

Family Law Dispute Resolution

the implications for victims of violence

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In this article Debbie Kirkwood looks at the introduction of compulsory dispute resolution for separating couples, and the issues this raises when there has been family violence. Debbie is currently writing DVIRC's next Discussion Paper on this topic, which will focus on strategies for improving outcomes for victims of violence in the new system.

Introduction

Recent amendments to the *Family Law Act 1975* in Australia require separating parents to attempt dispute resolution prior to having their parenting dispute considered by the court. The Commonwealth Government is establishing Family Relationship Centres to provide joint family dispute resolution. This article outlines the main arguments for and against dispute resolution (also referred to as mediation). There are many concerns about dispute resolution in the context of family violence. In addition to safety concerns, family violence may impact on the parties' capacity to participate in the process and on the likelihood of achieving fair outcomes. As many separating couples are affected by family violence, this is a critical issue to address.

What is Dispute Resolution?

The Family Court frequently refers disputing parties to mediation as a form of dispute resolution. Mediation is a process in which a third person, the mediator, facilitates the resolution of a dispute through discussion and compromise. The aim of mediation is to come to a mutually acceptable solution and to assist the parties to maintain a continuing civil relationship, which is considered to be particularly important when former partners will continue contact as parents (Haynes & Charlesworth 1996:1). Due to the rapid expansion of mediation over the last 20 years it is now described as a growth industry (Alexander 2000).

There has been a shift in terminology which has meant that mediation is now commonly referred to as Family Dispute Resolution (FDR). FDR is defined by the federal Attorney-General's Department as 'a service that assists families with the help of a neutral third party to identify and explore issues in dispute, develop options, consider alternatives, reconcile conflict, and reach agreements (in the case of parenting disputes reach agreements that are in the best interests of their child/ren without the need for litigation)' (Attorney-General's Department 2006a).

Dispute Resolution in the New Family Law System

Wide-ranging changes to family law in 2006 resulted in legislation which requires separating couples to use dispute resolution processes to resolve disputes relating to the care and residence of their children. Over a two-year period, commencing in July 2006, 65 new Family Relationship Centres (FRCs) will be established. The first fifteen centres opened in 2006; the four established in Victoria are in Mildura, Sunshine, Frankston and Ringwood.¹ These centres will provide dispute resolution services for separating parents. While dispute resolution can be provided by any accredited practitioner, the FRCs will provide three free hours of joint dispute resolution to resolve parenting issues. Consequently, it is likely that the majority of separating couples will attend FRCs for

1. Further information about Family Relationship Centres is available on the government website, www.familyrelationships.gov.au

dispute resolution if they are geographically accessible.

From July 2007, the court will not be able to hear an application for an order concerning children unless the applicant files a certificate from an accredited family dispute resolution practitioner or the matter falls within certain exceptions. The circumstances for exceptions include child abuse and family violence. However, the court must be satisfied that there are reasonable grounds to believe the abuse has occurred. This 'creates the impression that the court needs to make a finding about certain matters in the context of some sort of hearing based on evidence' (Altobelli 2006).

Family dispute resolution practitioners can issue a certificate for the court if the practitioner considers that it would not be appropriate to conduct family dispute resolution due to family violence or child abuse.

Screening for Family Violence Cases

Screening will be undertaken by practitioners to determine if family violence has occurred. However, it appears that practitioners will have discretion in determining whether the parties have the capacity to engage in the dispute resolution process.

FRCs have been provided with guidelines for screening and assessment of clients undertaking dispute resolution (Attorney-General's Department 2006b). These guidelines refer to the definition of family violence in the new Family Law Act, which is:

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to reasonably fear for, or reasonably to be apprehensive about, his or her personal well being or safety (p.26).

This differs to the previous definition in the Act by the inclusion of the word 'reasonably'. This is a cause for concern due to different perceptions about what constitutes 'reasonable'. As Renata Alexander has pointed out, workers at Family Relationship Centres 'will be the gatekeepers of what "reasonable" means' (2006: 9).

Many couples affected by family violence will undertake dispute resolution, either because the violence is not detected through screening, or because it is not deemed to affect the capacity of the parties to participate. In some instances family violence victims may choose to attend mediation. Given the cost of accessing legal representatives and the decreasing availability of legal aid, dispute resolution may be the only option available (Field 2005). It is therefore imperative that dispute resolution practitioners are fully aware of the impact of family violence and equipped to respond appropriately to both the victims and perpetrators. It is also important for family violence workers, lawyers and other professionals to be able to prepare victims for dispute resolution and support them through the process.

