

Chapter 18

The Development of Family Mediation

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It is difficult to resist the conclusion that the way the Law Commission's original proposals have been developed reveals a desire to use the device of providing 'objective' information as a means of influencing behaviour.¹

The relative merits of family mediation, typically contrasted with 'traditional' approaches (involving solicitors and the courts) to the resolution of matrimonial disputes, have been variously exalted, embraced and challenged since family mediation was first developed in England and Wales in the mid-1970s. Over the years, we have witnessed high levels of enthusiasm from the proponents of mediation, and equally high levels of scepticism from those who have been less convinced of its merits and its ability to transform the current approach to the management of divorce. These discordant positions have sharpened considerably since mediation was placed at the heart of the previous government's strategy for reforming the divorce process. The FLA marks a watershed in the development of family mediation in England and Wales. Not only does it envisage a central role for family mediation in the resolution of matrimonial disputes, but it provides a statutory basis for public funding for the provision of family mediation.² Family mediation may be enshrined in statute, however, but it continues to struggle for universal acceptance and professional respect.

It is widely acknowledged that marriage breakdown is rarely easy, and almost always painful and distressing. No matter how well-managed it is, people experience a range of emotions many of which are negative. In some cases, these negative feelings of bitterness, hostility, anger and resentment can last for years, and impact badly on all those involved. Yet the stability of post-divorce arrangements and the maintenance of good relationships between parents and children are key factors in the longer-term adjustment of children whose parents divorce. Promoting continuity in parenting relationships is an important policy objective: it follows, therefore, that conflict during and beyond divorce should be minimised wherever possible. It is family mediation which has been seen to hold the key to reducing conflict and promoting civilised divorce.

The special characteristics of family disputes were cogently detailed at the time when mediation services were blossoming.³ These need to be taken into account when assessing the suitability of any form of dispute resolution. First, family disputes usually involve people (notably parents) who have continuing and interdependent relationships. Secondly, family disputes arise, and have to be settled in the context of a range of distressing and fluctuating emotions and feelings. And thirdly, the disputes which result from marriage breakdown frequently impact on third parties, notably children, who may not be direct

¹ Eekelaar, J., 'Family law: keeping us "on message"', *Child and Family Law Quarterly*, vol. 11, no. 4 (1999).

² The Rt Hon. Lord Justice Potter (Chairman), *Mediating Family Disputes: Education and Conduct Standards for Mediators*, The Lord Chancellor's Advisory Committee on Legal Education and Conduct (1999).

³ Sander, F.E.A., 'Towards a functional analysis of family process', in J. Eekelaar and S.N. Katz (eds), *The Resolution of Family Conflict: Comparative Legal Perspectives*, Butterworths (1994).

participants in any dispute resolution process, but whose interests need to be protected. In Sander's view, these characteristics render a simple modification of other models of mediation, such as those used in industrial or environmental disputes, problematic. As Fuller⁴ observed, interventions in matrimonial matters should be person- rather than act-oriented, suggesting, perhaps, that the more informal mechanisms for resolving disputes, such as mediation, are better suited than the more formal procedures (through lawyers and courts) to addressing the emotional issues which surround family disputes. The advocates of family mediation have argued that the law is a blunt instrument with which to resolve family disputes, whereas family mediation offers a more appropriate level of support which focuses on problem-solving and private ordering.

Family mediation has been defined as a process in which an impartial third party, the mediator, assists a couple considering separation or divorce to make arrangements, to communicate better, to reduce conflict, and to reach their own agreed joint decisions about children, finance and property.⁵ Put simply, 'mediation helps separating and divorcing couples who are in dispute to make their own decisions for the future'.⁶ Specifically, unlike lawyers, the mediator is not identified with any of the competing interests and, unlike courts, has no power to impose a settlement on the participants. Mediation, then, offers an alternative to negotiation at arm's length by solicitors, and to adjudication through the courts. It is not and has never been claimed to be a substitute for legal advice. Its attractions lie in the focus on reducing conflict and improving communication as important factors in reaching settlements. It can be viewed as a relatively new social invention, but one deriving from previous practice in other fields and cultures. It has been seen as a more sensible way of settling family disputes and as a civilised and civilising procedure, a process which returns to, or keeps control in, the couple. As such it cannot be fully appreciated without consideration of such concepts as friendship, trust and the pursuit of mutual interests,⁷ as has been obvious in the accounts of information meeting attendees.

