GWYNN DAVIS

PARTISANS AND MEDIATORS

The Resolution of Divorce Disputes

CLARENDON PRESS
OXFORD

Partisans and Mediators

The Resolution of Divorce Disputes

Gwynn Davis

CLARENDON PRESS · OXFORD
1988

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

Published in the United States
by Oxford University Press, New York

© *Gwynn Davis 1988*

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press

British Library Cataloguing in Publication Data
Davis, Gwynn
Partisans and mediators: the resolution of divorce disputes.
1. England. Divorce. Mediation
I. Title
344.2061'66
ISBN 0–19–825612–4

Library of Congress Cataloguing in Publication Data
Davis, Gwynn.
Partisans and mediators: the resolution of divorce disputes
Gwynn Davis
Bibliography: Includes index.
1. Divorce mediation--Great Britain. 2. Divorce--Law and legislation--Great Britain. I. Title.
KD764.D38 1988 346.4101'66--dc19 [344.106166] 88-5381
ISBN 0–19–825612–4

Set by Pentacor Ltd.
Printed in Great Britain
at the University Printing House, Oxford
by David Stanford
Printer to the University

Preface

This book represents the fruits of five research studies undertaken over a period of eight years. The first of these, the 'Special Procedure' project, was funded by the Joseph Rowntree Memorial Trust. The other four were funded by the Nuffield Foundation and I should like to express my heartfelt thanks to the Nuffield Trustees and Secretariat for their support throughout this period. I am especially grateful to Pat Thomas, for all her encouragement.

It will be evident, to those who read beyond the first two chapters, that I draw heavily on the experience of divorcing couples interviewed in the course of our various researches. I should like to thank them all for their frankness and for giving me their time.

At each court where we carried out the various studies we were given generous access and treated with the utmost courtesy by court staff. I have been a thorn in the side of Registrars Parmiter, Bird, Price, and Dunford for several years, but they have continued to give me every possible assistance. I was also granted generous access by Fred Gibbons and his colleagues at the South-East London Conciliation Bureau, and by Rosemarie Fraser and her fellow mediators at the Bristol Courts Family Conciliation Service.

Throughout the 'Conciliation in Divorce' study I was guided by a Research Advisory Committee, chaired by Lord Justice Dunn MC, and I am grateful to all the members of that Committee for their advice. Sir John Arnold, President of the Family Division, also lent active encouragement to my various research enterprises. In addition, I have benefited from the advice of several experienced solicitors and divorce court welfare officers. I cannot mention them all by name, but I am especially grateful to John Westcott and Tony Wells, who commented (sometimes in strongly critical vein) on draft chapters of this book.

In the course of these researches I have been assisted by several highly skilled research interviewers, notably Margaret Borkowski, Jenny Bagley, Alison Jackson, Carole Moore, and Petula Smith. I have also been helped at various times by two friendly and efficient research secretaries in Pat Lees and Liz Young.

Researching the same field over a number of years can be an uncomfortable experience, as new insights (whether one's own or other people's) undermine old positions. Marian and Simon Roberts have been particularly influential in this respect and I should like to thank them both for sharing their ideas with me. Marian was a colleague on the study of the Bromley Conciliation Bureau, undertaking most of the interviews in connection with that project, and I learnt a great deal from her. Two eminent colleagues, Stephen Cretney and Roy Parker, have also offered wise counsel at various times.

My greatest debt is to two former colleagues in the Department of Social Administration in the University of Bristol who have been collaborators on several of the research projects relied upon in this book. Mervyn Murch gave me my start in research and helped me understand what it was all about. We enjoyed a productive working relationship over some ten years. Kay Bader is a valued colleague and friend who has likewise worked with me on several research projects. I have learnt to place great reliance upon her. She also, as an additional chore, typed and re-typed this book.

GWYNN DAVIS

Faculty of Law
University of Bristol

此为试读,需要完整PDF请访问: www.ertongbook.com

Contents

1

Introduction

THE term 'divorce' may be understood in a number of different ways—most obviously, as an event which entails massive disruption and reorganization for individuals and families. But 'divorce' may also be conceived as an area of substantive law destroying the status of marriage, or as a legal process (involving visits to solicitors, court appearances, and so on). As far as these latter aspects are concerned, there is a growing tendency to view divorce in administrative terms (Freeman 1976), with courts seeking to respond as quickly and efficiently as possible to the parties' private decision to end their marriage. But whilst obtaining a decreee may be, for most couples, a relatively straightforward and uncontentious matter, there are relatively few divorces which do not involve, in at least some aspects, conflicts of interest or perception. Fulfilment of the parties' hopes for the future may also, to some extent, depend on the co-operation of their former spouse. So divorce, far from being purely 'administrative', is also a time of conflict and of negotiation.

