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March 2009

Developing Family Mediation

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Innovative Approaches to ADR:
Modifying the Mediation Model Part 3: Civil and Family Models – where two traditions collide

'What's so funny 'bout peace, love and understanding?' – Nick Lowe, 1974

'For marriage is nothing but a civil contract' – John Seldon, c.1630

In this series about the evolution of family ADR models, I now turn to how family and civil/ commercial mediation ('civil mediation') can influence each other. This is an example of the creative development proposed in Part 1 [2008] Fam Law 926 ('Part One') and a further examination of how lawyer and mediator in the ADR process can work better in partnership, as discussed in Part 2 [2008] Fam Law 1048 ('Part Two'). I now examine the separate development of the models, then look at 'hybrid' models of family mediation (that is, mediations where the process and/or the subject matter of the mediation might include both the family and civil models.) I then consider mediating cohabitation/TOLATA cases, and the considerations relating to shuttled family mediations. As before, my aim is to highlight and celebrate what is already going on, and to stimulate discussion and dialogue – in this case, between civil and family mediators and Collaborative Family Lawyers ('CFLs'), between their governing bodies and with the lawyers who refer. At one level, I am merely proposing a different way of looking at ADR practice; but if we really want to develop ADR substantially, this also raises the possibility of something much more audacious, nothing less than the realignment of ADR models and practitioners.

Development of Civil and Family Models: time for dialogue?

Civil and family mediation models have developed in very different ways over the last 20 years. There is little dialogue between the two 'halves' of the lawyer–mediator profession, and even less, apparently, between those arms of government that seek to promote them (for example, the separate development of helplines, regulation, and court promotion.) There are good reasons for this divergence, but much would be gained now by revisiting many of the differences. The challenge arises from:

(1) those mediations where the subject matter straddles the jurisdictions;
(2) high conflict cases, where existing models drawn solely from one profession are inadequate;
(3) the increasing volume and maturity of mediation, and the scope for real learning, understanding and evolution.

Is the ethical base of civil mediation essentially different from that of family mediation?

Why do we have these substantially different models and professions? A starting point might be a consideration of their ethical and professional bases. What is the essence of mediating? For some practitioners, it may indeed be 'peace, love and understanding'; for others, something much more pragmatic.

Family mediation, especially where there are children, is in essence about transformation of relationships from antagonism to co-operation. If marriage were 'nothing but a civil contract' we would not have developed processes that recognise the human and the humane in dealing with its dissolution. Civil mediation is often about an alternative, more cost-effective, pragmatic, form of adversarial litigation. The stances taken may be no less polarised than in litigation, with the method of achieving an outcome the only significant difference. Does this make civil mediation in some way ethically inferior when compared to its family counterpart, or is it just a very effective way of achieving better outcomes?

Again, the one model is predicated simply on there being a value in reaching a cost-effective pragmatic bargain; lawyers play a central part, and they can adopt as adversarial a stance as in litigation. In the other, there is seen to be added value in the parties preserving a relationship (particularly where there are children or some other continuing common interest such as a shared business, or a historical or family context to preserve) and in working together at a common problem. At their simplest, civil mediation may commonly be a continuation of the contest, albeit on different rules and territory, whereas family mediation may commonly be about seeking effective re-arrangement of family systems and resources.

The Essential Differences between Family and Civil Mediation Models

The following table sets out the defining features of the typical family and civil models, and adds a third column for devising a 'hybrid.' In order to exemplify the differences, it is inevitably over-simplified. A more detailed, annotated version appears on our website at www.themediationcentre.co.uk. Any of these

differences is open to detailed discussion as to whether the distinctive elements remain justifiable. For example, what about the different approach to provision of documents? Or the (non-) binding nature of settlement proposals? To the open-minded/creative mediator seeking to find common ground between these approaches, these issues are brought into stark relief when a case is referred that appears to straddle the jurisdictions.