Conflicts with Principles of Mediation

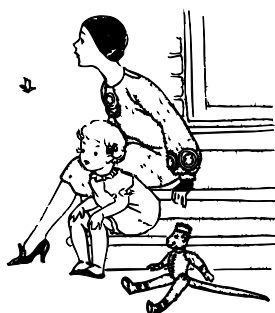
Traditionally, mediation has been viewed as a process in which *voluntary* parties are assisted by a *neutral* third party through a *confidential* process, to resolve a dispute. However, these principles are undermined in the new family law system. For instance, parties are compelled to attend, which counters the principle of voluntary participation. It also may not be possible to maintain confidentiality in certain circumstances such as where there has been child abuse (mandatory reporting requirements apply) or where parties threaten to harm others or themselves (for further information see Attorney-General's Department 2006b).

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The principle of neutrality in the dispute resolution process will also be affected by the recent changes. The performance of FRCs is assessed on the basis of the number of agreements reached. Neutrality cannot occur where practitioners have an interest in reaching an agreement (Astor and Chinkin 2002). FRCs also operate to achieve certain philosophical goals. The Operational Framework for the FRCs states that:

The Australian Government is seeking a cultural shift in the way we approach family relationships. Underpinning the Government's reforms are the importance of promoting healthy family relationships, preventing conflict and separation, encouraging agreement rather than litigation and promoting the right of children to have meaningful relationships with both parents... FRCs are central to achieving this cultural change and the operators of the Centres must be focused on achieving the Government's objectives. A Centre's performance in achieving outcomes will affect the amount of funding they receive (Attorney-General's Department 2005).

FRCs are required to encourage separating couples to stay together. They are also required to start from the presumption of joint parental responsibility which further counters the notion of neutrality (Field 2005). Some academics have argued that the quasi-adjudicative role of dispute resolution practitioners in the issuing of certificates for the court, transforms the mediator's role into a 'quasi-agent of the State' and threatens the perception of independence (Altobelli 2006: 149).



Financial Implications of Agreements

The primary focus of dispute resolution in FRCs is on reaching agreements about parenting

arrangements - that is, who has responsibility for the children and for what proportion of time - rather than determining property matters. FRCs are permitted to deal with both children's and property issues, but this is 'subject to staff having the appropriate skills' (Attorney-General's Department 2005). However, they are not permitted to give legal advice and clients will not be legally represented in dispute resolution sessions at the centres.

It's important to acknowledge that parenting arrangements have significant financial and legal implications. The Family Court is able to take account of these, but a dispute resolution practitioner may not necessarily address them. For instance, the parent who takes their child to the dentist or swimming lessons may need to pay for the cost of those activities. The amount of day-to-day responsibility of each parent will impact on their legal rights in property settlements and to financial support from the other parent.

The following discussion looks at the benefits and disadvantages of dispute resolution for resolving family law disputes between separating couples with children.

Potential Benefits of Dispute Resolution

Faster - It is argued that family dispute resolution is a faster means of resolving family law disputes than litigation, which can take years to finalise. Resolving disputes quickly may be particularly important when young children are involved because even relatively short periods of uncertainty or instability can have a significant impact on children (Astor and Chinkin 2002). Women may be particularly hopeful of a quick resolution because they are more likely to experience financial difficulties after separation. This can make it difficult for them to be able to

afford legal services (Alexander 2000).

Cheaper – For parties who cannot afford litigation, dispute resolution may be an appealing option because it is cheaper, and in some instances it will be the only viable option. Only a small proportion of family law children’s matters are funded by Legal Aid and almost no property matters (Hunter 2000). The family law system is also expensive for the government and the potential to save costs makes dispute resolution an attractive alternative policy approach (Astor and Chinkin 2002).

Less adversarial - It has been argued that mediation as a form of dispute resolution is better able to assist the parties to maintain or develop a cooperative approach to parenting arrangements by assisting them to communicate (Keys Young 1996). The process may foster learning about conflict resolution skills that can be utilised afterwards (Family Court Mediation Section Melbourne Registry 1994). Family dispute resolution may also allow the parties to negotiate an agreement rather than having one imposed on them by the court.

Empowering – Proponents of family dispute resolution argue that it has a capacity to take emotional issues into account. It can give parties the opportunity to speak on their own behalf about issues that matter to them, which generally does not occur in legal proceedings. Some have argued that mediation can be a transformative process which assists parties to clarify their needs and values, discover what resources and strengths they have, and to make clear and well-informed decisions (Lichtenstein 2000). Lichtenstein argues that mediation may be particularly empowering for women because it gives them an opportunity to speak for themselves (2000).

Potential Disadvantages of Dispute Resolution

Given that family law disputes are frequently emotional and difficult, the benefits of dispute resolution outlined

above are appealing.

However, after reviewing many studies of mediation, Alexander (2000) found that evidence for these benefits is mixed and inconclusive.