Evidence for the persistently conflictual nature of divorce is found in the growing numbers of contested applications to the courts over so-called 'ancillary matters,'—that is to say, money, property, and children.[1] (This is in apparent contradiction of the trend towards administrative decree proceedings.) Furthermore, it would appear that the number of contested applications understates the extent of the conflict over these issues (Davis, Macleod, and Murch 1982*a*). The majority of divorcing couples, even though they may not contest these matters through the courts, find themselves in dispute over one, if not all three. Some do indeed resolve their differences without outside assistance, although such settlements may reflect fatigue or domination as much as genuine agreement. But the great majority of divorcing couples will seek help in negotiating or, as it might appear, in battling with one another. This book is about that help, and about the partisans and mediators who provide it.

[1] The number of contested applications relating to children rose from 35,992 in 1977 to 108,305 in 1983, a period in which the divorce rate remained constant. *Judicial Statistics*, Annual Reports 1977, Table C. 13(m) and 1983, Table 4. 8, HMSO.

The former group are legal practitioners, either solicitors or barristers. They enjoy high status and have their own special language. Their responsibilities lie exclusively with one party to the conflict, although it has to be understood that their tasks include negotiation as well as advocacy, the former responsibility being one which they share with another group of 'helpers' who are of more recent origin and, generally speaking, have lower status.

This second group—the new mediators—offer themselves to both sides to the dispute, saying to them in effect, 'we see you cannot agree—why not let us help you sort out the problem?' Their claim to specialist expertise lies in the area of negotiating skill, although some will also be 'expert' in other areas, for example in counselling, or in knowledge of child developmental psychology. The partisan may likewise be a skilled negotiator, although the negotiations in which he engages will be of a rather different kind. But the professional partisan will also be expert (and have qualifications) in law and legal processes. The mediator's knowledge of these matters is likely to have been built up informally.

The recent rapid growth in the number of informal mediation schemes[2] has been accompanied by expressions of dissatisfaction with the formal legal process (Glendon 1981, 120). But whether this weakening of belief, or 'legitimation crisis' as it is sometimes termed, is actually felt by the parties to divorce proceedings is not easily established. (It could be, for example, that many of these criticisms emanate from rival practitioners, notably the new mediators.) Whether that is true or not, one difficulty faced by those who posit a general dissatisfaction with family law and practice is the need to explain the increased resort to litigation to which reference has already been made.

One possible counter-argument is that the mere fact of people using a service (the courts) does not mean that they are happy with it. They may feel that they have no alternative. That would be true in one sense, but false in another. In so far as litigation is viewed as a last resort, with the emphasis placed on the need for an *adjudication* of the dispute, there is indeed no alternative. But reference to lawyers 'bargaining in the shadow of the law' (Mnookin and Kornhauser 1979) points to the inaccuracy of this view of the legal process. Only a small proportion of initially contested applications are finally adjudicated. For the most

[2] See the *Report of the Inter-departmental Committee on Conciliation*, Lord Chancellor's Department, 1982, para.3.8ff.

part, the law and the court provide a framework for negotiation. If we place the emphasis on negotiation, rather than adjudication, it can be seen that divorcing couples have a great deal of choice, although they may not be aware of all their options. Even within the framework provided by solicitors and the court, there tend to exist what might be regarded as two separate but parallel negotiating processes: first, that which takes place 'on the record' through affidavit and preliminary hearing; and second, that which is conducted orally or by means of 'without prejudice' correspondence. In both cases the negotiations tend to be carried forward by professional legal advisers, with the parties remaining very much in the background.

To view legal process in terms of negotiation, as much as adjudication, is helpful also in that it suggests that it might well be a mistake to concentrate all our reforming energies on the substantive law, although it is here that the fiercest moral battles are fought. Statute and case law offer certain general principles to guide legal advisers—a series of signposts indicating the room for manœuvre. But the law cannot do more than this. Indeed, as far as disputes over money and children are concerned, it offers surprisingly little help.

That is why significant reforms are as likely to come about through *procedural* innovation, one might almost say through stealth, as they are through changes in the law. The gradual introduction of the 'Special Procedure' through the 1970s was one example. This enabled the divorce decree to be granted on the basis of affidavit evidence alone and had a profound impact on the experience of most divorcing couples. Nevertheless, it provoked only a fraction of the controversy surrounding the 1969 Divorce Reform Act.

