to settle disputes, to define problems or disputes, to manage conflict, and to prevent conflict.[5]

Then there are the transformative aspects of mediation – mediation as a source of self-awareness, empowerment, forgiveness, and reconciliation,[6] as an educative and therapeutic, transformative process that enables empowerment and responsibility, and hence benefits the parties regardless of the outcome.[7] It is important that the mediator has an understanding of conflict in order to assume a role as mentor and exemplar, coach and encourager, and as modeler of effective communication and problem-solving skills.[8] This enables the mediator to inform and educate parties about normal patterns of conflict and ways of responding to it.[9] It is empowering for the parties to have the conflict normalized buy being educated about its nature and its resolution. It allows for the expressions of emotions associated with conflict, particularly anger, betrayal and lack of acknowledgement – subject to the parties adhering to mediation guidelines.

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[1] Astor.H and Chinkin.C, Dispute Resolution in Australia, Butterworths 1992 at 47, 49 and 102 . Mediation is a process-based system. Certain core procedures are indispensable regardless of the particular circumstances of the mediation. A recognized process assists the parties to make decisions – it does not make the decisions for them. Refer: Boulle L(2), Mediation – Skills and Techniques, Butterworths, 2001 at 8

[2] Augsberger DW, Conflict Mediation Across Cultures ,WJK 1992, Chapter 7

[3] Boulle (2) op.cit. at 8. A fresh slant on Folberg and Taylor's well-used definition: *…the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participant's own responsibility for making decisions that affect their lives. It is therefor a self-empowering process.* UTS Centre for Dispute Resolution: Mediation Course Manual, 1995 at 28

[4] id. At 22 . He summarizes the mediator's main functions as (a) creating favourable conditions for the parties; (b) assisting the parties to communicate; (c) facilitating the parties' communications ; and (d) encouraging settlement.

[5] id. at 4, and at 13-14, the four mediator functions (1) Creating favourable conditions for the parties; (2) Assisting the parties to communicate; (3) facilitating the parties' negotiations; and (4) encouraging settlement.

[6] id. At 8

[7] McDonald D & Vagias A, op.cit.

[8] op.cit. and Boulle (1), Mediation – Principles, Processes, and Practice, op cit. at 45-56. The mediator thus steps out of role to act as a coach, trainer and educator in the assisting assist the parties to learn and develop the principles and techniques of constructive problem solving): the passing on of skills (listening, assertiveness, issue identification, problem-solving skills, style awareness and flexibility).

[9] Boulle (2) op cit. at 10 Helping people to preempt and/or resolve their own conflicts; helping people learn DR techniques; assist communication and understanding the nature of conflict

The difficulties of direct, face-to-face, unmediated, negotiations are many. Given the difficulty of reconciling and overcoming the objective and subjective issues that arise, the idea of bringing a third party to mediate is an attractive one. Third party interventions can contribute to problem-solving by making sure that disputants attack the problem rather than each other, and by keeping the focus on interests rather than on positions.[1] If the parties have unrealistic assessments of their situation should the negotiations fail, a neutral evaluation of the walk-away alternatives may be indicated.[2]

The following table summarizes the promise that mediation offers in conflict resolution. Drawing upon David Augsberger and Lawrence Susskind,[3] its primary focus is upon difficulties facing cross-cultural mediation and the skills required. But it is equally applicable across a broad range of conflict scenarios.

Boulle has noted that disputes can be dealt with on three levels. There is the power level, essentially a contest of strength in which victory generally goes to the strongest. There is the rights level, wherein parties in conflict can present their dispute to an authoritative institution or individual to make a decision as to which party is in the right. And lastly, the interests level wherein parties in conflict, either on their own or with varying degrees of assistance, negotiate their way to an agreed settlement. He notes that where a dispute resolution focuses on interests, there is more likely to be a greater satisfaction with outcomes, less strain on relationships, and a lower likelihood of the dispute recurring.[4]

Dispute resolution focussing on interests endeavours to resolve the conflict of needs. This is the essence of Principled Negotiation: separate the people from the problem; focus on interest, not positions; generate a variety of possibilities before deciding what to do; and insist that the result be based on some objective standard. [5]

In a family context, however, this may not be practicable for a variety of reasons.

There is a temptation to get caught up in the issues of the dispute. This may be in an emotional sense insofar as the mediator's value system may come into play and with it prejudices and preferences that colour his or her perception of the facts of the case. The mediator may take sides or play favourites, or merely be perceived as doing so. Impatience and frustration on the part of a mediator may result in a guided solution at best and an authoritarian solution at worst that fails to resolve the matter. The needs of the conflicting party or parties will nor be met; they may feel that decisions are being made without their consultation or consent.

Mediation as a PDR process endeavours to addresses issues such as these by giving dispute resolution focus, form and procedure whilst addressing above all else, the interests and needs of the disputants.

Mediation is, in a perfect world, value-free, and available to all (within the limits of realistic expectations, financial means, and practical access, of course). These are the accepted *rules of engagement*: the mediator is independent; the mediator does not impose solutions on the parties; their participation is voluntary and egalitarian; they *own* the procedure; the settlement, if achieved, is consensual; and, proceedings are confidential.

Does the mediator see him/herself as a player or as a facilitator? Is the mediator's power employed in support of the process to influence the content and outcome? Strong directive intervention by a mediator is likely to be effective at producing settlements. The mediator's world-view and understanding of the issues begins to influence that of the parties, and the mediator's solutions become part of the process.

Doubt has indeed been cast on whether mediators are indeed actually neutral. As Mayer points out, a mediator had power by virtue of the fact that the parties agree to be in mediation and have chosen a particular mediator. He/she has power also by virtue of the process, especially its impartiality and confidentiality, the mediator's ability to articulate the issues which concern the parties, and power derived from expertise in substantive areas.[6]

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[1] Fisher, R. Kopelman, E. & Kupfer Schneider, A. Beyond Machiavelli: Tools for Coping with Conflict, Penguin Books 1994 at 123

[2] id. at 125

[3] Susskind, op.cit.

[4] Boulle (1) at 65-66.

[5] Fisher R. & Uri W Getting to Yes, Arrow Books 1997, Chapter Two, from 18. This flows through to the philosophy behind assisted DR mechanisms such as mediation: that the very nature of consensual problem solving may ameliorate conflicts of emotions and values en route.

[6] Astor & Chinkin, op cit. at 104. The mediator's interventions may be subtle and not apparent to the parties; the nature of the influence exerted may be invisible, and it is highly likely to be variable. But it may be there nonetheless. The mediator may have a favoured or disfavoured outcome, may exert pressure towards the former, may create more opportunities to talk through the favoured option, make evaluative remarks more in support of it. By ignoring some interventions by the parties and choosing to pursue others, clients are steered in directions chosen by the mediator.

The sole presence of a third party in the mediation room creates an impression of that party's involvement in the substantive issues of the case. And who knows what motives the mediator has for achieving a solution, any solution. Professional self-esteem? Success rate? Another resolution reached (regardless of the quality, fairness, or durability of that outcome)?