Attending dispute resolution does not always result in an agreement being reached and does not ensure that litigation will be avoided. If an unfair outcome is reached, then one party may be financially disadvantaged, thus negating the benefits of a cheaper process.

Failure to ensure fair outcomes – The Family Law Act stipulates that Family Court orders must be just and equitable. However, concepts of fairness and equitable outcomes do not feature in the stated goals of family dispute resolution (Alexander 1999). Procedural fairness is determined by the individual dispute resolution practitioner and it is not necessary for dispute resolution outcomes to accord with law (Astor & Chinkin 2002). If parties reach an agreement, this does not necessarily mean that it will be in the best interests of the parties or their children.

In family law litigation, decisions are based on a detailed consideration of past conduct and contributions to the relationship. However, dispute resolution is future focused and is not required to account for history (Alexander 2000). For instance, past care-giving for children and instances of child abuse are relevant to determining the future care of, and contact with children. If women have foregone paid work opportunities to be full time homemakers and carers for children, this will impact on their employment and financial prospects after separation. However, these issues may not be considered in dispute resolution.

The tendency of dispute resolution is to treat parties as equal and to seek equal outcomes. However, as Hilary Astor points out, if two unequal parties are treated



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equally, this will result in inequality (1994). There may be significant power disparities, which may not always be evident to the dispute resolution practitioner (Field 2005). Women frequently experience disparity in economic power, in access to information about family finances and to legal advice, and in credibility (Mack 1995). Women are more likely than men to be socially conditioned to compromise and to consider the interests of others above their own.

Lacks accountability – Dispute resolution is a closed and private process, unlike the Family Court which is public. Consequently, the process and nature of agreements made in dispute resolution is not available for public scrutiny. There are no safeguards to ensure that the information provided by parties in dispute resolution is accurate and reliable (Alexander 1997). While mediators may seek to ensure all information is revealed (such as the amounts of superannuation held by the parties), dispute resolution does not have the protections of discovery available through the courts (Astor and Chinkin 2002).

Not appropriate for family violence cases

- There is general consensus amongst many mediators, family violence workers and academics that dispute resolution is inappropriate in cases involving family violence and requires special treatment (Murphy et al 2005). This is recognised in the recent legislation which makes family violence cases exempt from compulsory dispute resolution. There is a large body of

literature on the problems with dispute resolution in the context of family violence. The key points are outlined next.



Dispute Resolution and Family Violence

Given the high prevalence of family violence, it is likely that many couples attending dispute resolution will be affected by violence. In fact, the proportion of separating couples experiencing family violence is likely to be higher than in non-separating couples, given that violence increases at the time of separation (Jaffe et al 2003, Kaye et al 2003). A study by the Australian Institute of Family Studies found that 66 per cent of separating couples pointed to partnership violence as a cause of relationship breakdown, with 33 per cent describing the violence as serious (cited in Brown et al 2001). US studies show that family violence is present in at least half of the custody and visitation disputes referred to family court mediation programs (Thoennes et al 1995).

Family violence may not be identified

For a range of reasons, mediators may not identify or adequately respond to family violence. It is a hidden problem in the community, as the majority of victims do not report the violence to police or other services (Mulroney 2003). Women who have experienced such violence face major barriers in disclosing, including fear for their safety and that of their children or other family members, denial, embarrassment, concern about their children knowing about the abuse, and a lack of faith in other people's ability to help them (Keys Young 1998).

Research suggests that mediators are often unaware that family violence is affecting their clients. A study commissioned by the Commonwealth Attorney-General's Department found that mediators estimated that 30 per cent of mediated cases involved family violence (Keys Young 1996). However, when the women who participated in these mediations were surveyed, 75 per cent reported that they had experienced family

violence (Keys Young 1996). Similarly, a recent US study found that mediators failed to recognise family violence in close to 60 per cent of cases and that this occurred even where screening and assessment was undertaken (Johnson et al 2005).

Many professionals, like people in the general community, do not understand family violence or the importance of believing and supporting the victim (Bailey 2006). A study by Rendell et al (2000) shows that women found it difficult to disclose violence to professionals in the family law process, and they were unprepared for the negative attitudes they encountered when they did disclose. A mediator's personal views and attitudes about violence have an impact on their responses to disclosures (Astor 1991). Mediators may find it difficult to believe the violence occurred because of the influence of community perceptions that women lie about violence. However, research consistently and clearly shows that women and children rarely make false allegations (Brown et al 2001, Kaye, et al 2003).

Dispute resolution may place victims at risk

- The period directly following separation is the most dangerous time for women and children experiencing domestic violence and child abuse (Jaffe et al 2003).² The process of dispute resolution 'may in fact exacerbate the dangers presented by post-separation violence' because it provides perpetrators with the opportunity to come into contact with victims (Field 2005:12).