The Origins of Family Mediation

In 1974, shortly after the implementation of the Divorce Reform Act 1969, the Finer Committee on One Parent Families recommended that mediation, referred to then as 'conciliation', should be available to assist families with the consequences of divorce in a more civilised way than that which results from an adversarial process.⁸ The Committee envisaged a new approach to matrimonial proceedings within a unified family court structure. Successive governments did not take up Finer's recommendations, and so it was left to a small group of divorce-associated professionals (counsellors, family court welfare officers and lawyers) to spearhead the development of mediation in the voluntary sector and through the family court welfare arm of the probation service. A deeply-embedded child-saving philosophy encouraged family court welfare officers and certain children-focused voluntary agencies such as NCH–Action For Children to develop skills in family mediation and embrace it as part of their welfare services. However, without mainstream central government funding, or any coherent national strategy, family

⁴ Fuller, L., 'Mediation – its frame and functions', *Southern California Law Review*, vol. 44 (1997), pp. 301–28.

⁵ Walker, J., McCarthy, P. and Timms, N., *The Making and Remaking of Co-operative Relationships*, Relate Centre for Family Studies (1994).

⁶ Taken from the leaflet entitled 'Mediation' which was included in the information pack for the pilots.

⁷ Walker, McCarthy and Timms (1994), *op. cit.*

⁸ Finer, Sir M., *Report to the Committee of One-parent Families*, Cmnd 5629, HMSO (1974).

mediation services developed in a piecemeal, fragmented fashion. Mediation in the voluntary sector has been characterised by a recurring struggle for financial resources, services surviving on a year-by-year basis with little real prospect for longer-term business and strategic planning. In the statutory sector, the role of mediation within the probation service has often been confused, not least because of the statutory duties of welfare officers to prepare reports for the court. Mediation in the private sector has largely been colonised by lawyers (often working in partnership with social welfare professionals). Only in the voluntary sector have discrete mediation *services* been established, while family court welfare officers and solicitors have embraced mediation as part of their existing practice. As a consequence of this somewhat *ad hoc* development across a wide variety of previously existing agencies, family mediation has pursued a somewhat hazardous course with ambiguous and confused terminology, at least in the early years, differing ideologies, a multiplicity of practices, and a distinct tension between legal principles and the theoretical perspectives of social welfare.⁹ Separate bodies such as National Family Mediation (known initially as the National Family Conciliation Council, and then as the National Association of Family Mediation and Conciliation Services) and the Family Mediators' Association were established, and provided a professional reference point for the voluntary and private sectors respectively. Mediators in the voluntary sector have been affiliated to discrete mediation *services* with their own administrative arrangements. Mediators in the private sector have not come together in the same way, although they have been affiliated to a professional body. Family court welfare officers undertaking mediation (or adopting a mediatory approach) practise under the auspices of the probation service. It is only in the last ten years that some of these groups have come together to promote greater consistency in policy and practice (through, for example, the establishment of the UK College of Family Mediators), but tensions remain between the various professional groups involved in providing mediation.

The pioneers of family mediation from the voluntary and statutory sectors traditionally worked with a focus on children in their parent professions, a focus which was transferred into mediation practice. In this respect, mediators struck an implicit deal with solicitors to mediate only children's issues, principally residence (custody) and contact (access) disputes, leaving lawyers to deal with disputes involving finance and property, thus offering little in the way of a direct challenge to the role of the legal profession with its long-established monopoly on managing the divorce process. The support of the legal profession was crucial if mediation was to get off the ground as an alternative approach to dispute resolution in the early years. This support came with conditions attached.

Research indicated, however, that the rather restricted focus on children's issues was not necessarily in the best interests of clients, many of whom could not disentangle disputes about money and property from disputes about children.¹⁰ Those who could not agree about arrangements for children were likely to be in dispute about other matters also. Slowly but surely, over the years, mediation practice has embraced all the issues, although, as we know from this and previous research,¹¹ solicitors have continued to question the use of mediation in financial matters, particularly when the mediator is not legally qualified. The initial development of comprehensive or all-issues mediation took an experimental form, with a variety of models and approaches (reminiscent of the

⁹ See Walker, J., 'Divorce mediation – an overview from Great Britain' and Walker, J., 'Divorce mediation – is it a better way?', both in J. McCrory (ed.), *The Role of Mediation in Divorce Proceedings: a Comparative Perspective*, Vermont Law School (1987).

