Family Mediation - The Comeback

Talk for Family Mediation Northern Ireland Stormont Hotel Event 4/6/09

Mediation is not new. The idea of people with a dispute turning to someone else to help them 'sort it out' is so obvious that our forebears did it without much comment. To quote one of mediation's most trenchant critics:

> *'In pre-capitalist societies, people of high as well as low status invest extraordinary amounts of time in mediation, an investment that (proportionately) far exceeds the resources devoted to the adjudication of disputes in our society'* (Abel, 1983, p.181).

Another scholar notes: *'Everywhere in the Ancient Greek World ... arbitration was normal and in arbitration the mediation element was primary'* (Roebuck, 2007, p.106). It seems that mediation pre-dates litigation. Those who are familiar with Chinese mediation or Islamic 'Suhl' would agree. Nearer your own situation, I can still remember one Joe Campbell, lately of Mediation Northern Ireland, entrancing a Scottish audience with his description of the old Irish role of the 'go-between', brokering cattle sales between intransigent farmers.

I say all of this to make a simple point. Mediation has always been a common-sense way of dealing with conflict. That sense is all the more common in the area of family mediation, where parents' ability to juggle their own and their children's needs is critical for the next generation. Rather than seeing it as a new-fangled American import, like giant fridges and psychoanalysis, mediation can be framed as a return to our roots. And just as mediation seems to have pre-dated litigation, I want to suggest that, at least in the field of family law, it is once again becoming the dominant ideology. In England, John Eekelaar has cogently argued that mediation is one element in a movement that has overhauled the norms we apply to relationship breakdown, a movement he terms '*the new morality'* and Kathleen Wright has observed lawyers behaving more like mediators, sometimes disconcerting their clients (Wright, 2007).

I have fifteen minutes, which divides neatly into two slices of seven minutes (six now that I've waffled on). First I ask 'does it work?' I will consider a sliver off the tip of the iceberg of research that now exists on family mediation. Then I turn to the EU's recent directive on cross-border mediation, a topic of particular relevance on this island, before thinking about the future: where should family mediation sit in the range of options for separating parents?

Research

When we ask, 'Does it work?' the answer depends, of course, on what we mean by work – this is the efficacy question. We can frame the question in different ways:

- Do people like it?
- Does it achieve agreement?
- Does it reduce conflict?
- Does it improve children's lives?
- Does it reduce litigation?
- And, last, but not least, does it save money?

The first is easiest to answer. Most of the research into mediation comes from the USA, but we have carried out our own research in Scotland, and similar findings having been replicated in England and Wales. Mediation is enduringly popular. Even in California, where mediation is mandated, more than 90% of clients said the mediation treated them with respect, listened to their concerns and tried to keep them focused on their children's interests. 70% said the mediator had helped them to see more ways to work together as parents. However, 13% felt pressured by the mediator to go along with things they didn't want and 17% felt rushed (Kelly, 2004, p.7). This cautionary note is replicated in England and Wales where, following the introduction of (semi) mandatory intake interviews by the Family Law Act 1996, the number of clients who were satisfied dropped from 75% to 46%. In Scotland, where mediation remains voluntary, the most recent figure for satisfaction was over 80%.

Agreement rates are notoriously subjective, and therefore less reliable. In Scottish research from the 1990's 57% reached agreement on all issues discussed, and another 21% on some, totalling 78% who get somewhere (Lewis, 1999, p.12). In Colorado these figures were 39% and 55% (totalling 94%) and in Virginia 77% seem to have reached agreement (Kelly, 2004, p.11). 55% reached agreement in a single session snapshot in California (Kelly, 2004, p.6).

We know that reducing conflict and improving children's lives are intimately connected, so I'll take these together. In the Scottish study, 53% thought that communication had improved – this is clearly a tougher nut to crack, and a whopping 31% were unsure. When it comes to measurable improvements in children's lives, the most useful study, and perhaps the only one of its kind in the world, was conducted by Professor Robert Emery in Virginia (Emery et al, 2005). He and his team were able to take families who had applied to the court for a custody hearing and randomly assign them either to mediation or to a

determination by a judge. They then followed up those families at one and twelve years after the mediation or court hearing.