One general trend encompasses both law and procedure. This is towards making separation and divorce less acrimonious than was formerly the case. For example, it is pointed out that certain aspects of our family law no longer conform to an 'adversarial' model of justice.[3] Recent procedural developments designed to encourage and institutionalize negotiations on court premises also reflect this trend.[4] These changes may be observed, not only in this country, but in many others with a common law tradition.

[3] This is true, in particular, of s. 41 of the Matrimonial Causes Act 1973, under which courts have a duty not to grant a decree absolute without first checking on the proposed arrangements for the children's future.

[4] See in particular the *Report of the Matrimonial Causes Procedure Committee* (Booth Committee), Lord Chancellor's Department, July 1985, in which it is proposed that there be an 'initial hearing' in most categories of divorce case.

It is consistent with these developments that we should have recently witnessed a mushrooming of services geared to resolving family disputes through informal negotiation. Our legal system is trying to reform itself from within, whilst at the same time its monopoly of dispute resolution services is being challenged by these new mediators, a breed of expert which did not exist ten years ago.

One way to locate and understand this latter development is to place it in the context of a general movement towards 'informalism' in the resolution of disputes (Abel 1982*b* and Auerbach 1983, 3 ff.). The application of 'mediation' to family conflict is a relatively recent phenomenon, but in relation to other kinds of quarrel, mediation is well established and probably universal. The essential characteristic—a non-aligned third party who attempts to bring about settlement through negotiation and persuasion—is to be found amongst several cultures (Roberts 1979, 164 ff.).

The movement towards informalism has been criticized on the grounds that, in the absence of a coherent community with shared values, there is no possibility of justice outside the legal system (Auerbach 1983, 16). It is suggested that without a shared commitment to common values, informal dispute resolution will reflect 'the historical forms, but not the historical substance of non-legal dispute settlement' (Auerbach 1983, 67).

On this view, there are grave problems whichever way one turns. In heterogeneous societies, where there may well be no 'community' of shared values, law is all we have left—but that law is bound to be unsatisfactory since it is not sustained by shared norms; accordingly, to some groups and individuals, it will appear arbitrary and unjust. But in these circumstances, to look for justice *outside* law is to follow a chimera. The success of informal mechanisms depends entirely upon shared values; they cannot even fall back on the *trappings* of legitimacy, as may the law itself.

These criticisms of informalism were developed in the context of the 'de-legalization' movement in the USA, a country which is heterogeneous, individualistic and aggressively materialistic, perhaps more so even than our own. But can the critique be said to apply to the informal resolution of *family* disputes? Members of a family might well be expected to have a system of shared values and, therefore, to meet the definition of 'community' advanced as a prerequisite for informal dispute resolution. On the other hand, there is the strongly articulated view that men and women do indeed have different aspirations within

此为试读,需要完整PDF请访问: www.ertongbook.com

marriage and different perceptions of any problems that emerge (Bernard 1982, 5 ff.). This poses a problem for the mediation 'movement', although the challenge to the aura of consensus surrounding mediation is based not so much on these supposed differences in ways of seeing the world, as on the alleged structural inequality between men and women. It is this analysis in terms of gender which has led to the image of mediation as empowering *both* parties to the conflict coming under strong attack (Bottomley 1984). The argument is that 'mediation' provides a forum in which the dominant spouse (usually the man) will continue to hold sway, unchecked by judicial authority. This enables a false image of equality to be assumed, so that the real inequality between the parties is both masked and perpetuated. It is also feared that hard-won gains achieved by women through the courts (in domestic violence, property on divorce, and property acquired during cohabitation) will be undercut as men resort to these informal modes of dispute resolution.

Whilst feminist critics of mediation tend to assume that the woman is more vulnerable than the man in these negotiations, the essential criticism relates to the alleged imbalance of power, no matter in which direction it operates. The same criticism may be applied to informal resolution of other types of conflict, such as disputes between consumers and large suppliers of goods or services; disputes between individual employees and a corporate employer; or disputes between an injured person and an insurance company.