¹⁰ Conciliation Project Unit, *Report to the Lord Chancellor on the Cost and Effectiveness of Conciliation in England and Wales*, Lord Chancellor's Department (1989).

¹¹ See Ch. 32.

piloting of information meetings). Evaluation of these experiments suggested that mediation seemed to be ‘a permeable form of intervention, subject to the “pushes and pulls” of interests: those of users, of providers and the state’.¹² For example, protracted discussions took place between the Law Society and mediation services (notably, National Family Mediation) on the emerging distinction between legal information and legal advice, an issue which has also permeated consideration of information meetings as they are conceptualised in the Family Law Act. Research suggests¹³ that mediation, however comprehensive in its remit, does not necessarily address the perceived need of mediation clients for advice and guidance, for reflecting on the ending of the marriage relationship, and for attributing blame. The Green Paper seemed to suggest that mediation did or should have such a remit, promulgating a dangerous confusion and potentially unrealistic expectations about the purpose of family mediation.

Dispute Resolution or Assisted Decision Making?

Increasingly, mediation came to be recognised as ‘a means of dispute resolution independent of the legal process and clearly distinguished from social work, counselling and family therapy’.¹⁴ This being the case, the entry requirements have tended to be that couples must be in dispute about some aspect of future arrangements relating to children, finance or property. Yet as mediation has gained a higher policy profile and become enshrined in the FLA, it is not always clear that mediation is being promoted as alternative dispute resolution. At times, it seems to be promoted as a service which can best be described as ‘assisted decision-making’. As was noted in previous research, as it became possible to mediate all issues,

so couples approaching mediation were not always ‘in dispute’, but were seeking to sort things out amicably and co-operatively – to receive skilled help in making decisions about how to manage separate and overlapping futures, to achieve the life that each can best live.¹⁵

Mediation sometimes looks more like an alternative way of talking through issues which arise on the ending of a marriage. To some extent, this subtle shift in the role of mediation from alternative dispute resolution to assisted decision-making was reflected in many of the parliamentary debates during the passage of the Family Law Bill. When he presented the Bill to the House of Lords, the (former) Lord Chancellor said that research had shown the importance of the need to reduce conflict between divorcing parents in order to reduce the damage caused to children. He also pointed to the need to help parties try to communicate better during the divorce process and to encourage them to try to manage conflict so that they would make arrangements for the future which would be better for their children, and on which they could both agree:

In these important respects, namely, the reduction of conflict and improvement of communication, mediation has been shown to be most effective ... I believe that mediation has enormous potential in appropriate cases ...¹⁶

¹² Walker, McCarthy and Timms (1994), *op. cit.*, p. 160.

¹³ *ibid.*, p. 164.

¹⁴ Roberts, M., ‘The essentials of conciliation’, in T. Fisher (ed.), *Family Conciliation within the UK: Policy and Practice*, Jordans (1990).

¹⁵ Walker, McCarthy and Timms (1994), *op. cit.*, p. 164.

¹⁶ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 30 November 1995 at col. 704.

The Lord Chancellor went on to suggest that although the Bill provided for the Legal Aid Act to be amended to allow parties who are eligible to apply for state funding for the use of mediation, this did not deny them (if eligible) access to state-funded legal advice in support of mediation. The primary focus was not on dispute resolution as such, but on the role of mediation in helping parties to communicate better, to reduce conflict between themselves and to make arrangements for the future. This effectively equates with a process of assisted decision-making. In his response to the Lord Chancellor, Lord Irvine of Lairg (the present Lord Chancellor) expressed support for mediation, but raised concerns about the availability of legal advice, commenting that

fair arrangements necessarily depend on skilled legal advice and representation ... Your Lordships are being asked to legislate for a two-tier system – proper legal advice and representation for those who can pay and the lowly prospect of the mediation room for the rest.¹⁷