TYPICAL CIVIL		TYPICAL FAMILY		'TYPICAL' HYBRID	
1	Takes place over the course of a day or longer, or part of a day	1	Takes place over a series of meetings, a few weeks apart	1	Either/both
2	Caucused in separate rooms, starting and interspersed with joint meetings	2	Usually in the same room; increasing minority 'shuttled'	2	Either/both
3	Mediators hold separate confidences	3	Mediators and parties share everything, even if shuttled	3	Either/both
4	Mediators have pleadings or case statements	4	Mediators may not have access to court or legal documents	4	Either/both
5	No pre-mediation assessment and screening	5	Follows assessment process and screening	5	Unclear – either?
6	Solicitors present	6	Solicitors not present	6	Either/both
7	Results in binding agreement and *Tomlin* order	7	Results in confidential summary given effect by lawyers or court	7	Unclear – either?
8	Mediator impartial, but may suggest proposals or privately indicate their views	8	Mediator impartial, and will not usually evaluate or be directive	8	Either/both
9	Typically undertaken by individual mediators, who may be lawyers or from other commercial professions	9	Typically undertaken by members of mediation services in the professional or charitable sectors	9	May depend on whether pre-/post-proceedings
10	Typically referred by court or solicitors to one of a panel of mediators taken from national or regional organisations	10	Typically referred by solicitor or self referral by parties to named mediation service	10	Mediators can come from both 'sides' of profession
11	Unregulated so far, but mediators generally members of either CEDR or ADR Group; currently various initiatives for registration or regulation underway	11	'Regulated', in that all mediators practising publicly funded work are accredited and supervised at least as rigorously as family lawyers	11	Depends on 9 above
12	'Voluntary', but increasingly under pressure of costs sanctions	12	'Voluntary', but triggered by LSC Funding Code referral in publicly funded cases or 'contact activity direction'	12	As above
13	May take place before, or following stay of, litigation	13	Generally takes place before, but increasingly, alongside, litigation	13	Either/both
14	Privately Funded, but increasingly may be under terms of insurance	14	Privately or publicly funded	14	Opportunities for both private and public funding

A 'hybrid' mediation model

There is in principle no reason why a model cannot be created for a specific case that uses elements from both accepted models. We could, if we were very careful, adopt a 'pick and mix' approach, but there may also be a place for a paradigm 'hybrid model' which typically involves a number of these elements. Whatever we devise for our 'third column' will be transparently constructed and boundaried, adopting those aspects of each model that are most likely to assist (see Part One.) To do otherwise would be confusing for those clients to whom we want to offer genuine process choice.

What disputes would benefit from a 'hybrid' model?

A civil mediation may be about preserving (commercial) relationships, and might benefit from some family mediation strategies; conversely, family mediation where there are no children or interest in preserving relationships may be purely about achieving a commercial bargain, and benefit from use of the civil model. So why do we not acknowledge this in the models we apply?

Few cases have either a subject matter or a balance between commercial and relationship considerations that can be said to be purely one or the other; this tends to suggest that our pure models are often likely to be impoverished and inadequate. Just as all cases lie somewhere on a spectrum of levels of conflict, so it can be argued that all (family) conflicts lie at a unique point on a spectrum from commercial bargain to ongoing relationship/communication. So a model of mediation that draws on the best of both pure family and civil models is likely to be suitable for any of the following:

(1) where the subject matter straddles jurisdictions – TOLATA, inheritance etc;
(2) where the subject matter is complex, such as where there are substantial shared or overlapping business interests and shareholdings, multiple properties, or complex pension arrangements;
(3) where the conflict requires something more robust than the standard family approach, but the level of ongoing relationship requires more than an arms' length civil model;
(4) where there are multi-parties to the dispute.

If we take seriously our claim that ADR is infinitely flexible compared to the court process, each case deserves a negotiated model taking into account its unique identity. A starting place for constructing that model might be an analysis of where our case lies on each of these spectra:

Subject matter		
Civil claim	<————————->	Family dispute
Desired outcome		
Commercial bargain	<————————->	Ongoing relationship
Complexity/conflict		
High conflict	<————————->	Financial complexity

Example 1: Intergenerational farming litigation

The final hearing in Chancery proceedings over respective interests in a family farm was stayed pending mediation between the four parties, two of whom were divorcing spouses in ancillary relief proceedings, themselves adjourned generally pending the outcome of the Chancery proceedings. Total costs to date in the 4-year long proceedings were over £30,000. Following separate 'assessment meetings', a hybrid family/civil mediation took place lasting one day, attended by the four parties and their solicitors and counsel, a *Tomlin* order was concluded in the Chancery proceedings, and a publicly-funded privileged family mediation also produced a memorandum of understanding in respect of the ancillary relief proceedings. The total cost to the four parties and the public purse was just over £2,000.

Example 2: Inheritance claim in civil proceedings

Mediation took place over a day between the claimant widowed mother claiming a share in the estate left by her estranged deceased husband to three children, who were themselves at different stages of estrangement from the mother. Although the basic model used to reach settlement was solicitor-supported civil mediation, a flexible approach was used to allow joint meetings (sometimes between family members with the support of the mediator but not the lawyers) to deal with the sensitivities of the issues, the interplay of family/civil law and practice and the prospect of ongoing relationships following the resolution, resulting in a *Tomlin* order.