Indeed, this goes to the heart of any discussion of the qualities demanded of effective mediators – that of whether or not a mediator can indeed be completely impartial given that his or her own background, opinions, political bias, or professional motivation, will colour mediator behaviour. Can the mediator really check his or her baggage in at the door?

It may be preferable for a mediator to possess an outsider's perspective, one unprejudiced by the facts of the case and unconnected to its outcome. .

There will be the underlying concern on the part of the parties for a fair and balanced hearing, and for confidentiality.

The mediators' neutrality may therefore be an ideal rather than a reality. Perceptions are important. There may be an expectation on the part of the disputants that the 'neutral' will be directive because he or she is appointed by, say the court, or recommended by one's lawyer, or whatever. One party may have just agreed to 'go along; with mediation to satisfy the other or to seek some solution, any solution. Because of this, parties may not always feel that they are in control of their dispute.

Party control may be compromised by power imbalance between the parties. If there is such an imbalance, and it is not dealt with in the process, 'party control' becomes another way of describing exploitation of the weak by the strong.[1] Persons with limited access to information and unable to articulate effectively their interests, concerns, needs and rights, might feel quite unable to resist pressures to attend a mediation, and once there, be unable to assert their needs in relation to the other party in the dispute. A danger of consensuality and a neutral role for the third party is that the outcome of the process will simply reflect the power relationship between the parties themselves.[2]

If the mediator does not provide affirmative support for the weaker party in mediation, the imbalance of power will almost certainly be reflected in the agreement. But the stronger party may perceive such support as bias on the part of the mediator and may not therefore wish to participate further in the process.[3] Where a mediator acts to address a power imbalance, his or her neutrality is compromised

Then there is the matter of power. Not just the power imbalances between the parties, but also of the third party.

Power, like neutrality, is a concept driven as much by perception as reality. It originates from many sources. From position and status; from economic or financial means; from force of personality, gender, size and physical presence. And in its rawest form, the power to help or hurt others.

Emotional issues derive from all this. Negative attitudes towards each other; reluctance to speak out for fear of the repercussions and payback that may or may not be applied (remember, perception is just a powerful as reality in a conflict situation). Nervousness, tension, stress, and those ineffective dispute resolution strategies discussed above: denial, appeasement, or surrender in the face of a perceived stronger party.

Consider power and authority from the point of view of the intervener too.

The mediator's integrity, and that of the process, will always depend on creating and maintaining a delicate balance between interventionist and non-interventionist, and between parties' right to self-determination and the mediators function of encouraging them to make decisions and reach agreements. It is relative too. Whether an intervention is one of influence, pressure or coercion will depend on the attitudes and circumstances of the parties, the personal disposition of a party, their educational status and emotional stability, how they may react to the various forms of encouraging settlement.[4] Boulle sums it up succinctly:

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[1] id. at 74, quoting S. Roberts:…retention of control over the outcomes by the parties themselves does not necessarily remove the coercive element which is seen as an objection to third party decision making. Where this control lies with the disputants themselves, that may enable one party to enforce a solution which would not have been tolerated by an even-handed outsider.

[2] id., at 105 .In the absence of an authoritative and powerful third party, and at 95, quoting S. Murray,
The disputing party who is s stronger and has more resources and more effective powers of persuasion will tend to do better. The weaker party argues for the best that he or she thinks she can get, not what he or she thinks is most fair.

[3] id., at 107-108 with reference to the difficulties of redressing the imbalance without being perceived as compromising neutrality (per Davis and Salem)

[4] id. at 193-194

This all suggests the need for a delicate balance between assertion and oppression, between persistence and pressure, between patient and endurance.[1]

The voluntary nature of the PDR process is often emphasized. If there is a degree of perceived compulsion, doubt may be cast on the alleged flexibility of PDR. The parties may not believe that they retain a great deal of control over their dispute resolution process. They may in fact take what they are given including the identity of the third party.[2] Hence, quite apart from third party neutrality, there are limits to voluntary nature of the process, the flexibility, and even consensuality and party control, the hall-marks of PDR.

Ideal conditions for mediation include the willingness of parties to participate in the process, to maintain confidentiality, to interact in a rational manner; and to have direct, open and honest communication. And time: mediators need to work against the pressure of *fixing the problem and fixing it quickly* in order to shorten the process.[3]

But first, you must get the disputing parties to the table. What if one side does not want to face the other? What if one side does not recognize and acknowledge that there is a problem to be solved, a conflict to be resolved? What can an intervener do to in these circumstances to advise the parties, to encourage them to participate in a dispute resolution process, to prepare them for such participation, seek other means of resolving the conflict.

Must the mediator or conciliator engage reluctant parties, either independently or together, in a reality-checking exercise that obliges them to consider the alternatives, and indeed the consequences of not engaging in some form of reconciliation.

If this fails, and the parties cannot be brought together, then perhaps other measures must suffice. Shuttle 'negotiations' perhaps, or each side taking positions and modifying behaviours that are calculated to ease the mutual tensions and stabilize if not mend the relationship without actually confronting reach other.[4]

One should always be cautious respect to shuttle mediation or indeed any facilitation or conciliation process that tackles the problem by dealing with the parties individually and apart – and particularly the dangers of *Shuttle by Default.* There should always be a specific reason for shuttle mediation – never should be for its own sake!

Legal or safety reasons, for example; one party may feel intimidated or afraid; high emotions may be exacerbated; there may be gross imbalance of bargaining power that the third party cannot mitigate. The mediator becomes the sole messenger for offers and counter-offers, the sole conveyor of information on the attitudes and behaviour of the parties. The mediator can thus impose his/her own perspective/slant/spin on the issues, the information passed back and forth, and the outcome. The confidentiality principle may be compromised, as may be the concepts of partiality and the use (and abuse) of mediator power.[5]

It can be argued that such mediation is not true mediation. The parties do not work collaboratively together on the problem. They do not learn how to negotiate with each other. They do not have the opportunity to improve their relationship for the future.[6]

The degree of compulsion to go to mediation, or consensual participation, is proportionate to the degree of the intensity of the conflict, and also the degree of urgency and seriousness as interpreted by one or both of the parties. And in family DR, the primary impetus to go to mediation may be to reach a financial settlement or the needs of the children.