Lord Irvine went on to express the view that whenever a serious issue in respect of assets arose in mediation, mediation should cease and legal aid for representation should be made available for court proceedings. Earl Russell was also keen to seek reassurances that mediation would be voluntary, and that parties could leave mediation if they did not like it.¹⁸ Similar concerns were expressed when the Family Law Bill was given its Second Reading in the House of Commons, with references made to the risk that couples who go to mediation may be disfranchised, and that mediated settlements are not necessarily just and fair:

In appropriate cases, there is a role for mediation, but it is folly to believe that it is primarily concerned with justice and equity, because it is not. Mediation is about arriving at a settlement with a minimum of conflict, whereas conflict is sometimes necessary to achieve justice and equity ... During our deliberations ... we must ensure that we do not propose a two-tier system which says, in effect, 'If you can afford a lawyer, you will receive justice and equity; if you cannot afford a lawyer, it will be the mediators for you.' That cannot be right ...¹⁹

Having expressed this concern Mr Boateng went on to describe the aim of mediation as being 'to achieve the speediest possible resolution of outstanding conflicts about the disposal of property, the children's future and parental responsibility'.²⁰ This is the nearest approximation during the parliamentary debates to a definition of mediation as a dispute resolution mechanism.

Mediation as an Option

What was evident throughout the debates, however, was widespread agreement that mediation must be a voluntary, optional service; that there should be no inducement for parties to enter into mediation if either or both choose not to; that they should not be disadvantaged if they choose not to mediate; and that legal advice should be available throughout. As the MP for Sheffield, Healey put it:

¹⁷ Lord Irvine of Lairg, Official Report (H.L.), 30 November 1995 at col. 708.

¹⁸ Earl Russell, Official Report (H.L.), 30 November 1995 at col. 714.

¹⁹ Mr Paul Boateng MP (Brent, South), Official Report (H.C.), 25 March 1996 at col. 752.

²⁰ *ibid.*

I should stress that mediation is the facilitating of communication. It is not a forum for giving advice. Negotiations cannot take place without advice ... It would be unfair to those on legal aid if they were disfranchised for seeking a second opinion after or during mediation ...²¹

Mediation was seen as a substitute for litigation, but not as a substitute for legal advice. But it was also seen as being something more, namely a process the primary functions of which were to improve communication, reduce conflict and promote settlements. There were no indications, however, that members of either House had inflated expectations of what mediation might achieve, and its incorporation into statute was repeatedly marked with caution. As Lord Archer of Sandwell stated:

I hope that there is not a danger that, like so many other admirable remedies mediation may become the automatic answer to every problem, even after the proceedings have begun. There is a danger that one has a Pavlovian reaction whenever confronted with the question of what to do next ...

There has been some anxiety expressed in the country that the Government are anxious to make mediation a blanket remedy to the exclusion of such other remedies as legal advice.²²

Lord Archer went on to list a number of situations which would indicate that mediation was unsuitable:

- the parties are not agreed on the facts
- there may be irreversible imbalances of power
- one party may suffer from mental or other impairment
- one or the parties may feel coerced
- there may be criminal child protection issues
- one party may lack commitment to mediate

Neither House was keen to see a presumption in favour of mediation encapsulated in the FLA, nor to promote any diminution in the importance of parties seeking legal advice. While the notion of promoting conciliatory divorce was not questioned, the extent to which mediation should be promoted as the preferred process was met by continued concern. There was general agreement that people should have a choice of processes, and that they should be able to have recourse to law rather than to mediation if they wished. It was felt that mediation should be chosen only when it was the most appropriate course and not because it might be the cheaper route. So, while a degree of emphasis was to be given to mediation,²³ and it was to be considered as more appropriate than taking court proceedings, mediation was to remain a voluntary process, a matter of choice and appropriateness.

²¹ Mr Bill Michie MP (Sheffield, Healey), Official Report (H.C.), 25 March 1996 at col. 773.

²² Lord Archer of Sandwell, Official Report (H.L.), 25 January 1996 at cols 1200, 1201.

²³ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 23 January 1996 at col. 1001.