But is the relationship between former marriage partners likely to be marked by this degree of power imbalance? There are indeed several potential sources of inequality, the most obvious being: control over financial resources; *de facto* custody of children; intellectual or emotional dominance; and violence, or the threat of violence. The latter can serve to provide one illustration of the potential difficulties. It has been suggested that anyone who attempts to 'mediate' following violence by a husband against his wife, is doing no more that maintain the status quo. Thus, if a policeman who is called to a domestic 'incident' merely cautions the husband (and a 'mediator', generally speaking, has no power to do more than this) he is, in effect, acting in the interests of the stronger party. This is because the home circumstances will be essentially unchanged after he has left. This view has been taken by representatives of the Women's Aid Federation:

> Where there was intervention, the whole emphasis was on conciliation—with

the aid of valium, a psychiatrist, some casework—rather than on the challenge to violence that . . . the woman actually sought[5]

Equally, it should be acknowledged that the power balance between men and women may change upon separation and divorce. That is why many women leave. Also, the sources of male and female power are likely to be different with, for example, the man having the economic power derived from his position as principal wage earner, whereas the woman may be better placed to draw on her children's allegiance in any conflict that arises. Each may feel powerful in different circumstances. Power in one area may compensate for powerlessness in another. It is also important to recognize that most people have a tendency to feel powerless, rather than powerful. Either party may fail to recognize the power which they hold and so not understand why this is resented by their former spouse.

It is also slightly incongruous to find our notoriously male-dominated legal institutions being presented as upholders of women's rights, in opposition to mediation services with their predominantly female staff. However 'bourgeois' the latter may be to some eyes, they probably have a better appreciation of, say, the problems of single parenthood than do most judges.

None of this is to deny that, in many important respects, men occupy a privileged position in family life. They may also, following separation, be hoping to recover some of the power which they have lost. Thus it is not altogether fanciful to regard men as 'fighting back'. But on the other hand, the *need* to resort to mediation is to some extent a refutation of the view that the man tends to retain this more powerful position; after all, it is usually the weaker party to a dispute who seeks outside help (Schattschneider 1964, 4). The fact that over 50 per cent of self-referrals to the busiest mediation services in this country come from *men* (Davis and Roberts 1988) offers therefore a two-edged message, suggesting the man's vulnerability, but also a strategy for recovering power and influence against which women may need to be on their guard.

Meanwhile, there are a number of other key ideas which have encouraged the development of mediation services, some of them providing further ammunition for feminist and other critics. Perhaps the first of these is the desire to promote *compromise*, almost as a worthy

[5] The *Guardian*, 7 October 1981. Report of DHSS Seminar on Domestic Violence by A. Shearer.

objective in itself. This ties in with the present reluctance to assign blame for marriage breakdown. The resulting emphasis on incompatibility, rather than fault, has encouraged all forms of negotiation, but this aura of compromise appears to cling, above all, to mediated settlements. This pursuit of compromise has a pragmatic element since it is often claimed that compromise agreements, in being more 'amicable' (itself a questionable assumption) are more likely to be adhered to (Murch 1980, 222).

Secondly, there is the view that disputes between divorcing couples cannot be taken at face value: the legal issues serve as a channel through which the couple express their anger at past hurts and mourn for what may seem wasted years. This view of divorce-related disputes may appear somewhat patronizing, but it is certainly the case that many custody and access disputes reflect long-term family problems which courts cannot finally resolve. The legal framework may appear clumsy and inappropriate as a means of settling issues which have such a high emotional content and which stretch back over many years.

Thirdly, it is argued by some that mediation may assist the parties in adjusting to the shock of the marital breakdown, enabling them to share feelings of distress and uncertainty which would have little relevance in arriving at a settlement defined purely in legal terms. Taking this argument one stage further, mediation is even seen (by what might be termed the 'therapeutic' wing of the movement) as a means of transforming 'the crisis of divorce' into an opportunity for personal growth and fulfilment. Influential research conducted in the context of a divorce counselling service (Wallerstein and Kelly 1980, 157) has encouraged some mediators to think of their work in these terms.

Descending rather abruptly from these rarified aspirations, a key plank in the case made *to government* on behalf of mediation schemes is the claim that they offer a *cheaper* means of settling disputes. As far as officials in the Treasury and Lord Chancellor's Department are concerned, personal growth is something that they shave off each morning. For them it is sufficient that mediation offers the prospect of a higher rate of settlement of contested applications, reduced congestion of court lists, and finally, most important, a saving to the Legal Aid Fund. This preoccupation with 'savings' has arisen largely because the sheer numbers involved in divorce have led to escalating legal costs. Divorce is now the resort of the humble many, rather than the privileged few. In the past, the actual number of litigants was small.