It is accepted that in any mediation environment, the power and/or influence of absent parties can impact upon issues and outcome, and must therefore be taken into account. There are the parties' children, their relatives, their

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[1] id. at 194
[2] Astor goes through these issues with respect to litigation and court-based or court-related PDR schemes. op.cit. at 49
[3] McDonald & Viargas, op.cit. In addition, participants are asked to commit to certain rules of engagement: To try to respect each other's views and perceptions: to try to actively listen: to take turns, and to minimize disruption; to abstain from judging, blaming, labeling and attacking: to handle as best they can their emotions, and those of the other party (tears, anger, sadness, loss, and the like).
[4] The dispute resolver must always be prepared to *go with the flow* when defining and diagnosing a dispute prior to intervention. He or she must be able to think on one's feet in assessing what is requred, and selecting a *fit* from a variety of models: facilitation, conciliation, simple advise and guidance, mentor, enabler, teachers, agony aunt, fire-brigade, or mediator.
[5] Boulle (2) ibid at 104 and 198. In addition, there is potential for error and omission when conveying parties messages to each other, whilst parties ma be sensitive to the amount of time the mediator spends with each side. Some other drawbacks of parties not facing each other: communication is liable to distortion; their focus is more on substantive rather than emotional content; it is easier to engage in positional bargaining, threats, bluster, and other negotiation tricks; there may be attempts to persuade the mediator instead of each other; unconsciously using the mediator as their agent to advocate their case to the other side.
[6] id. at 199

friends, and their colleagues and associates to be considered. Some of these may have a keen interest in the proceedings and may demand input in the shaping of any resolution, settlement or formal agreement that emerges from the mediation.

Absent parties cannot be ignored. They may have considerable influence over one or other party, and whilst not being required to ratify an agreement, can still nevertheless stymie it by reticence, intransigence, or obstructiveness. It is critical therefore that the mediator ascertain from parties the existence of stakeholders whose approval is, formally or informally, a required factor for success. Or of any others who will be insist on knowing how the matter is settled – and who may, indeed, want input.[1]

The mediator can anticipate absent party influence and take it into account. Make contact with them, involve them, and consult with them. Advise as to how parties to consult with them. Ask how parties will counter anticipated criticism, or potential sabotage of an agreement. In short, the mediator must identify interests, priorities, options and choices of the absent parties.

And the most critical, most powerful absent party is the children. Their shadow is cast over the dispute resolution processes, They have an awareness of what is happening, and have a vested interest in its outcome. And the length of the shadow cast is proportionate not only to the impact upon the spill effect of the dispute, but also, to the power and influence of one or both of the parties. For example, the custodial parent for example will have more direct influence upon the children's attitudes toward the situation, and towards the absent parent.

Associated with this is another imperative of mediation – the parties' power to settle, The power to actually decide and agree on an outcome, to sign-off on a mediation agreement, is a fluid thing that advances and retreats depending on the progress and outcome as perceived by one or other of the parties. It may be conditional, limited, concealed, invented, a cynical *going along with* process.[2] One or both parties may tolerate a mediation effort, but go through the motions, only. They may participate but, in the end, they retain the right to make the final decisions and even veto the outcome.[3] And more subjective influences may be at play. A party may be concerned how friends and relatives will react to any compromise he/she may reach.[4] Fear of criticism, ridicule, or otherwise may undermine commitment to a mediated outcome.

There are many problems to overcome, particularly those relating to neutrality and power. Yet, ought not a PDR regime with mediation as one of its options is permitted to take root without the full satisfaction of these concerns? Is it really necessary to concentrate so much on the notion of neutrality? Perhaps mediators are never neutral. Perhaps mediators should not be neutral.

What of the necessity of redressing power imbalances? If this is achieved, it is often fleeting, temporary - illusory even, if the status quo ante merely re-asserts itself once the mediation is over and the parties have departed from the mediation environment. The parties are empowered during the process, but return to the real world with their powerlessness, and are in most cases required to return to an environment or culture that has not changed. A dis-empowered party may suffer further disadvantage or discrimination after what they have disclosed during mediation (hence, there are hidden dangers in mediation). Why the need to redress power imbalances that cannot in reality be redressed? Perhaps these should be merely acknowledged and taken into account in the process.[5]

These questions probably never be answered fully, even with the best intentions in the world. But as conflict can be so debilitating, so damaging to all involved, one would probably have to settle for a flawed dispute resolution process on the grounds that a flawed process is preferable to no process at all. Also, in many cases, it might just work.

The pitfalls are many and various, and the outcomes uncertain. All third party interventions in conflicts are about change and changing – asking people to change how they think and feel about each other, about resolving what has happened, and about moving onto what will happen. Ideally, there will be a degree of closure, an intention to put the past behind, to let go, to move forward. In reality, however, this may not be a realistic expectation, particularly when people are asked to abandon, forgive, and forget. Often a conflict is never fully resolved to the satisfaction of all parties, and whilst people may be prepared to bury the hatchet under immediate circumstances and pressures, there are some among them who will always remember where it is buried.

[1] Boulle (1) op.cit. at 237, 271

[2] e.g. Because I have been ordered to; or:because it is expected of me: or I had no choice.

[3] See Susskind, op.cit. A promise by an elected official or a manager to "live with the results of an informal consensus building process" could be criticized as a "dereliction of duty" or as "delegating away" statutory or management responsibility

[4] Boulle (2), op cit. at 236

[5] There is nevertheless the educative nature of the mediation process. The demonstration of equality and empowerment of the weaker party may have a downstream effect influence upon both parties. including the educative function discussed above. Boulle (1) op.cit. at 45-46

But, even if ostensibly unsuccessful, even if outcomes are inconclusive, a mediation process may actually achieve goals of bringing people together to resolve their differences, of improving communications, and of increasing their awareness of their own and others' needs and interests.

As Boulle points out, the mediation movement regards constructive conflict management not only as a means to an end of settlement, but as an end in itself.[1] The literature on mediation suggests that the system should be evaluated not only in terms of the final outcome. Even where the dispute is not fully resolved, mediation might provide other benefits. Parties discover each other's concerns and interests. They vent emotions in a positive environment, with a consequent lowering of hostility and antagonism. They define the dispute more clearly, prioritizing issues in dispute, generating a range of optional 'solutions', and agreeing on procedures or methods to resolve substantive issues. They are forced to confront the conflict and not abdicate responsibility of settlement decisions. The mediation provides a model for constructive problem solving for use in subsequent disputes.[2]

[1] id..at 45

[2] ibid. Furthermore, the post-mediation milieu is important in any mediation or PDR. Once an agreement has been finalized (or not, as the case may be), and a transformative process has occurred)(or not, again as the case may be), the participants are in most cases requred to return to a culture, an environment that has not changed. Iwould there be adequate post-mediation support in the short term and beyond to enhance the likelihood of sustained behavioural change and the development of DR skills? Can there be skill development and training in communication skills, effective listening, conflict resolution and the like?