While the benefits of mediation have been promulgated, particularly by those involved in its delivery, there has been a danger that it has been viewed somewhat too simply. The expectation, particularly among advocates of mediation, has been that if couples could be told about the benefits of and persuaded to try mediation they would be able to engage in it, but research has shown that, for couples and for mediators, achieving the benefits is far from easy.²⁴ Addressing all issues in mediation can be a long and arduous process. Facing ‘facts’ about division or distribution of assets, in addition to making arrangements for children, is demanding of each party and of the mediator. Achieving a Memorandum of Understanding which lays out the agreements reached is a significant feat.

Although research has shown that all-issues mediation is reasonably effective in helping parties to reduce bitterness and tension and to improve communication, it is not something that all divorcing couples can contemplate.²⁵ The entry criteria for mediation involve the existence and delineation of some kind of dispute; even then not all couples need it, and even fewer will manage the process. The evaluation of the information meeting pilots has confirmed previous research findings that mediation does not reduce the perceived need for advice and guidance, and for an opportunity to reflect on the ending of the marriage. Solicitors continue to provide ‘security’, ‘advice’, ‘comfort’, and a ‘safety-check’ on private ordering. There is no evidence from this or any other research that mediation can offer a complete replacement for lawyers in the divorce process. People facing divorce have varying needs and can benefit from a range of services. Equally, voluntariness is the central tenet of mediation, and no amount of government or professional ‘desire’ will render it possible, necessary or desirable for large numbers of divorcing couples to mediate. Access to justice in its traditional sense must remain. In her study of pathways to justice, Hazel Genn²⁶ highlights the central dilemma in the access to justice argument as

whether the objective of legal policy should be to enhance access to legal forums for the resolution of disputes, or whether it should be aimed at preventing problems and disputes from arising, equipping as many members of the public to solve problems when they do arise without recourse to legal action, and diverting cases away from the courts into private resolution forums. It is not an answer to say that they should be twin objectives of policy, because they logically conflict. The more that is done to enhance access to the courts, the less the public will be interested in wasting time in possibly fruitless self-help remedies or alternative dispute resolution processes.

This dilemma is particularly pertinent to any discussion about ‘diverting’ people into mediation. At the beginning of the evaluation and of the piloting process, there was no explicit expectation that the information meetings were to be used as a diversion mechanism from one service to another. Indeed, the emphasis in the development of the script and information materials was on providing a ‘level playing field’ for all the services. Consequently, the information meeting pilots were not set up to divert people into any specific route through the divorce process, but the expressed disappointment with the preliminary research results would indicate that the Government might consider attempts at diversion to be necessary and/or desirable. If this is the case, it is important to determine what such diversion is expected to achieve, particularly if a broader definition of mediation is adopted.

²⁴ Walker, McCarthy and Timms (1994), *op. cit.*

²⁵ *ibid.*

²⁶ Genn, H., *Paths to Justice*, Hart (1999), p. 326.

The creation of harmony between disputants who have continuing responsibilities together (as parents, for example) would seem to be an eminently sensible goal of any dispute resolution process, and one might question whether this is or should be restricted to mediation. True resolution of disputes must involve some level of mutual acceptance, forgiveness and a desire for co-operation, but this is especially difficult to achieve during the divorce process, particularly one based on adversarial principles.²⁷ Within a process which is based on the principles of not attributing fault and of encouraging ongoing responsibilities and co-operation, mediation can maximise the exploration of options, address the varying needs of children and parents, and support parties to reach agreements which they perceive as fair.²⁸ Evaluation of mediation services has found that mediation can assist in the reconstruction of co-operative relations, help couples cope with the severe stresses and strains associated with separation and divorce, reduce resentment between the parties, lessen tension, and improve communication. As many users have put it, mediation helps 'to sort out troubles'.²⁹

