Mediation in Family Disputes

Principles of Practice

Fourth Edition

Marian Roberts

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Principles of Practice

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International Journal of Law, Policy and the Family

For Simon

For Adam and Sara

For my parents

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Preface to fourth edition

Since the late 1970s, mediation has become an institutionalized, officially endorsed and expanding mode of decision-making across many areas of social life. Mediation in family disputes, early on the scene, is now the approved pathway in the current landscape of family dispute resolution processes. Publicly funded by government, with a recognized potential to benefit a larger section of the public (though with diminishing eligibility), family mediation is confirmed by academic research to provide the public with the opportunity to resolve suitable family disputes co-operatively, with less acrimony than the traditional competitive litigation and court processes, as well as more quickly and cheaply.

The consolidation of the professional practice of family mediation reflects its progress and creativity – the remarkable achievement, in particular, of the rich resource of quality assurance work of the College of Mediators (formerly the UK College of Family Mediators), exemplifies this, as does the application of mediation to a growing range of family conflict situations, such as international family disputes including child abduction, and the homeless young. However, the last decade has also seen the field disturbed by turbulence and flux – for example, the failure to implement divorce reform under of the Family Law Act 1996; the dominance of lawyer interests in alternative dispute resolution processes; external pressures arising from an overburdened family justice system; the drastic impact of legal aid cuts; the risks to the public of bad practice arising from a market crowded with inexperienced practitioners; and the structural tensions and conflicts of interest that have so seriously compromised professional and regulatory developments within the field. It is therefore essential, yet again, to re-affirm the need for continuing vigilance in relation to the fundamental principles that distinguish mediation as a discrete and autonomous professional intervention.

This book seeks to place those core ethical and professional principles at the centre of effective practice. This approach, developed mainly in relation to mediating issues arising from high conflict disputes over children (where the author has most experience), applies to the mediation of all aspects of decision-making arising from family separation and divorce, as well as to disputes arising in other family situations. In addition, improved practice depends on how we mediators think about, as much as how we perform our

role and function. So understanding what we do and why we do it is essential for understanding how to work effectively. That is why such significance is accorded here to the classic texts that have informed understandings about mediation over the past century and which provide clarity in respect of the defining characteristics of mediation, observable across cultures and across times, in contrast to current complexities and contradictions.

Mediators can be conceived of as contemporary practitioners of an ancient and universal craft. With accumulated experience, collegiality contributes significantly to the spirit and practice of craftsmanship as a vital source of learning and expertise. I want therefore to thank all those with whom I have worked over the years for their contributions to the field – at the South East London Family Mediation Bureau, during my 10 years at National Family Mediation in the 1990s, with the reunite International Child Abduction Centre, and within the College of Mediators. My recent engagement with the European Network of International Family Mediators has been a fruitful expansion of interest and collaboration. The insight and enthusiasm of students I have taught over the years, at LSE and at SOAS, have enriched my understanding of this field.

I want to pay particular tribute to Fred Gibbons, innovative pioneer in the field and a continuing source of practice wisdom, and to the late Toni Gerard, an esteemed colleague and dear friend. I want too, to say how grateful I am, again, to Susan Tilley – solicitor, lecturer, mediator and trainer – for her informed, careful and detailed suggestions for updating Chapter 3 on the legal context of family mediation. Sara Roberts, counselling psychologist, was of great assistance in clarifying aspects of contemporary therapeutic understanding. The late Simon Roberts, distinguished scholar of dispute processes, has been an indispensable guide, unfailing support and beloved companion over the years. Again, responsibility for the views expressed in the book, for all its limitations, and for any errors, remains mine.

Marian Roberts
July 2014

Prologue[1]

... I simply wanted some kind of reasonableness to operate, recognizing the marriage had ended but seeking to achieve, you know, an ending in a reasonable manner. *Non-resident father*

One needs a neutral Guardian Angel to step in – someone not legal, not family, who has no vested interest but is very aware of both sides. *Mother with residence*

We thought there should be something in between two people talking and a court hearing. We thought there must be something in between, surely ... we didn't want something as drastic as court ... when it gets as far as court it's taken out of your hands. So we felt that wasn't satisfactory ... but the two, one to one, wasn't working. So we needed something in between. *Father with residence*

Well, we weren't talking really. We were very hostile to each other then. And I think we needed somebody to act as intermediary, to break the ice and to get us talking. *Non-resident mother*

1 Quotes of those who experienced mediation (see Davis and Roberts, 1988).

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1 What is family mediation?

> The varieties of dispute settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wish to avoid or encourage conflict, suppress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute-settlement procedures. (Auerbach, 1983, pp. 3–4)

The emergence in Britain of mediation as a recognized approach to settling family disputes following family breakdown has been, in many ways, a remarkable development. Its adoption in the late 1970s involved a new and evolving application of an ancient method of settling quarrels, perhaps better suited than any other to the special characteristics of family disputes. This fresh approach to family dispute resolution was a distinctive feature of a wider landscape of alternative dispute resolution processes, and of mediation in particular, that had developed across the civil and common law world. These changes were of such radical ideological and institutional import that they had begun to transform disputing arrangements in the West by the end of the twentieth century. This was a cultural transformation that followed a long period during which judges had acted as principal official agents of dispute resolution and lawyers had established a monopoly of control over negotiation within the litigation process and themselves as the sole means of access to the courts (Menkel-Meadow, 2012; Roberts and Palmer, 2005).