The Promise of Mediation	
A third party may be necessary • because parties are bogged down by tradition, training and complacency in the argument mode of thinking. • The parties may not be able to carry out certain thinking operations because these would not be consistent with their positions in the conflict. – anger and frustration can cloud good judgement • they may fail to focus on the issues by adopting adversarial positions • disputes may have become internalized and personalized • if the parties have unrealistic assessments and expectations of their situation with respect to positions and outcomes, and, should the negotiations fail, a neutral evaluation of the walk-away alternatives may be indicated • the parties may be bogged down by positions– by issues, personalities, and history - rather than impelled by interests	**The 3rd Party** • can contribute to problem-solving by making sure that disputants attack the problem rather than each other, and by keeping the focus on interests rather than on positions • may offer information or introduce an intervention in the dispute to break a negative cycle – or to turn it to positive ends • can seek to achieve a balance in the power situation of the parties. Any power differential will undermine trust and inhibit dialogue…symmetry in situational power: attempt to guarantee equity, favour the least articulate • help achieve a balance in the reciprocal confrontations between the parties – so the at apparently premature actions by either will not be misinterpreted • listen and communicate, and be non-judgmental in both • facilitate communication to enable clear deciphering and interpreting of each other's messages • assess the degree of openness in the dialogue and introduce processes to free the interaction… • maintain an optimum level of tension in the negotiations • be neutral on content and outcome and be hard on process and soft on content • be hard on the problem and soft on the people
Mediation • offers an external agent with alternative and additional information, experience, and expertise, who can provide resources and motivation • offers a neutral who can facilitate, educate, and guide the parties through a structured resolution process • can provide alternatives beyond those which the parties themselves can generate • keeps in focus the visible prejudices, values, stereotypes, fears and needs of both parties and their communities in a way either is able to do for him/herself • invites and often ensures full participation and full communication between the parties • can equalize power differentials and provide maximum opportunities for both parties • gives freedom for both parties to express and explain their sides of the dispute without limits on the style or content • decreases confusion, cultural misunderstandings, and individual limitations to make the proceedings intelligible to all • aims to reduce largely psychological obstacles that prevent hostile parties coming together for constructive negotiation	**Mediation allows disputants and their supporters to** • talk to each other in a verbal style that is natural, comfortable, and mutually intelligible to all parties • ventilate anger and frustration in a free and appropriately open and therapeutic fashion • receive an increased sense of power and personal worth • gain access to a readily available, quick and inexpensive forum • equalize or re-align status and interpersonal power struggles by promoting an egalitarian ethic • re-establish and realign the persons, place, and sense of belonging in the relevant social group • learn about other parties' cultures and perhaps learn to understand and to tolerate them • learn to work together side-by-side in joint effort and joint problem- solving • get their rights recognized as legitimate by the very fact of being 'on the table' and often, the public record • develop problem solving skills in general and dispute resolution skills in particular

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The mediator

- remains outside the conflict itself, refusing to slip in to the role of judge, adviser or advocate on content or policy issues
- acts as a cultural bridge between the conflicting parties, reframing value-laden concepts in a non-judgmental, non-provocative manner
- if competent, can assist parties in breaking open the conflict, untangling the issues, the behaviour going on between the parties, the conflict that enmeshes them, separating people (and their attitudes and actions) from the problems (the conflict situations
- is supportive of people as they clarify their own views and values whilst being confrontational with the conflict situation itself i.e. hard on the issues soft on the people!
- maintains caring neutrality – the commitment not to a particular outcome but to end the suffering of both parties
- seeks to progressively sharpen his/her basic skills of empathy, active listening, sensitivity to the needs of the parties, sense of timing, verbal and nonverbal communications skills, capacity to maintain neutrality while remaining in contact, and ability to understand the stages of negotiation and conflict resolution

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The mediator must be able to

- identify who are the stakeholders, and endeavour to include them in the mediation
- determine the preferred process, e.g. formal or informal; face to face or shuttle, and establish the right conditions, paying due deference to cultural norms and protocols
- see and perceive with a measure of creativity and objectivity, including being aware of nuances of speech and body language (active listening and perceiving)
- be non-judgmental and avoid provocative, value-laden language
- define and clarify, to separate and discern
- link and focus the parties and reconcile opposites
- contribute creative skills e.g. offer
- a probe (question, observation, proverb, quotation)
- a provocation (reversal, exaggeration, paradox, contradiction)
- a picture (metaphor, story, case, image)
- a principle (basic assumption that the parties hold in common, goal they now share, value they have both affirmed)
- pirate and promote ideas
- review issues and concepts, provide an overview enabling parties to broaden their perspectives
- develop a sixth sense for timing

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Difficulties facing Cross-cultural Mediation

- defining the role of the mediator –how the mediator is viewed by the parties – as a neutral? An equal? A judge? a participant? a party, even? (in some cultures, a mediator can indeed be part of the dispute, his/her reputation or face dependent on the outcome).
- there are almost always great many parties, and not all of them are obvious
- it may be hard to know exactly who the stakeholders are and who can speak for them.
- bringing these groups together to resolve differences is a laborious task
- ground rules have to be negotiated anew in each such situation
- participants are likely to have diametrically opposed views of what will happen if negotiations fail
- mediation may have to be handled by teams of mediators – too much work, too many parties
- things that can go wrong when attempts are made to bring made parties together to tackle a complex issue
- the impatience of many convening authorities
- mediators may bring **their** cultural and other baggage to the table

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Skills required for cross-cultural mediation

- mediators need to know something about the substantive milieu in which they are working and be aware f the cultural assumptions of the parties
- mediators must be aware of the temporal realities of the milieu. In some contexts, time is not an issue
- mediators must be extremely sensitive to the larger context of their work
- attempted intervention or mediation by one external to the culture inevitably misses cues, scrambles data, and confuses primary and secondary issues at best.
- a mediator unfamiliar with the culture may utilize tactics least likely to facilitate an opening of communication that will clarify differences and enable conciliation
- mediators must be highly eclectic in their approach to problem solving.
- a passive mediation style in a situation that requires a high level of mediator activism may result in failure
- But an activist mediation style can overwhelm or put off a group of participants who expect the mediator to play a low-key role.
- mediators must match their approach to the demands of the situation
- mediators must be attuned to the contracts and continuities across cultures.

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• it may be necessary "to go slow to go fast." - unless all the pre-negotiation logistics are handled with great care (to give the overall effort the necessary credibility and legitimacy in the eyes of the stakeholders), the entire process is likely to falter before it is completed • one or more parties may resist a consensus building effort • the parties may be confused about what the process entails • a key party may not accept the basic premise that mediation is voluntary, and remains so right up until the final agreement is signed • mediation is very dependent on the environment, the pressure to resolve the dispute, the motivation of the parties, and the resources available • perceptions relating to neutrality and power are problematical for all mediations • there may be a perception that the process may be just an exercise in middle class or first-world patronization or manipulation • these difficulties hinder the development of legitimacy and credibility for dispute resolution processes, and work against the adequate understanding, acceptance and commitment to these processes on the part of the stakeholders • the process must be consistent with the parties' orientation to, and understanding of dispute resolution	• mediators must give equal attention both person and problem, to relationships and goals and to private interests as well as public positions
Is mediation the answer • both parties must be self-motivated to enter into give and take negotiation • parties may not be ready for mediation, may not want it, and may have to be brought gradually to the idea by a gradual, educational process • parties may want to be directed, to have their conflict arbitrated and adjudicated • what of the necessity of redressing power imbalances? If this is achieved, it is often fleeting, temporary, illusory even, if the status quo ante merely re-asserts itself once the mediation is over and the parties have departed from the mediation environment • parties are empowered during the process, but return to the real world with their powerlessness. Why the need to redress power imbalances that cannot in reality be redressed? Perhaps these should be merely acknowledged and taken into account in the process	**Even if mediation fails, there are still gains** • even where the dispute is not fully resolved, mediation might provide other benefits. For example: • parties discover each others concerns and interests • venting of emotions in a positive environmental the consequent lowering of hostility and antagonism • defining the dispute more clearly • prioritizing the issues in dispute • generating a range of optional 'solutions'; agreeing on procedures or methods to resolve substantive issues • forcing the parties to confront the conflict and not abdicate responsibility of settlement decisions • providing a model for constructive problem-solving for use in subsequent disputes • the demonstration of empowerment and equality of a weaker party can have a downstream, heuristic influence on both parties as they take away with them the experiences and lessons of the process
Sources include: Augsberger DW Conflict Mediation Across Cultures Multi-Party Public Policy Mediation: A Separate Breed, Lawrence Susskind. American Bar Association Boulle L, Mediation –Principles, Process, Practice, Butterworths1996	

