THE ROLE OF LAWYERS USING CURRENT AND PROPOSED METHODS OF DISPUTE RESOLUTION IN FAMILY LAW HAS COME UNDER THE SPOTLIGHT FOLLOWING AMENDMENTS TO THE *FAMILY LAW ACT.*

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FAMILY LAW ACT CHANGES

The introduction of The *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) placed an emphasis on shared parenting and informal modes of dispute resolution.

These are relatively new ideas and parties face many problems in this form of dispute resolution.

Mandatory dispute resolution can be problematic for couples when there are issues of violence that will affect negotiations but which are not severe or well documented enough to warrant exemption.

Exceptions to the requirement to attend family dispute resolution include when the Court is satisfied, on reasonable grounds, that there has been abuse/family violence or there is a risk of abuse/family violence of the child by a party.[1]

This is not always easy to demonstrate and many victims of family violence will still be forced to take part in mandatory dispute resolution with the perpetrator.

The purpose of mandatory dispute resolution was stated by then Attorney-General Philip Ruddock in a news release as "creat[ing] a culture of cooperation rather than of litigation, to help families maintain their relationships and save costs by not litigating".[2] These purposes are entirely valid and worth striving for, but mandatory dispute resolution simply does not satisfactorily deal with family violence, power imbalances, intimidation and lack of legal advice and information.

"Family violence" is defined as 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 reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.[3]

This definition does not include issues such as economic control and emotional violence that often create imbalances of power that will adversely affect the dispute resolution process and make mediation ineffectual.

A study in 2006 by DVIRC (Domestic Violence and Incest Resource Centre) and Relationships Victoria determined that women who took part in dispute resolution found that mediators were often dismissive of their experiences of family violence and their ex-partners' intimidating behaviour was not always contained by the mediator.[4]

This may be because the mediators – family dispute resolution practitioners – are not trained or qualified to manage and assess family violence. The definition of "family dispute resolution practitioner" is vague, with legislation stating they are "a person accredited as a family dispute resolution practitioner under the Accreditation Rules or by the court".[5]

University of Western Sydney School of Law Associate Professor Dr Tom Altobelli says this definition is remarkably broad and there is a need for more clarity to understand what skills and tools these practitioners are bringing to family mediation.[6]

One way to combat the problems of mandatory dispute resolution is to have family dispute resolution practitioners trained in identifying, assessing and managing situations of family violence.

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A new program has been developed in the US to assess and manage the risk of domestic violence between partners during and after mediation. This helps mediators reduce the effects of family violence by first acknowledging it and then combating the factors of intimidation and power imbalances.

DOVE (Domestic Violence Evaluation) uses 19 statistically significant predictors of male violence against female partners that has been empirically validated by the results of a two-year field study on couples taking part in mediation.[7]

Information gained from the couples, such as whether police have ever been called to the marital home, any past history of violence, mental health issues and emotional dependency are used cumulatively to assess the risk factor.[8]

This could be an effective tool for Australian family dispute resolution practitioners, allowing them to assess the risk of family violence and use this assessment in the mediation session to control intimidating tactics and seek to balance any perceived power differential.

This does not solve the problem of parties who have been a victim of family violence being forced to enter dispute resolution or mediation, but it would at least acknowledge the risk of family violence and allow mediators to act accordingly.

This type of screening process would also allow family dispute resolution practitioners to follow concrete legislative guides to help them determine whether dispute resolution is appropriate in the circumstances.[9]

Should they then decide to proceed they will be able to set up rules for the mediation session and watch for signs of intimidation, power imbalances and anxiety. This will still involve family dispute resolution practitioners receiving training on family violence and its effects on victims.

Queensland University of Technology Faculty of Law, School of Justice Studies senior lecturer Rachael Field suggests that the way to combat family violence is for lawyers to become more involved in dispute resolution.

She believes that reforms appeared to be a concession by the 2005 Coalition government to the demands of men's rights lobbyists and ignored the justice implications of the significant disadvantages that potentially arose for women and their children in informal dispute resolution.[10]

The disadvantages that typically arise for victims are imbalances of power within their relationship and ultimately the mediation process, lack of self esteem and confidence, anxiety and feelings of intimidation and fear.

Ms Field believes that the role of a lawyer in dispute resolution is to be a coach, advocate and support[11] to the woman.