The Search for Middle Ground

Mediation has been in the vanguard of new ways of working with separating and divorcing parties to help them come to agreements about matters about which they could not agree on their own. Establishing co-operation in troubled relationships is no easy task, but both mediators and the more enlightened family law solicitors have long searched for the 'middle ground'. Unfortunately, the development of family mediation in England and Wales has been hampered by a persistent level of mistrust between the long-established practice of law and the relatively new profession of mediation. Both lawyers and non-lawyers have engaged in a rhetoric of partnership, but co-operation has had to cope with the fact that while legal practice has a clear identity (and an unchallenged position in the management of divorce), mediation has been more vaguely described in social work terms. As Davis³⁰ has pointed out, not to consult a lawyer during divorce is seen as risky, and this has seemed to create a dependence on their services irrespective of whether people actually want to engage a solicitor to act on their behalf. Lawyers both provide technical competence and act as a safeguard against injustice resulting from the conflicts of interest which are inclined to arise in divorce. As they have embraced mediation training their technical expertise is absorbed into the mediation process, giving it greater legitimacy in the eyes of mediation clients.³¹ Family mediation in England and Wales has sought to offer an alternative way of resolving disputes to that offered by lawyers acting in their traditional professional role, but, in so doing, has hovered at the margins of the legal process. Furthermore, it has become identified with a very specific form of service delivery involving face-to-face meetings with both partners attending together and a mediator (or mediators) acting in a specialist capacity under the auspices of, or with an affiliation to, a specific service or agency. An evaluation of the effectiveness of mediation in achieving its goals becomes a comment on the performance of one or more specialist services, rather than on a specific type of process which can be incorporated into a number of other professional services. Yet, as lawyers embrace mediation training and

²⁷ Walker, J., 'Mediation in divorce: does the process match the rhetoric?', in H. Messmer and H.-U. Otto (eds), *Restorative Justice on Trial*, Kluwer (1992).

²⁸ Folberg, J., 'Mediation and child custody dispute', *Columbia Journal of Law and Social Problems*, vol. 19, no. 4 (1985), pp. 1-36.

²⁹ Genn (1999), *op. cit.*

³⁰ Davis, G., *Partisans and Mediators: The Resolution of Divorce Disputes*, Clarendon Press (1988).

³¹ Walker, McCarthy and Timms (1994), *op. cit.*

practice skills, it is reasonable to hypothesise that they might adopt a conciliatory approach which might meet objectives which are similar to those of a specialist service.

It is significant, therefore, that the Lord Chancellor's Advisory Committee on Legal Education and Conduct has recently concluded that family mediation constitutes a legal service. Family mediators provide legal information relevant to disputes between the parties and require sufficient knowledge of the law to know when to advise clients to seek independent legal advice; they also help to resolve matters which are subject to legal review; and the Access to Justice Act 1999 places mediation firmly in the remit of the Community Legal Service established by the Legal Services Commission (formerly the Legal Aid Board).³² The new Legal Services Commission has the power to fund family mediation and to set and monitor standards. The Committee has recognised the divergence of views about the relationship between family mediation and legal proceedings, and does not accept that mediation could or should be seen as a complete alternative both to lawyer negotiation and to legal proceedings. Mediation, then, is considered by the Committee to be an additional resource within the legal services portfolio, and one which will evolve as an autonomous form of professional practice with a single, unified code of practice. It may be, however, that if the numbers using mediation remain relatively low, mediation skills should be put to use by all those professionals involved in the divorce process so that the potential benefits of family mediation are not lost merely because it is an option chosen only by the minority of divorcing couples. We would suggest that there is room for considerable debate about these issues, and a need to agree how mediation can and should most effectively fit into the legal process of separation and divorce.

Notwithstanding the impetus for the development of autonomous mediation services, we suggest that it may be helpful to regard mediation as a distinct process rather than as an outcome in itself. As we have found, going to mediation does not necessarily result in disputes being settled. The focus, it seems, should be on helping and encouraging couples getting divorced to do so 'with the minimum of distress' and 'with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances', as in the principles in Part I of the FLA.³³ There is evidence that the provision of information did contribute to these objectives of the FLA being met, even though it did not deliver a high number of couples to mediation.

Mediation represents a complex process of accommodation in the face of changing views about how matrimonial disputes should be resolved. Mediation is valued by professionals as one of a number of services which, between them, meet a variety of needs. There is no evidence that mediation can or will take over from other professions, nor offer a panacea for the resolution of the difficult and intensely personal private disputes which characterise some divorces. With relatively few people choosing to use mediation services, they remain on the margins of divorce processes despite the focus given to mediation in the Family Law Act. The public policy agenda is firmly focused on the need to reduce the antagonism and conflict inherent in the divorce process for many couples, the desire to promote conjoint responsibilities between parents, and the wish to reduce the financial cost of divorce. Dingwall and Eekelaar³⁴ have pointed to the difficulties of fusing cost-saving, welfare paternalism and self-reliant dispute resolution in the movement for divorce reform.