A specific area: mediating cohabitants

If we look at separating cohabitants in mediation, pre- and post-proceedings, this artificial dichotomy seems even harder to justify. Why are couples generally denied the benefits of the civil mediation model pre-proceedings by the accident that they have been to see family lawyers? And, in proceedings, why are they denied the skills of family mediators to resolve their relationship issues?

Cohabitants are the forgotten potential beneficiaries of ADR, just as they are always the stragglers of family law reform. At best they creep into the family mediation model, or find themselves referred out to civil mediators. Neither existing model serves them well, and its time we offered them something better.

Where do cohabitation disputes lie on the spectra above? In terms of conflict, they may be anywhere. It may be that the end of the cohabitation is like the end of a business relationship, but, more likely, especially if there are children, there will be issues over emotions, continuing relationship and communications, to be untangled, for which the 'soft skills' of the family mediator would be as essential as in divorce. So a model is needed that is flexible enough to accommodate this.

Why mediate?

Many of the arguments for mediating divorce disputes surely apply with greater force in cohabitation cases. There is huge uncertainty about the state of the law, the costs of litigation are significantly higher, there is difficulty over appropriate venues for litigation, and there is a potential conflict of legal principle where there

are children between TOLATA and Sch 1 Children Act 1989 applications. They cry out for a cost-effective model of resolution, and a place where there can be neutral, mutual explanation of potentially polarising interventions such as the CSA/CMEC.

The scale of the problem

Pre-proceedings, if they are mediated at all, referrals are usually as a result of a Funding Code referral by a family lawyer. Post issue, referrals are caught by the encouragement to ADR in the CPR, and often end up mediated by civil mediators. This distinction is at best haphazard, and at worst dangerous. In the former situation, does the family mediator have sufficient understanding of the uncertainties following *Stack v Dowden*, judicial development of Sch 1 of the Children Act 1989 and the CPR to be able to mediate 'in the shadow of the law'? If in the latter case, the parties end up with a civil mediator, yet it becomes apparent there are children issues arising from a consideration of Sch 1, how competent will the mediator, or sensitive and child-centred the process, be? If, by luck, the parties are referred to a mediation service offering dual-trained mediators, will the separating family get a 'better' outcome? Do we have any 'research', however anecdotal, that might inform the development of some better systems than this lottery?

For the reasons set out above about the ethical base of each pure model, there would seem to be strong reason for family mediators to take such cases on, but should they be required to have undertaken dual training in order to obtain public funding? (Much of this is supported by Thorpe LJ in *W v W (Joinder of Trusts of Land Act and Children Act Applications)* [2003] EWCA Civ 924, [2004] 2 FLR 321, a TOLATA case which encourages the consideration of all issues together, the predominance of children issues, and the use of mediation.) The politics of creation of new referral methods, or panels of appropriate mediators such as currently planned by ADR Group, are outside the scope of this article. So is the case for reform, eloquently proposed by Resolution with much emphasis on ADR (and also the movement of these cases into the family jurisdiction.) My concern remains whether we have sufficiently flexible and robust mediation models to give best opportunity to prospective clients now.

Possible models

These should be just the sort of cases where the creation of a transparent, bespoke model ought to work best. Depending on the level of conflict, and the balance between need for simple commercial bargain or ongoing relationship, decisions could be made about one day or multi-session process, lawyers in or out, same room or caucus, and so on.

As to documentation, the sharing of information/open financial summary would need explicit modification to allow for relevant and proportionate, not comprehensive, disclosure about issues such as a shared history of contributions and intentions. Essential information would include disclosure of conveyancing documentation, and needs of any children. Just as in incomplete family mediations, the cost-effective gathering of this information is likely to assist any litigation, even if matters are not fully resolved. Similarly the structure of a memorandum of understanding is likely to be significantly different. What is the legal status of such a document? And, if a mediated agreement leading to a *Tomlin* order is negotiated by civil mediators, how adequate will this be if there are children or relationship issues?

Shuttling family mediation: some issues

Another fundamental difference in models is whether mediation takes place in the same room or not. For some family mediators, working in separate rooms is anathema; it is 'simply not mediation'. Whilst remaining true to professional boundaries and standards, it surely betrays the essential creativity and humanity of what we seek to do to limit it in such a way. We would not, for example, try to argue that conflict resolution in Gaza was 'not mediation' if it failed to conform to a particular model.

Dangers

But there are plenty of reasons to be cautious and sceptical:

- If the factors militating against face to face are so great, why mediate at all?
- If the ills are absence of trust, or abuse, power imbalance, how are they to be cured without face to face communication?
- If mediation is about accentuating the positive, does shuttling not preserve the negative?
- Is this anything more than arms length negotiation, but quicker?