Although they found the usual high rates of satisfaction with mediation, this effect faded after a year. And, disappointingly for mediation advocates, one year on they were unable to detect a significant difference in relationship quality or psychological wellbeing between the two groups. However, this changed dramatically at the 12 year mark. Contact with non-residential parents is a major concern for all of us working in this area, and also for fathers' rights groups and children themselves. They found that, of those who had been to court, only 9% were seeing their children once a week or more, compared to 30% for the mediation group. At the other end of the scale, 39% of non-residential parents saw their children once a year or not at all, compared to only 15% of the mediation group (Emery et al, 2005, p.30).

In a large and highly mobile country like the USA, telephone contact is perhaps even more important. And here the numbers are stark. 13% of the non-residential parents in the court group spoke to their children once a week or more, compared to 54% in the mediation group. Conversely, 54% of the adversary group had spoken to their children once or less in the past year compared to 12% of the mediation group. Let's pause and consider the human impact of these figures – we are talking about large numbers of children growing up with their 'other' parent as a real, living part of their daily lives, or not, depending on a five hour intervention their parents took part in twelve years earlier.

It is worth taking another leaf out of Professor Emery's book, before moving on. He poses the question: 'if mediation is such an effective process, what made it work?' He comes up with four answers:

- *Taking the long view*
- *Education about emotions*
- *Businesslike boundaries*
- *Avoiding becoming adversaries*

And I need to say a word here in defence of our legal partners. I have recently had the dubious privilege of marking students' essays on mediation, and one made a simple but astute observation: it is not the <u>purpose</u> of the adversarial system to reduce conflict. Indeed, it may well be in the short term interests of an enthusiastic advocate to increase it, so as to heighten their client's chances of 'winning'. Imperfect as it may be, the fact that mediation sets itself the goal of reducing parental conflict probably means it will achieve it in at least some cases.

I promised some data on re-litigation and cost. In the Colorado study, the mediation group used substantially less court time initially, presenting more joint motions and asking for fewer orders. After two years 24% had returned to court as against 38% of the comparison group (Kelly, 2004, p.31). However, altering arrangements is not necessarily a bad thing, and Emery's study found that parents who mediated made more changes in their agreements than the adversary group (1.4 compared to 0.3 – 2005, p.28).

Cost remains an imponderable. How do we compare like with like? Without a random assignment like Emery's we can never know whether parents who choose mediation are more reasonable in the first place, and therefore less likely to run up solicitors' bills. However, one figure to toy with comes from a Californian Comprehensive Divorce and Mediation project, for which clients paid in full. It found that the total costs, including attorney's fees for the mediation group were $5,234, compared to $12,226 for the adversarial group.

The EU Directive

Directive 2008/52/EC of the European Parliament and of the Council archly refers to *'certain aspects of mediation'*. Like all European documents, it begins with high-sounding pronouncements, to keep us on message, so to speak. First it traces its lineage through the EU's commitment to the free movement of persons, leading to the need for *'judicial cooperation'* and access to justice and thence to previous directives promoting *'alternative methods of settling disputes'* (code for mediation and arbitration). As mediation is such a good thing, the EU would like it to be promoted by member states – and arguably it is being, not least on occasions like today. However, this directive seems to arise from recognition that mediation needs some structural support if it is to be effective, particularly in those vexed disputes between people in two different member states.

So, this Directive applies to *'mediation in cross border disputes'* (Preamble, para 8). It applies to any mediation, whether freely chosen or ordered by the court (or even judicial mediation) (Article 2, 1). It is careful not to create any new rights:

> *'it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law'* (Preamble, Para, 10).

Two conditions are worth noting. The first concerns the credibility of mediation. The key words are *'to ensure the necessary mutual trust'*. The EU seems to understand that a consensual process like mediation is doomed if it isn't trustworthy. And how should Member States ensure this trust? They should *'encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services'* (Preamble, Para 16). So, states

and mediators need to raise their game before we even get to the border, so to speak, by ensuring that mediation is a credible, quality service.