Appendix 4: The Promise of Collaborative Law

The following table highlights the differences between conventional settlement mediation and collaborative law. Moreover, it identifies many of the things that distinguish Family DR from other forms of DR.

Collaborative Lawyers
▪ create a safe environment in which to communicate. ▪ acknowledge that maximizing each party's satisfaction is key to success. ▪ allows both parties to speak and be heard. ▪ generate the widest range of settlement in that it is interest based rather than claim-denial based ▪ do not tell their clients when or what to negotiate or when to go to court. ▪ believe that the client shares control of the process and owns the outcome. ▪ do not limit the solutions available to the client to those dictated by law. ▪ view each client as a whole person, with emotional, psychological, relational, financial and legal interests. ▪ advise their clients about their legal entitlements and obligations but encourage their clients to look for solutions that go beyond the law and address their real interests. ▪ recognize that the impediments to effective negotiation for divorcing clients are psychological as well as practical. ▪ know that individuals experiencing separation and divorce often feel hurt, angry and out of control. ▪ help clients learn to manage strong emotions, communicate effectively, express their views and objectives, listen to and appreciate the perspective of the other spouse, and take a long-term view of the issues. ▪ ensure that temporary financial and parenting arrangements are in place, that agreements are kept and that clients are protected while they negotiate. ▪ listen more than talk, work respectfully with each other and both clients as a team, acknowledge the interdependence of the parties, and focus on process as much as results. ▪ make a radical, ground-up change in assumptions about the nature of conflict, the capacity of individuals to resolve their differences, how they define temselves and deliver their services. ▪ let go of many unconscious and subconscious behaviours and attitudes and adopt an entirely new skill set and mindset
Benefits of Family Mediation not found in Settlement Meetings
▪ negotiations take place with the assistance of a third party mediator ▪ both parties are made to feel safe and comfortable in each other's presence ▪ allows the parties to take charge of their lives and design a plan for their future that would be good for themselves and for their children ▪ facilitates, promotes and improves communication between the parties ▪ hard bargaining tactics are avoided ▪ helps the parties to exchange views and information ▪ helps to reduce conflict and hostility between the parties ▪ encourages co-operation and trust ▪ allows the parties the opportunity to express their feelings associated with ending the marriage ▪ the position of the other party is not filtered through lawyers ▪ the parties have more control over the outcome ▪ increases potential for solutions that may go beyond remedies which can be ordered by the court ▪ mediated settlements generally work better because of the fact that the parties worked co-operatively to arrive at the agreement, rather than having it negotiated back and forth between their lawyers ▪ preserves family relationships; a Settlement Meeting will not tell the parties how to do that ▪ can make termination of a relationship more amicable and less traumatic ▪ empowers the parties to solve their own dispute and find a compromise that works for both of them ▪ a mutually acceptable solution lets both parties be winners and respect each other ▪ the parties can deal with the issue of new partners ▪ can and should make post-divorce relations easier among the parties and extended family ▪ provides a way for families who are splitting into parts to learn to deal with the changes in roles, duties and opportunities and to face those changes with emotional balance
Added Benefits of Mediation Where There are Children
▪ focuses attention on the children and in doing what is best for the children ▪ minimizes the harmful effects of divorce and separation on children ▪ courts deal with custody and access; mediators deal with parenting plans; parenting is a lifelong commitment that transcends court orders; children need both parents ▪ agreements reached through mediation can take into account the personal needs of children in much more detail than other kinds of agreements ▪ may involve children when their input is appropriate and helpful ▪ children of parents who mediate adjust better to their parent's divorce than do children of parents who

simply go through the Settlement Meeting or litigation process; the children are happier, more secure, more reassured, and less distressed

- presents a co-operative model for addressing future changes in the lives of the children
- establishes a sound foundation for post-separation parenting arrangements

Advantages of Family Mediation for Lawyers

- lawyers will have clients who are generally more satisfied by the experience of crafting their own resolution satisfied clients are more appreciative of the lawyer's services and spread the word
- more clients will therefore to seek out that lawyer for similarly satisfactory results
- lawyers representing clients in mediation are more likely to be paid their full fee
- lawyers who go the traditional route of settlement meetings and litigation often do not bill their full fee, or they often do not collect all the money that they do bill their clients
- thus, while lawyers may bill fewer gross dollars to an individual client, they collect a higher percentage of what is billed and get more business as a result of satisfied clients.

Adapted from Norman Pickell, In Family Law, How is Mediation Different from a Settlement Meeting , at http://www.mediate.com/
And Victoria Smith at www.collaborativefamilylawassociation.com

Appendix 5: Collaborative Family Law Q & A

The following is a Question & Answer segment on the Website of the Canadian-based Collaborative family Law Association, s designed to provide would-be users of the Collaborative Law process with a clear picture of how it works and what it offers to separating couples.

1. What is Collaborative Family Law?
"Collaborative Family Law" (CFL) is a new way to help families who are in the midst of separation and need professional legal assistance to settle the issues. A commitment is made in a CFL negotiation that:

- negotiations will be principled, dignified and respectful;
- issues will be resolved without going to court or threatening court action;
- both sides will exchange all important information;
- the parties will be assisted in exploring as many options for settlement as possible; and
- the lawyers will help the parties to reach a settlement that best meets their goals and priorities.

2. What types of family law issues can be resolved using the CFL process?
Most family law issues can benefit from the CFL process including issues concerning child custody and visitation; spousal and child support; property and the family home and changes to existing arrangements.

3. What is the Collaborative Family Law "Participation Agreement"?
The CFL "Participation Agreement" is a contract signed by the parties and their lawyers committing to work out a settlement without going to court. If it turns out that court *is* necessary because the dispute between the parties cannot be resolved in a CFL negotiation, both lawyers must resign from the case. Your CFL lawyer will assist in transferring your file to your new lawyer, but he or she (or any member of his/her firm) cannot represent you in court.