Her suggestion to coach the woman would involve giving her sound legal advice and preparing her for the mediation process. Being an advocate and support would involve "being a supportive presence and affirming (to the client) her own abilities"[12] and "ensuring the woman is safe in the period immediately after the dispute resolution session".[13]

This does not seem satisfactory.

It is not the role of a lawyer to console a party and affirm their own abilities. This seems to be the role of a counsellor.

One solution that will allow lawyers to maintain their role and deal with inequalities in bargaining power while avoiding litigation is collaborative law. Collaborative law is an alternative dispute resolution process that involves both parties having legal representation. Four-way meetings between parties and their lawyers occur to negotiate and settle the problems.

Collaborative law uses an interest-based negotiation model where clients and their lawyers work together to resolve a dispute without going to court.[14] The aim is to reach a fair agreement while minimising costs, delays and stress.

Collaborative law differs from mediation in that the lawyers and parties to the dispute sign a contract saying they will resolve the matter outside the court system and if the collaborative law process ultimately fails then both parties must get different legal representatives and all information from the process will be inadmissible in court.[15]

In collaborative law each client has their own lawyer, which means that any difference in knowledge, information and negotiating capacity is diminished.[16]

This helps remove the power imbalance between couples that hinders dispute resolution. This would be an excellent alternative for parties who have issues of family violence. The signing of a contract also signals that both parties are willing to resolve their differences and create an atmosphere of cooperation while still having legal advice to ensure they come to a conclusion that is fair and equitable.

This model seems to maintain the purpose of mandatory dispute resolution, to create a culture of cooperation between parties and to help them save money by not litigating – the collaborative law process costs about $5000,[17] much less than litigation.

The problems with collaborative law are the same as with dispute resolution: it is not appropriate in cases where one party is driven to destroy the other or cases of extreme domestic violence.[18]

This latter situation is very problematic. There is no simple solution. Family violence is serious, but under family law there is a need to avoid costly litigation to help save relationships, especially where children are involved, and start new relationships with ex-partners.

IN SUMMARY

- There needs to be a clearer description of family dispute resolution practitioners and the role they are expected to perform. They will also need to be trained in the effects of family violence and how to recognise and counteract them during mediation.
- The definition of family violence should be revised to include economic and social control, which can make an individual as apprehensive as can physical harm and threats. This was one of the recommendations made by DVIRC and needs to be dealt with by the Victoria Law Reform Commission.
- Ms Field's ideas have merit, but they seem to be impractical as the role of a lawyer is not to console, protect and comfort the client.
- The dispute resolution process of collaborative law is the most effective at dealing with the issues that family violence can cause in mediation. With each party having their own legal representative they can be advised of realistic expectations and their rights and responsibilities while any difference between the parties in knowledge, information and negotiating capacity is diminished. This will remove the issues of power imbalance. The signing of a contract stating both parties' willingness to solve their dispute outside court will create a sense of cooperation and will help establish a new relationship between ex-partners and achieve the proposed outcome of a culture of cooperation. ■

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1. *Family Law Act* 1975 (Cth), s60I(9)(b).
2. P. Ruddock, media release, 31 March 2006, see www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_First_Quarter_31_March_2006.
3. Note 1 above, s4.
4. D. Kirkwood, "Behind closed doors: family dispute resolution and family violence-new discussion paper", *DVIRC Quarterly*, 2007, p19.
5. Note 1 above, s10G.
6. T. Altobelli, "A generational change in family dispute resolution in Australia", *Australian Dispute Resolution Journal*, 2006 pp84-86.
7. D. Ellis, N. Stuckless, "Domestic violence, DOVE, and divorce mediation". *Family Court Review*, 2006, pp658-9.
8. Note 7 above, p661.
9. Note 1 above, s60J.
10. R. Field, "Federal Family Law Reform in 2005: The problems and pitfalls for women and children of an increased emphasis on post-separation informal dispute resolution", *QUT Law Journal*, vol 4, 2005.
11. Note 10 above, p44.
12. Note 10 above, p46.
13. Note 10 above, p48.
14. Collaborative Law Professionals of Victoria (2007), LIV, viewed 2 February 2008, see www.liv.asn.au/collablaw/index.html.
15. J. Ford, "Collaborative law: family lawyering in the 21st century", [2007] *Australian Family Lawyer* (18)(4) p20.
16. Note 15 above, p23.
17. Note 14 above.
18. Note 14 above, p23.