There are dangers for the mediator herself in such a process –

- Shooting the messenger!
- Setting up unrealistic expectations.
- Onus on mediator to report accurately.
- Process may take longer and be more costly.
- Encourages entrenchment
- Stressful.
- Lets ground rules slide.
- Keeping the unengaged party interested; balancing the time.

Benefits

However, if we recognise that civil mediators have come to the opposite conclusion, and revisit some of the fundamental considerations discussed in Part One of this series (above), we might think differently. If the parties wish to work towards a co-operative conclusion, but are unable to meet together, surely the mediator needs to be able to offer this alternative model and not refuse the parties the opportunity. Some mediators will consider shuttling only as a way into face-to-face work, and this is clearly a significant benefit, but others will consider even this to be an unnecessary constraint. At the very least shuttling might be an appropriate model to support a commercial bargaining process along civil lines, or to model communication where face-to-face is impossible.

For example, if mutual distrust underlies a contact dispute, it is difficult to see how shuttled mediation might assist; but where communication is essential, it may provide a bridge to something better, as an attempt to model better communication. Other benefits might be:

- Leads to work in the same room
- The only way to keep process going
- If that's what they want?
- Avoids imbalances/less stressful
- Opportunity for individual empathy
- Modelling communication
- An opportunity to explore options with the mediator without commitment or raising expectations
- Space to breathe and think privately

Safeguards

So what safeguards might be put in place to maximise effectiveness?

- Keeping track of time, keeping participants informed, transparency about the process both in the sessions and in the outcome summary
- Co-mediating
- Revised agreement to mediate if caucus
- Realistic expectations
- Involvement of lawyers – ground rules
- Planning – equal time to each, or transparency if not; rooms and environment; materials for the unengaged participant (both relevant and irrelevant)
- Use of flip chart or some transportable document

Maintaining separate confidences

A fundamental strategy of the civil mediator is to hold secrets in caucusing so as to build a picture of a realistically achievable outcome and to encourage discussion about sensitive issues and options in a confidential environment – 'caucusing'. Can family mediators ever maintain separate confidences without appearing to collude? Would there need to be a new agreement to mediate to do so? Would this only be in finance and property matters? And before family mediators again consider rejecting this as anathema to their art, why is it so successful in civil mediation, and would it not at least be appropriate in hybrid cases?

Role of lawyers revisited

Consideration of shuttling raises again another fundamental difference between the civil and family models – the role of lawyers. I discuss above whether civil mediation is really modified lawyer-led negotiation within an adversarial process. Much has been written about the role of the partisan lawyer in civil mediation; the role of the lawyer in family mediation is less well defined. This is likely to continue to be the case, but that does not excuse us from looking at how best that role might be developed (see Part Two (above)). Joint training or dialogue would address such issues as clients' ownership, an honest appraisal of lawyers' interest in achieving an outcome, partisanship and impartiality, and so on.

Shuttling at a distance

Once one acknowledges the possibility that family or hybrid mediations need not be face-to-face, how far can one go in time and space? Presumably, in cases of serious violence where a common interest remains in making arrangements for children or resolving finances, the shuttle could be within the same building, but on different days. And where the difficulties are of distance, why should mediation not be in different places, using various means of communication from video link to managed telephone ('tele-mediation') or online communication? The latter could range from simple email to model communication to a sophisticated online dispute resolution (ODR) package, to interaction in a virtual world. The test for suitability remains that discussed in Part One; the feasibility depends again on scrupulous and documented boundaries and process. Acknowledging that the ongoing-relationship-based nature of family mediation will usually require a face-to-face component, there must be cases where an ability to offer other modes of communication will provide a satisfactory alternative to litigation.

Incorporating insights from CFL into the 'hybrid model'

There are clearly aspects of collaborative family law (CFL) practice from which mediators could learn. What for example about the greater forensic quality of CFL? Would this challenge the impartiality of the mediator (see Parts One and Two) or the greater propensity to bring in third party 'experts' such as accountants and barristers?

But if every separating couple with outstanding issues about children and finance lies at a unique point on the continuum between emotional/relationship transformation and commercial bargain, between therapeutic/facilitative and law-based resolution, is not the optimum model for family ADR one where the specialist mediator becomes the manager of a discrete process in which the lawyers are always potentially contributing actively, in a unique model that draws on the best of not only the civil and family mediation processes but also CFL, all of which might prove inadequate on their own? And so could not the presumption in any complex or highly conflicted case be that the mediator is the process manager, calling in the (collaborative) family lawyer, rather than the other way round? Would this not give far more flexibility and robustness to the process in such cases? A creative comparison of the CFL and civil mediation models might suggest this. It could be argued that only mediation, and particularly the FMA model of co-mediation that combines the specialist family lawyer and family therapist, provides the robustness and flexibility to enable this. Could this be the starting point for any alternative to litigation? That is, the complexity and entrenchment described above is best managed by the mediator, calling in partisan lawyers in a sort of 'upside-down' CFL or 'collaborative mediation.'