An important aspect of this transformation was the new significance that was accorded to the views of disputants themselves. The affirmation of the 'person-oriented perspective' which characterizes mediation and distinguishes it from the 'act-orientation' of litigation, also challenged traditional attitudes and values in the context of dispute resolution (Fuller, 1971). Courts and legal professionals, inevitably constrained by legal rules and limited knowledge, had failed to respond to the needs and interests of disputants who were perceived both to care about the processes by which decisions were reached and to be perfectly able, in most cases, to devise

their own more satisfactory solutions to their disputes (Galanter, 1981; Menkel-Meadow, 2004).

Mediation is defined as a process of consensual joint decision-making in which a third person, the mediator, exercising a non-aligned role, assists those in dispute to negotiate together to reach their own mutually acceptable agreements. Mediation is based on certain values that have justified its use, both for the disputants as well as for those who have chosen to become mediators. These core ethical values are exemplified in a comparison of the way people are treated under existing forms of intervention:

> It strikes me that if you have some kind of grading scale for your institutions, like courts, schools, and hospitals, as to which gave the participants the most adult setting, it might be interesting to see how different institutions rank. Are you told what to do or asked what you want to do? Are you made to wait or is your time valued? Are you allowed to know what is going on or are you kept in the dark? Are you powerful or powerless? Are decisions made for you or do you get to make the decisions? Are you treated as a human being or are those qualities not considered? One of the things that strikes me in mediation is that it comes out much higher on that scale than many of our institutions and I think that is why it works. (Davis, 1984, p. 54)

This comparison highlights the standard of respect that lies at the heart of mediation as a practice intervention. Respect for the parties' authority and capacity to make their own decisions has been paramount in mediation as has been respect therefore for their perceptions and values. This fundamental ethic of respect has been seen to be essential for the mediator to have proper regard for the right of the parties, whatever the difficulties, to be the architects of their own agreements, and for party competence and control, as distinguishing characteristics of mediation, to have meaning. Norms of fairness, mutual respect and equity of exchange have long informed the expectations of adult behaviour that underpin the practice of mediation (Fuller, 1971; Rubin and Brown, 1975). These expectations have been perceived to be of most value precisely because of the recognition that conflict may be bringing out 'the worst' in people, who, in the context of family breakdown, may perhaps have become victims of their own 'powerful infantile feelings which divorce itself may catalyse' (Brown and Day Sclater, 1999, p. 154). However, laid low by circumstances and personal vulnerability, disputants were not to be regarded as lacking capacity to make their own decisions. Mediation, simply in the offer of a calm, safe forum for reasonable exchange, could provide the opportunity for the parties, not only to have the conversation they were unable to have on their own, but also to retain authority and regain control over their own affairs.

Decision-making capacity defines the standard of adulthood that informs decision-making authority. The location, in mediation, of decision-making authority with the parties, distinguishes it both from other forms of dispute resolution (such as lawyer negotiation and adjudication) as well as from other forms of professional intervention (such as therapy, counselling and social work). The affirmation of the decision-making authority of the parties derives from a tradition of humanist ideas about equality and liberty, which accords respect to the inherent dignity, privacy and autonomy of the individual person (for example, Lukes, 1973). Sennett (2003, p. 262) distils the connection between equality, autonomy and respect in this way:

> Rather than an equality of understanding, autonomy means accepting in others what one does not understand about them. In so doing, the fact of their autonomy is treated as equal to your own. The grant of autonomy dignifies the weak or the outsider; to make this grant to others in turn strengthens one's own character.

The spirit informing the pioneering origins of mediation in Britain was a transatlantic reflection of the 'new consciousness' that had arisen in the social movement of the 1960s in the United States, in the community justice movement in particular. This was a revival of alternative approaches to conflict and dispute that challenged traditional attitudes and values in the context of dispute resolution (a process memorably observed by Reich in *The Greening of America*, 1970). The values of mediation exemplified this spirit of the time – the importance of respect, dignity, fairness, justice, reciprocity, individual participation, consensus and party control. The resurrection of these values countered a dominant, prevailing value system characterized by adversarial processes, impersonality, lawyer control and rule-centred authoritarian command.

It is fair to say too that the story of the modern growth of mediation, incorporating family mediation, can be described in different ways (S. Roberts, 2006):

- as a response to the 'evolutionary demise' of 'conventional forms of institutionalised searches for justice, in the form of the courts and trial because they are failing to satisfy modern requirements for voice, justice and conflict resolution' (Menkel-Meadow, 2004, p. 100);
- as symptomatic of the changing nature of state power in late capitalism, manifesting both in the radically transformed nature of the courts developing new strategies of dispute settlement and in the expansion of government outwards to co-opt and shape a hitherto 'private' sphere of negotiation;