Safety planning is essential for women and children experiencing family violence. It is dangerous for dispute resolution to take place without the mediator's knowledge that family violence has occurred (Kunce Field 2002). However, even with the

2. Women are more likely to be killed by a male partner or ex-partner than by any other person (Mouzos 1999) and it is estimated that 25-50 percent of women killed by intimate partners are killed in the context of separation (Polk 1994; Mouzos & Rushford 2003).

mediator's knowledge and efforts to minimise the risks to victim's safety, dispute resolution can potentially be unsafe. Dispute resolution may also give perpetrators the opportunity to continue to exercise control over their victims and to extend that control into future interactions (Field 2005, Johnson et al 2005).



Family violence affects the capacity of parties to negotiate - Perpetrators of family violence are unlikely to be willing to cooperate and negotiate with their ex-partners in dispute resolution. Perpetrators frequently coerce, intimidate, threaten and deny the interests of their victims (Field 2005). Perpetrators may present to the mediator as fair, reasonable and charming (Astor 1994), while victims of violence may appear angry, obstructionist and unwilling to compromise (Kunce Field 2002). For instance, a woman's unwillingness to agree to a father having unsupervised contact with their children may be viewed as obstructing the dispute resolution process, however, the woman may be seeking to protect the child (Johnson 2005). Much of the abuse of women and children after separation occurs in the context of agreements made through family law processes such as through contact handover (Rendell et al 2000). However, women's attempts to protect themselves and their children may be perceived as hindering the goal of achieving agreement.

Family violence has severe, wide-ranging and persistent effects on women's physical and mental health (VicHealth 2004:10). Research by DVIRC and Relationships Australia found that mediation was a difficult process to enter into for women who were still traumatised by, or recovering from, violence (Bailey and Bickerdike 2005). In these circumstances it is difficult for women to state their needs and concerns.

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Astor argues that family violence creates a power imbalance that can not be effectively addressed in mediation because it is not possible in a few sessions to alter patterns established over long periods of time (1994). Throughout the relationship, the abused partner has been conditioned to relent, compromise and conform in order to avoid violent repercussions. Women may agree to a disadvantageous outcome in order to placate the abuser and minimise the risks to her safety and that of her children. Victims may be so affected by fear that even highly skilled mediators are not able to compensate for the power disparity (Johnson et al 2005).

A Pragmatic Approach

For some separating couples dispute resolution may be beneficial and may be a better option than going to court. Dispute resolution is likely to be most effective for those couples who are unlikely to have to resort to court. However, where there is a power disparity in a couple, the less powerful party may be placed at a disadvantage in dispute resolution. The greater the power disparity, such as where there has been family violence, the less appropriate dispute resolution will be. It can place women at risk of further violence, and may result in unfair outcomes for women and their children.

In the family law system, all separating parents in dispute will be compelled to attend dispute resolution prior to going to the family court. Given the limited alternatives, and the likelihood that family violence may not be identified or may not be deemed by the dispute resolution practitioner to affect the parties' capacity to participate, many women who have experienced family violence are likely to be involved in dispute resolution. For this reason DVIRC is looking at ways to inform dispute resolution practitioners about the impact of violence on the dispute

resolution process and ways to increase safety and improve outcomes for victims and their children.

DVIRC is currently preparing a Discussion Paper on dispute resolution strategies that will best respond to family violence. If you have any feedback on this article, or if there are any particular issues that you would like to see explored in the paper, please contact **Debbie Kirkwood at DVIRC on 9486 9866**.

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Getting Safe Against the Odds

INFORMATION FOR WOMEN WITH DISABILITIES NEW DVIRC PROJECT



DVIRC has recently received funding from the Telematics Trust to research and produce online and print information for women with disabilities. The guide will be based on the experiences and advice of women with disabilities who have survived violence.

Women with disabilities are at high risk of experiencing family violence. A range of research reports have identified the need for creative information strategies that address the difficulties faced by these women. The 1996 Keys Young study *Against the Odds*, funded by the Federal Government, recommended using stories from 'empowered survivors' to give women in abusive relationships advice and hope that there is 'life after abuse'.

DVIRC will conduct interviews with women with disabilities who have experienced violence, to find out about their experiences, what they have learned and their advice to others. This information will then become a guide for women with disabilities, which will be provided online and in print format.

The project will be undertaken in consultation with Women with Disabilities Australia and the Victorian Women with Disabilities Network.

The Telematics Trust has also funded DVIRC to translate the information into community languages.

If you would like to know more about the project, or to be involved in our research, please contact Chris Jennings on 9486-9866