The second is equally interesting: *'Mediation should not be regarded as a poorer alternative to judicial proceedings'*. It goes on, *'in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties'* (Preamble, Para 19). In other words, if mediation is going to be effective, its outcomes have to be seen as equally worthy of state support. So this is about enforcement. The Article itself states:

> *'Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable'* (Article 6, 1).

Having said all this, I am not sure that this makes a great deal of difference to family mediators. If I were speaking to commercial mediators, where mediation sessions regularly produce binding legal agreements, there would be general rejoicing before turning to legislators to get this into law. But, at least in my experience, family mediators go out of their way to ensure that mediation outcomes are <u>not</u> binding legal agreements. An outcome is called a 'Memorandum of Understanding' and it spells out the need to seek independent legal advice before anything with irreversible legal consequences takes place, such as the sale or transfer of a property.

It remains a moot point whether this Article would allow someone to take a Memorandum of Understanding and try to enforce it in another country (possibly one just down the road!) The term *'written agreement resulting from mediation'* is pretty broad. Nonetheless I would suggest that the safe practice for family mediators remains one of producing a memorandum and leaving it to family lawyers to turn it into a binding and enforceable legal agreement. In Scotland, such a Minute of Agreement can form the basis of a subsequent divorce judgement, which would be as enforceable abroad as any other judgement. Your own publication says much the same:

> *'The Memorandum of Understanding may, with your consent, be sent to respective solicitors to become legally binding; may become the basis of a court order; or remain a private agreement between you'* (Separation in Northern Ireland, p.9).

So, let's not get too excited about enforcing mediation agreements in other jurisdictions.

Of more concern to mediators are the provisions on confidentiality. It remains one of mediation's cardinal tenets that it is a protected space, where people are free to consider options without their conversation being used against them in subsequent proceedings. Equally, mediators hardly relish being called as witnesses to support one or other of their joint clients, not to mention the mischief this may make for subsequent mediations. It is pleasing then that Article 7 calls on Member States to:

> *'ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial proceedings or arbitration regarding information arising out of or in connection with a mediation process'*

If you will allow me a wee boast here, Scotland remains the only country in the EU to have put such legislative protection in place (although I believe Slovenia is just catching up). The Civil Evidence (Family Mediation) (Scotland) Act 1995 provides that *'no information as to what occurred during family mediation to which this Act applies shall be admissible as evidence in any civil proceedings'* (1995 Act, S.1 (1)). This Act contains the usual exceptions for child protection, information relating to the commission of a crime and the existence of a contract. Rather more worryingly, if everyone involved apart from the mediator agrees, the evidence is admissible (S.2 (1) c).

Nonetheless the Act is a fine piece of protection for family mediation, and has I'm sure boosted people's confidence in its credibility.

Conclusion

To conclude, I have suggested that mediation is not so new, and owes as much to common sense as to psychology or law. At one time, commentators could talk of divorce mediation as *'Bargaining in the Shadow of the Law'* (Mnookin & Kornhauser, 1979). Recent work in England (Wright, 2007) suggests that things have gone full circle, with family lawyers and judges being so heavily influenced by the mediation movement that we can almost talk about lawyering in the shadow of mediation. Mediation is making a comeback.

There are reasons for this. Society has changed and is changing, to such an extent that social commentator Francis Fukuyama talks of *'The Great Disruption'.* The common-sense idea of sitting down with a friendly and helpful outsider to try and work out what to do following separation has caught the public's imagination, and influenced a generation of lawyers. And mediation works. It isn't a magic wand, it can't do everything, and it isn't necessarily cheap, but it works well for a significant proportion of parents. People like it. It can reduce court time. It produces reasonable workable outcomes. Perhaps it works most of all because it sets out to reduce conflict, which has been shown to be the most toxic by-product of parental separation that children can face.

The EU Directive may not make a huge difference, but it is one more straw in the wind, suggesting that mediation is here to stay. I particularly like the EU's determination that mediation should not be a *'poorer alternative'* to the court but sit alongside the justice system as a respected and respectable way for people to resolve disputes.

I want to finish with a quote from two more American mediation innovators: *'The critical policy question is not whether mediation is useful, but how to use it to best advantage'* (Irving & Benjamin, 1995, p.423).

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