³² The Rt Hon. Lord Justice Potter (1999), *op. cit.*

³³ Family Law Act 1996 Part I.

³⁴ Dingwall, R. and Eekelaar, J., *Divorce, Mediation and Legal Process*, Clarendon Press (1988).

A key message of the FLA is, of course, that no longer should divorce legislation be merely concerned with the dissolution of a legal contract, but it must take account of the need to protect and preserve, as far as is possible, primary family relationships. The Act represents a radical shift away from adversarial positioning towards a more informal, individualised system of justice. In this respect, however, the rigidity of the information meetings in the pilots was strangely at odds with the new philosophy.

The FLA emphasises co-working, and interdisciplinary co-operation. Mediation has much to offer, but its potential to change behaviour must not be overstated. It is most unfortunate that during its formative years mediation has been seen as a positive, civilised dispute resolution process while negotiation by lawyers has been viewed negatively as antagonistic and confrontational. This polarisation is not justified, particularly since many lawyers would argue that what is applauded in mediation as its strengths constitutes the very essence of what very many family lawyers have been attempting to practise for a number of years. The previous government set an agenda for mediation which involved identifying marriages capable of being saved, helping couples to accept responsibility for the ending of their marriage by acknowledging conflict and hostility, dealing with feelings of hurt and anger, addressing issues which may impede a couple's ability to negotiate settlements amicably, and focusing on the needs of children. This was a tall order and also almost certainly unachievable given current mediation practice. Critics of mediation have accused mediators of applying moral pressure to parents in a quest to reassert traditional models of parenting even after divorce. The belief that with the 'right' legislation and the 'right' processes in place divorcing spouses can be helped to function in an amicable, co-operative fashion is almost certainly flawed. The benefits of mediation were spelt out in the leaflets provided at information meetings. Only in group presentations was a more determined effort made to encourage the use of mediation. That the law should encourage people, especially parents, to mediate any disputes is entirely consistent with the principle of promoting conciliatory divorce. As we have found, however, merely counting the numbers going to mediation services does not give an accurate picture of the extent to which couples are being conciliatory and are managing to mediate issues with or without the help of specialist mediators.

Explaining what mediation is and is not has remained problematic. Nevertheless, the knowledge gained about mediation at an information meeting seems to have been considerable. If the purpose of information meetings was to increase knowledge and empower citizens to take informed decisions, the evidence is that they have succeeded in achieving these objectives. As will be explained in the next three chapters, however, there are many constraints on the choices open to people. Moreover, our research has not found a relationship between knowing more about mediation and actually using it. The FLA endeavours to nudge people into mediation by requiring all parties wishing to apply for legal aid for representation by a lawyer to attend a meeting with a mediator prior to being able to make such an application. Eekelaar has described this as an example of government by persuasion:

Mediation was not simply a method of bringing parties to an agreement; it was a further way of informing people about how they should have behaved, and should behave, and, through informing them about these matters, bringing pressure to bear on them to act in a 'responsible' manner.³⁵

³⁵ Eekelaar (1999), *op. cit.*, pp. 387–96.

As Eekelaar points out, it is hardly novel for the law to try to influence behaviour, but legal attempts to maintain particular forms of family living have not been very successful, as the history of divorce testifies. The unanimous intention of Parliament when shaping the FLA was to encourage people whose marriages were at an end to manage the process of dissolution in an as amicable and conciliatory a manner as possible. The messages about doing things decently have got through to the majority of people who went to an information meeting, as witness the numbers who said they would be willing to use mediation if it seemed appropriate. Mediation offers one route to achieving conciliatory divorce. The fact that most have not used mediation services needs to be attributed not only to inadequacies in the messages, but to a wide range of other factors which we explore in the following three chapters.