4. How does a CFL negotiation work?
CFL negotiations take place at meetings with both the parties and their lawyers present. The lawyers act as facilitators or coaches and role models for constructive communication. The lawyers will help keep the discussions between the parties focused on the problems that the parties are trying to work out and help to find creative solutions. In a CFL negotiation, you and your spouse are empowered to reach decisions that will work best for both of you. The lawyers will provide legal advice and generate options for resolution. They will also assist you to improve your listening, communication and negotiating skills. In a CFL negotiation, both parties must make full, honest disclosure of finances and other important facts that are necessary to make informed decisions. If there are issues concerning children, the parents and lawyers commit to finding solutions that meet the best interests of the children. In a CFL negotiation, all of the participants commit to treat one another with politeness and respect. The lawyers work as a team with the parties to provide options and choices for settlement.

5. What if my spouse does not make the disclosure he/she promises in the Participation Agreement?
If one of the spouses refuses to make proper disclosure, his or her lawyer is required by the Participation Agreement to withdraw from the case. This provides very strong incentive to both spouses to honour their promises.

6. My spouse and I do not communicate at all. How can we use this process if we can't talk to each other?
It is fairly typical for separated spouses to have serious communication problems. The CFL lawyers will coach each client individually about new ways to communicate with his/her spouse. The lawyers will also be present during the negotiations to help through the rough spots and to defuse conflict and avoid destructive communication.

7. What if we need help to decide certain issues?
It may be necessary to hire outside experts (such as pension valuators, real estate appraisers; etc.) in order to value certain assets. Input about the children's needs may be sought from a therapist. Accountants may be asked for income tax advice. Before any outside assistance is obtained both parties must agree on the selection and payment arrangements for the outside professional. Any expert whose services are used will not be allowed to assist either person if the matter does go to court in the future, unless agreed by both parties.

8. Can all lawyers be CFL lawyers?
If a CFL negotiation is going to be successful, it is important that both lawyers have an understanding of and commitment to CFL principles. Most lawyers who practice CFL have taken specialized training. Many CFL lawyers are involved in local associations. CFL is a relatively new approach to dispute resolution in Southern Ontario and not all lawyers have experience with the concept or have received training. If you and your spouse are interested in CFL, ask your lawyer about CFL.

9. How does CFL differ from mediation?
A mediator is a neutral person who assists the parties to work out a settlement. The mediator does not act for either party and does not provide legal advice. In a typical family law mediation, the clients attend mediation without their lawyers. Lawyers for each of the parties provide independent legal advice regarding any proposed agreements. In a CFL negotiation, each of the parties has their own lawyer present. Each lawyer will ensure his/her client is provided with legal advice about the issues. The lawyers work as a team to guide the parties to the best settlement possible.

10. How does a CFL negotiation differ from the traditional family law negotiation process?
In a CFL negotiation, the parties and their lawyers commit to resolving the dispute without going to court or threatening to go to court. In a traditional family law negotiation, court may be used as an ongoing threat or bargaining tool. In a CFL negotiation, the parties explore options for resolution which include legal and other options. In a traditional negotiation, typically only legal options are considered. In a CFL negotiation, the lawyers work as a team with both parties to develop a settlement that that best meets the goals of both parties. In a traditional negotiation each lawyer advocates solutions that best meet their client's goals. In a CFL negotiation, the clients negotiate directly with one another and take responsibility for resolving the issues themselves. In a traditional negotiation, it is the lawyers who maintain control of the process and the negotiation.

11. What if final settlement is not reached using the CFL process?
There is no guarantee that the CFL process will resolve every issue, although with a commitment to the process, most CFL negotiations should be successful. If one or both of the parties decides that they do not want to continue with CFL, then ***both*** lawyers *must* resign from the case and no other members of the lawyer's law firm can represent the client. The lawyers will assist in transferring the file to the new lawyer but will have no further involvement in the case.

12. Can one of the parties withdraw from the CFL process at any time?
The CFL process is voluntary and either party may withdraw at any time. There may also be circumstances when one of the lawyers *must* resign, for example, if it is discovered that a client is hiding important information during the process.

13. How much does a CFL negotiation cost?
Each of the parties will be responsible for paying the fees of his or her own lawyer. In addition, (with your consent), it may be necessary to hire appraisers or valuators to value certain of the assets. These valuations will also have a cost. The expense of a CFL negotiation will vary depending on the complexity of the issues and the time needed to resolve them. Typically, the process will cost less than going to court. Each of the parties to the CFL negotiation will have to discuss fees with his or her individual lawyer.

14. What to Do After You Decide Collaborative Law is the Right Process for You?
Once you have decided that a CFL negotiation may be the right process for you, you should discuss this option with your spouse. A CFL negotiation can only take place if *both* parties agree. If your spouse agrees to consider a CFL negotiation, speak to your respective lawyers about the process.

15. Why should I choose Collaborative Family Law?
By choosing CFL, you ensure that the arrangement reached between you and your spouse will be designed by you, with the guidance and legal advice of your CFL lawyer. You will be able to achieve a settlement in as dignified, respectful, creative and cost effective manner as possible. CFL provides an opportunity for you to maintain the integrity of your family even though you do not wish to remain spouses.

From Website of the Canadian-based Collaborative family Law Association, at www.collaborativefamilylawassociation.com

Appendix 6: Shattered lives

Trouble ahead for babies of divorce

The majority of babies who live alternately with their divorced parents develop long-lasting psychological problems, new research has found.

Such arrangements cause enduring "disorganised attachment" in 60 per cent of infants under 18 months, says a clinical psychologist and family therapist, Jennifer McIntosh. As older children and adults, they have "alarming levels of emotional insecurity and poor ability to regulate strong emotion".

Dr McIntosh called the presumption of 50-50 shared parenting, the focus of a federal parliamentary inquiry into child custody, a "dangerous idea". She made a submission, based on research in the *Journal of Family Studies,* to the family and community affairs committee yesterday. Dr McIntosh agreed that the sensitive involvement of both parents was vital to children's adjustment after family breakdown, but said the greatest damage came from continuing parental conflict, whatever the living arrangements.

"Shared parenting in the absence of a parental relationship that can support the necessary co-operation is fraught for children, particularly pre-schoolers. Equally, shared residence, that often manifests in week-about arrangements, runs counter to the developmental needs for a secure predictable existence with their primary attachment figure, be that father or mother."

A bond with at least one caregiver could profoundly influence a child's development, but prolonged absences from this person and multiple transitions confused infants, especially when parents were in conflict.

For infants who had regular access to their non-residential parent, but no overnight visits, attachment was normal. As well, shared residence in early adolescence was viable and useful, provided parents managed their conflict and the child was allowed some choice.

A mediator from Relationships Australia, Dianne Gibson, said it was best for young children to spend some time with both parents, but not necessarily overnight. Evidence did not show that shared residence was beneficial to children or workable for most parents.