And if so, what has stopped this becoming the standard 'intake model' so far? Is it because, as research consistently tells us, clients value first the support of their partisan lawyers? Or the way some professional interests within Resolution have understandably appropriated ADR? The Resolution ADR conferences provide one place where this urgent dialogue needs to take place; the next step might be a conference of civil and family mediators and CFLs to develop models together.

Implications and Outcomes

Dialogue and creating the environment

We do not even have the time to talk to each other, unless we have been dual trained. But surely each discipline has much to learn from the other? A challenge for the next generation is the extent to which we can assist each other to move forward. A joint conference, for 'promoters' and practitioners would be a start. This is not just a matter of informing and stimulating each others' practice since it is critical that we find a model that works in the expanding number of cases that are not properly touched by either existing model. Continuing as at present is not an option.

Training and standards

Each of my articles has suggested the need for more available advanced training to deal with the opportunities and controversies created by these modifications, whether the widened subject matter or the sharing of ideas. Who should be allowed to mediate these cases? The more extravagant suggestions above for the presumption of the involvement of mediators are open to the criticism that these people do not exist in sufficient numbers; that most recently many of the most talented co-operation-committed family lawyers have concentrated on collaborative practice. Given the very different issues arising from, say, TOLATA cases, it's at least arguable that only mediators who have attended an advanced training course (run from either discipline) should be able to mediate. Or are these specialists self-selecting, as in civil cases? (That might depend on how satisfactory one considers the current method of selecting civil mediators to be!) The development of a new mediator panel, drawn from those who are dual-trained, might help; ADR/FMA is exploring this.

New Codes of Practice and materials for hybrid cases

The above seems to argue for a completely new set of standard documents, including forms of summary. In recently designing a separate referral process for our own hybrid service, we have realised how many issues arise from the very different roads into mediation, the questions for preliminary determination such as the number of sessions, and whether separate assessment sessions. If cohabitation reform is still some way off, here is a great opportunity for the ADR profession to produce a satisfactory mechanism for resolution of these disputes in the shadow of civil proceedings; and, if no common approach can be obtained, for individual services to develop a reputation for a highly professional and unique approach to this wide spectrum of disputes. New documents can be developed by imaginative mediators on a case by case basis; I suspect it will need something more, and for a lead body to take an interest in their development.

Funding and marketing

Current public funding is controversial and confused, within both the civil and family LSC fields. Again, I suspect there is little dialogue. What is clear is that CPR-based litigation of family disputes is cost-prohibitive, so it is very difficult to gauge the size of the problem. So mediating any of these non-divorce-based family disputes is highly likely to be very cost-effective, if that message can be got across.

The current consultation on the 2010 Legal Services Commission (LSC) contracts proposes an extension of Funding Code referrals to include applications under the Inheritance (Family and Dependants) Act 1975. And in the brave new world of post-2010 LSC contracting, should we be thinking of ADR practices that offer the full range of models from traditional family and civil mediation, to hybrid, to CFL, with initial assessments and the further challenges to conflict of interest issues that would follow? Even before then there is great scope for creative marketing.

Encouragement to mediate

What might the family and civil jurisdictions learn from each other about the encouragement to mediate, such as the implementation of mediation assessments as contact activities, and what might the impact be on models of mediation? There is research in the civil field suggesting that pressure to mediate may be counterproductive, see 'Twisting arms: court referred and court linked mediation under judicial pressure' by Dame Hazel Genn, 21 May 2007 at: www.justice.gov.uk/publications/research210507.htm. Might the same considerations apply in family cases?

The Way Ahead

So, if the essence of mediation is indeed a more humane way to heal legal disputes, we must remain open-minded about such new possibilities. But so much of this depends on how ADR professionals embrace openheartedly the possibility of real change, without recourse to vested interests. It also requires commitment by all agencies to work in partnership to make the right form of ADR available in individual cases (the 'new and innovative ways of resolving family law disputes' advocated by Coleridge J at [2008] Fam Law 1169.) It is to this partnership I will return in Part 4, looking at models of ADR which might best serve the courts where entrenched proceedings are already in train.

The author wishes to thank Henry Brown and James Pirrie for their assistance with this article.