The Move towards Private Ordering

There has been a considerable growth in the development of extra-legal dispute resolution processes since the early 1970s, particularly in North America, Australia and, more recently, Europe. In Lord Woolf's³⁶ comprehensive review of civil justice the potential of alternative dispute resolution was emphasised enthusiastically. The new Civil Procedure Rules (April 1999) give courts substantial power to direct parties to attempt to settle disputes outwith the courts. The Government's discussion paper on alternative dispute resolution³⁷ outlines the benefits of alternative mechanisms. Clearly, as Genn's³⁸ study has shown, civil and family disputes incur considerable social and economic costs, and we know that the number of disputes in relation to arrangements for children brought to the attention of the courts has increased in recent years.³⁹ It may be that many of these so-called disputes reflect a breakdown in communication or ongoing hostility which would be addressed in mediation. While courts may impose a solution, the legal process is unlikely to be able to change the behaviour of the parties involved, or, in other words, to effect real resolution of the dispute. Both family lawyers and mediators promote compromise in the face of intractable conflicts: sometimes the parties negotiate solutions acceptable to each of them, while sometimes they cannot do so and require someone to adjudicate the problem. The provision of legal aid for mediation inevitably brings with it an expectation that people will behave in particular ways, in line with Government policy.⁴⁰ Hence the 'disappointment' when people apparently do not behave as expected. The employment of mediation for the purpose of diversion is exemplified by Section 29 of the FLA, which states:

A person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator –

(a) to determine –

(i) whether mediation appears suitable to the dispute and the parties and all the circumstances, and

³⁶ Access to Justice, Final Report [Woolf Inquiry], Lord Chancellor's Department (1996).

³⁷ Lord Chancellor's Department, *Alternative Dispute Resolution: A Discussion Paper* (1999).

³⁸ Genn (1999), *op. cit.*

³⁹ Davis, G. and Pearce, J., 'Privatising the family?', *Family Law*, vol. 28 (1998).

⁴⁰ Davis, G. and Genn, H., with Bevan, G. and Walker, J., unpublished paper on alternative dispute resolution prepared for the Lord Chancellor's Department (2000).

- (ii) in particular, whether mediation could take place without either party being influenced by fear of violence or other harm; and
- (b) if mediation does appear suitable, to help the person applying for representation to decide whether instead to apply for mediation

The aim is to encourage people to consider mediation before using partisan lawyers to represent them in order to resolve disputes. It was this measure which caused concern during parliamentary debates lest it should result in a two-tier, two-class system of justice because legal aid for representation could be denied to those unable to pay for a lawyer. The Committee on Legal Education and Conduct also pointed to the danger that implementation of Section 29 would be seen as discriminating against those who seek legal aid for representation. The operation of Section 29 is not within our research brief, and a separate research team led by Professor Davis at Bristol University has monitored Section 29 as it has been rolled out in England and Wales. It is important, however, to draw attention to the fact that Section 29 has not resulted in a massive diversion to mediation either. Even though the pilot areas did not for the most part overlap with the information meeting pilots our research almost certainly throws light on this issue. Any shift in the culture of disputing is going to take a long time – far longer than the period during which information pilots were operational and longer than Section 29 has been in existence.

We doubt estimates that, on a worst-case scenario, 40 per cent of attendees might be expected to use mediation.⁴¹ While both the last government and this one may have harboured hopes that the provision of information would encourage a greater take-up of the service, the evaluations undertaken by Professor Davis and ourselves indicate such aspirations are unrealistic. Governmental concerns about the ‘low take-up’ of mediation require consideration of whether information meetings or information provision in some other form could and should be attempting to divert people along certain pathways, or whether, as in the pilots, it is more appropriate and acceptable to provide objective information which equips people to make better informed choices.⁴² If a diversionary approach is favoured, this would shift the provision of information away from being presented in the form of a ‘technical guide’, as in the pilots, towards it being presented as an unashamedly persuasive ‘consumer manual’ which attempts to ‘sell’ mediation as the preferred route through the divorce process. The ‘level playing field’ approach of the pilots would have to be jettisoned if this latter approach were adopted. But even if these shifts were made, there would still need to be a greater sense of realism about just how many couples could and would use mediation effectively.

⁴¹ As suggested in the Lord Chancellor’s address to the UK Family Law Conference on 25 June 1999.

⁴² Walker, J., ‘Whither the Family Law Act, Part II’, in M. Thorpe and E. Clarke, *No Fault or Flaw: The Future of the Family Law Act 1996*, Family Law (2000).