Lawrie Maloney, director of LaTrobe University's department of counselling and psychological health, said the equal residency proposal tapped into the desire for better parent-child relationships. "But a rebuttable presumption of 50-50 residency . . . cannot and should not succeed from either a legal or social perspective."

LaurenMartin, SMH October 21, 2003

What drives a father to slay his family? Malcolm Brown, who reported on Monday's horrifying multiple murder at Wilberforce, investigates.

On Wednesday morning, November 20, 1974, legal secretary Pauline Joy Winchester was a picture of happiness, an engagement ring on her finger, waving to her beaming mother, Dorothy, who then went to her Brisbane home to prepare for Pauline's engagement party.

Pauline was to marry an 18-year-old fitter and turner, Robert Boyle. But there was a cloud over her life - another man: 23-year-old law graduate John Campbell Edwards, who had become obsessed by her and had ignored all attempts to brush him off. Her advice to him that she was betrothed to another lit the fuse. His response was to ambush her in a Brisbane mall that morning, shoot her to death and turn the gun on himself.

Nearly 30 years after that tragedy, which this reporter covered, the commander of the Greater Sydney Metropolitan Area, Assistant Commissioner Bob Waites, said in the aftermath of the Wilberforce massacre that there was "a fine line" between love and hatred, and that "we see it all the time".

The scenario of love turned to homicidal or suicidal violence has been been played out time and again, the circumstances only varying superficially. But no amount of legislation, community intervention or police precautions can guarantee the murderous passions so often engendered will not be fulfilled.
The Family Law Act was implemented shortly after Pauline's death. But many relationship failures never get to the level of the Family Court.

This week in the wooded backblocks of Wilberforce, on Sydney's north-western outskirts, another relationship ended in homicidal violence.

In Australia, 55,012 divorces were granted in 2001-02 and 37,527 from July 1 last year to the end of March. These figures are fairly consistent - more than 100,000 broken marriages every two years, and thankfully the overwhelming majority of people involved react in a moderate fashion.
But hanging over the Family Court have always been the attitudes and actions of the significant minority of people who are not rational. The majority of homicide victims have known the perpetrator, and most of those have been in domestic situations.

In an introduction to a paper delivered in June, Adam Graycar, then the director of the Australian Institute of Criminology, wrote that almost two in five homicides in Australia were committed by members of the victim's family, with an average of 129 family homicides each year.

Most of family homicides occur between intimate partners (60 per cent) and three-quarters of these involve males killing females. "On average, 25 children are killed each year by a parent, with children under the age of one at the highest risk of victimisation," the report said. Three-quarters of these homicides, known as "filicides", occurred in a residential location and just over half occurred during the day. Sixty-eight per cent of all child victims were five or younger, and children younger than 12 months comprised 26 per cent.

The paper said: "The most prevalent motives, where known, were domestic altercations (21 per cent) and jealousy/termination of a relationship - where the killing of a child by one parent is a consequence of the actual or pending separation from the other parent (9 per cent)."

In NSW, family breakdown was found to be the precipitating factor in almost one in five filicides.
If the intentions of the perpetrators are telegraphed at all, then often they fit into the catalogue of apprehended violence orders (AVOs), introduced in the late 1980s as domestic violence orders, whose use mushroomed after people became familiar with them.

There was an obvious need. In 1989, 77 per cent of women seeking such orders cited an alleged physical assault by a spouse and 23 per cent alleged they had had one death threat or a shooting threat from a spouse.

NSW Bureau of Crime Statistics and Research figures show that in 1996 more than 20,000 AVOs were issued, ("domestic" AVOs totalling 14,068 and "personal" coming to 6256) and the total AVO figures never went below 20,000 in each succeeding year. In 2001, the latest year for which figures are available, there were 18,853 domestic AVOs and 7480 personal AVOs.

So what are the police to do? They are surrounded by an ocean of potential violence. For the police who went to Wilberforce on Monday morning to investigate a complaint of sexual assault, it was at the outset just another domestic "situation". According to Waites, attempts were being made to repair the marriage. After the sexual assault, the mother was "considering her options" about what legal recourses she might take.

The Family Law Act, which its architect, the then senator, Lionel Murphy, so fervently hoped would streamline and humanise the system, was designed to give as much scope as possible to repair relationships. For those not inclined to shrug their shoulders and move on, there was arbitration. But at least it made divorce easier and the formal process less acrimonious. But the changes in legislation, like shifts in the Earth's crust, simply transferred the pressures elsewhere.

The outrages over the years - including the murder of the Family Court judge David Opas, and of Family Court justice Ray Watson's wife, the bombings of Justice Richard Gee's home and a Jevovah's Witnesses meeting, and in Western Australia, Norman Drummond's murder of his children and his suicide, followed in similar fashion by Ronald Jonker, and by Barbara-Anne Wyrzykowski and Mark Heath - all showed that passions can reach a point where virtually nothing can be done, apart from locking up the potential offender.

But what system could move pre-emptively like that?

The extreme response to the Family Court has simmered down but it is still present. Men believing the Family Court had been biased against them were still "pretty active", a spokeswoman for the Family Court said yesterday.

The virtual tidal wave of enmity that taxed the then chief justice of the Family Court, Elizabeth Evatt, to a point of desperation is no longer evident. But the frustrated passions, whether specifically Family Court-related or not, remain volatile and are likely to go off in other directions.

One of these is the nihilistic impulse, where a person, normally a man, decides to wipe out himself and all those closest. In 1985, psychiatrist Harold Leyton, who had mounting financial difficulties and was confronting a sexual harassment allegation, shot dead his wife and two sons in their beds at their Chatswood home, tried to burn his house down, and committed suicide by slitting his wrists.
At Wilberforce this week, the father apparently decided to enforce his conjugal rights. His wife escaped the massacre; she was in the company of police who arrived home with her, only to witness the slaughter of her family.

Family relationships might be seen to have something to do with immortality, the hallowed place in someone's mind of the sacredness of his or her own genes. It is an area where the object of the frustration can become more important than life itself.

My late father, a country-based lawyer, was pursued for decades by a man who had lost a custody dispute to the woman whom he had represented. "I would rather handle a black snake than a family law matter. Nothing the other side does is any good. Nobody will concede anything," my father said.

In some of these circumstances, if the party cannot win, then he, or she, will kill. One such murder was that of Margaret Case, who divorced her husband, a Darwin mathematics teacher, Arthur Colin Case, in 1991, then moved to Adelaide to get away from him, and got the Family Court to issue an injunction to prevent him approaching her. Case went to Adelaide, bought a rifle, telling the salesman he wanted one "suitable for killing pigs", and shot Margaret dead.

On several occasions the Family Court has provided the venue where the final acts of vengeance have taken place - because it was a venue both were required to attend.

At the Parramatta Family Court in 1996, a Jordanian migrant, Hoss Majdalawi - whose marriage with Jean Lennon had broken up - had reached the brink. The first official indications of trouble were in 1994 when she took out an AVO against him, and in the next two years there were moves apart, moves together, breaches of AVOs, threats of suicide and increasing desperation. On March 21, 1997, Majdalawi approached her saying: "Don't make it difficult for me to get access to the kids. I only want access." When she replied, "No way, no chance," he fired five shots into her, then gave himself up to security staff.

In Victoria, Robert Clive Parsons took issue with his former de facto, Angela, to whom he had been paying maintenance for five years. She told him she wanted more, and unless she got it he could not have access to his children. At Warnambool Family Court on December 10, 1997, he stabbed Angela 41 times, including eight times through the heart, screaming as he did so: "It's over now, bitch! It's over!"

The problem, of course, is that it is only one of the parties who has taken it on himself, or herself, to decide that it's over.

Sydney Morning Herald 17 Sept 03
Malcolm Brown edited *Bombs, Guns and Knives: Violent Crime in Australia* (New olland)

Father drugged, drowned three children, court told

When Steven Fraser picked up his children from his estranged wife he told them to kiss their mother goodbye. It was something he had never done in any access visit.

Over the next two days Fraser killed all three of his children in his Caringbah home, the NSW Supreme Court was told yesterday,. Late on Saturday night of August 20, 2001, he gave his sons, five-year-old Ryan and four-year-old Jarrod, doses of Mogadon before drowning them, the court was told. He placed Ryan on a mattress in the lounge room, and wrote on his face in felt-tip pen, "I love you Ryan, RIP xo". He left Jarrod in the main bedroom, with a similar message on his face.

Fraser spent the next day with his seven-year-old daughter, Ashley, and then killed her, the court was told. She struggled violently in the bathtub, the court heard, and Fraser hit her on the back of the neck to subdue her. He laid her on a bed and wrote on the wall, "There's no place like home."

On the day he picked the children up, he pleaded for six to eight hours with his wife, Maria Chona, to take him back, telling her he didn't want to be a "part-time father", the court heard. She had begun a relationship with a new man, the court was told, and Fraser had begun to question her incessantly about her sexual relationship with him. "I can't accept someone else is going to take my place," he allegedly told her. "All I ever wanted was to be a good father."

The next morning when Fraser's mother arrived at the house, a toy monkey hung from an electrical cord from the ceiling. A knife had been placed through it, and tomato sauce used to look like fake blood.

When detectives arrived, they found Fraser naked in the bath, drinking milky liquid from a tumbler, the court heard. He was extremely agitated and tried to put his head under the water. Fraser was taken under police guard to Sutherland Hospital where police allege he said: "My children were my world, I killed my kids to protect them. My children are in peace now."

Fraser has pleaded guilty to manslaughter on the basis that he was suffering from a mental disorder at the time.

He stared ahead blankly while the Crown Prosecutor, Mark Tedeschi, QC, outlined allegations against him yesterday, telling the court he killed his children because he wished to punish Ms Chona for getting a new boyfriend, and refusing to reconcile with him.

Mr Tedeschi said there were human emotions at play, and not any mental illness. But counsel for Fraser, John Stratton, told the court while there was no question his client had killed his children, the question was why he did it. "Because of a mental abnormality, the accused's ability to judge right from wrong was impaired," he said. "Are these things the accused did . . . the product of a normal mind or . . . of a deeply disturbed mind?"

Sydney Morning Herald 21 Oct 2003

It happens almost every day, dad blows his wife and kids away;
And when he's sure they're safely dead, He puts a gun to his own head.
The finger fights, the trigger wins, and cures a multitude of sins.
No survivors.

There is no reason, there is no rhyme, no sense in serving overtime;
No need to balance on the ledge, no comfort on the razor's edge.
They have no future without me; I'll break their chains and set them free.
No survivors

It no longer hits the headlines, no longer seems so odd.
Daddy feels the power; daddy playing god.
The finger fights, the trigger wins, his blood will wash away our sins.
No survivors.

Paul Hemphill *No Survivors*

Minnelli rejects abuse charge

Stage star Liza Minnelli today dismissed assertions by her estranged husband David Gest that she physically attacked him during their marriage, calling them "hurtful and without merit".

"I hoped very much that the end of my marriage would be handled with mutual respect and dignity. The allegations in this lawsuit are hurtful and without merit," Minnelli said in a statement issued by her lawyer, Delia McCabe.

Gest, who married Minnelli in March 2002 and separated from her three months ago, filed a $US10 million ($A14.21 million) suit yesterday stating she had attacked him during drunken rages, leaving him with an "unrelenting pain in his head". He said he suffers from "throbbing pain, severe headaches, vertigo, nausea, hypertension, scalp tenderness and insomnia" and takes 11 medications a day to treat his pain and injury.

Gest alleged that heavy drinking gave the singer/actress “remarkable force and strength”. Gest said that when they married, Minnnelli's career had “eclipsed, she was an alcoholic, overweight, [and] unable to be effectively merchandised”.

"My lawyers will respond to the lawsuit in the proper forum," Minnelli's statement said. The singer-actress, best known for her role in Cabaret, concluded: "I will continue to focus on my work, my sobriety and my fans who have been so wonderful to me."

Sydney Morning Herald 21Oct 2003

Minnelli's fist of fury

Liza Minnelli's ex-husband is not the only one who claims to know the fury of her fists - her bodyguard has come forward to allege she hit him harder than many men he had fought.

Imad Handi, a karate expert who is reported to be a former world champion, admitted he stood little chance against the drink-fuelled actress when she hit him at London's Connaught Hotel. The bodyguard said Minnelli, who shot to fame in the 1972 film version of *Cabaret*, had delivered a blow harder than many he had received from his karate opponents when he tried to stop her punching her husband.

"She hit me with a backhanded fist and I must confess it hit me so hard I took a step backwards," he said. "I have had people, men, kick the shit out of me and they didn't hit me that hard. Out of 10, she was a six."

Mr Handi, who is based in London, said the attack occurred on the night of June 10 after Minnelli, 58, had allegedly launched a violent assault on her then husband David Gest, 50. Mr Gest is now suing her for $US10 million ($14.2 million) and claims to have suffered brain damage.

The bodyguard alleged Minnelli punched Mr Gest in the head and face for about 10 minutes. "That does something pretty bad. I know, because I've been in the ring."

As the actress accused Mr Gest of "using me to be a star when I am the star", the bodyguard tried to calm her down. "I held her hand gently, and I said, 'Liza, don't do this'." The tactic failed. The actress "swung with a tight-fist backhander into my solar plexus and hit me very hard", Mr Handi said. "She was out of control." Mr Handi said the blow was "absolutely drunk-induced". However, the next day she was a different woman. "She was so sweet and forgot about the whole thing," he said.

The couple separated a month after the incident and 16 months after their wedding, at which Michael Jackson was best man.

Mr Gest, an events and concerts promoter, filed his lawsuit last week, claiming Minnelli had beaten him so badly that he suffered brain damage and was forced to take 12 prescription drugs.
Minnelli has said that Mr Gest's claims are "hurtful and without merit".

David Harrison in London
The Telegraph, October 28, 2003