This kept total costs within bounds, whereas now the Legal Aid Fund makes a respectable contribution to our national debt.[6]

Nor is it simply that the numbers are greater; the *kind* of case, it may be said, does not merit the full panoply of the law. Most divorcing couples have a limited income and (at most) one mortgaged home. In their financial, as in their child-care arrangements, they have little room for manœuvre. In these circumstances, procedures designed to unravel complicated family fortunes can seem wasteful and irrelevant. The provision of legal and welfare services to oversee what, in legal terms, are humdrum divorces, has become unduly expensive for the state.

However, it is by no means clear that solicitors are tending to divert their poorer clients towards mediation services. Some indeed would say that the verbal skills which they believe to be required lead them to do the very opposite. But the fact remains that government interest in mediation, such as it is, rests on the premiss that legal aid savings may be achieved by these means. To that extent, mediation in family disputes is vulnerable to the same criticism as has been levelled against the whole 'informal justice' movement, namely, that those being channelled away from the courts are relatively low status, disadvantaged people, feeding little of their own resources into the legal coffers.

This does not mean that savings will in fact accrue. Indeed, there is good reason to believe that mediation services, even if successful in securing agreements, are unlikely to achieve a major impact on legal aid expenditure. After all, for a large section of the legal profession, the Legal Aid Fund is, quite literally, their bread and butter. Many solicitors are feeling disgruntled because the scope of the scheme has been cut back in recent years.[7] They already consider that they receive meagre payment for the preliminary work which they do on their clients' behalf. Understandably, they will be resistant to further loss of income. Given that there is an element of 'robbing Peter to pay Paul' in the compilation of most legal bills, it should not be too difficult for solicitors to ensure that any loss of income from a few successfully mediated cases will not be reflected in their *overall* level of remuneration.

It is also necessary to bear in mind the burden which conciliation

[6] Legal Aid expenditure in matrimonial disputes totalled over £71.1 million in 1984/5, as compared with £32.1 million in 1980/1. *35th Legal Aid Annual Reports (1984–85)*, The Law Society's Report, Appendix 4H(ii), HMSO.

[7] Legal Aid (as distinct from the more limited 'Legal Advice and Assistance') was withdrawn from undefended decree proceedings from 1 April 1977.

schemes may impose on the Exchequer—since it is clearly their *intention* to impose such a burden. In Britain, at present, these services are provided free. This is possible thanks to a combination of volunteer effort, *ad hoc* local funding, and subsidization by the divorce court welfare service. Unlike the USA, there is no significant fee-for-service sector (Dingwall 1986). This means that government is under continual pressure to find *additional* resources to finance conciliation schemes. There are signs that the Lord Chancellor's Department now recognizes that not much can be expected from extra-legal mediation schemes in the way of 'savings'. Hence its dilatory response to the various campaigns aimed at securing government funding.[8].

One other anxiety, or preoccupation, has contributed to the current interest in mediated divorce settlements. There is hardly an article written on the subject which does not express concern about the well-being of children whose parents divorce. This anxiety is on two levels: there are fears for the happiness and psychological health of these children; and secondly, there is concern about the impact on future generations who may experience even more instability. Mediation has become identified with a greater concentration on the needs of children, bringing home to parents the hurt and perhaps even the long-term damage which may result from their continued quarrelling, or the abandonment of all links between the child and the non-custodial parent.

In the recent past this concern has led to various forms of investigation, or treatment, or supervision of the family by qualified experts. Indeed, since 1958, following the Royal Commission's recommendations, a child welfare check has formed an integral part of divorce proceedings, the court having a duty to satisfy itself about the proposed arrangements for children before granting a decree absolute.[9] This investigation has been shown to be perfunctory at best. It also meets with a decidedly ambivalent response from parents (Davis, Macleod, and Murch 1983). It is not too fanciful to suggest that we are entering a climate of scepticism with regard to both surveillance and treatment approaches. Assistance with negotiation may be more

[8] This coolness was apparent throughout the *Report of the Inter-departmental Committee on Conciliation* (see n.2), not least in the Committee's recommendation that a further three-year research project be set up (paras. 5. 19 and 5. 20), thereby ensuring that no decision need be taken on funding new services until the end of the decade.

[9] This provision was originally s. 2 of the Matrimonial Proceedings (Children) Act 1958. It was later re-enacted in s. 33 of the Matrimonial Causes Act 1965 and has since been consolidated in s. 41 of the Matrimonial Causes Act 1973 (see n.3).

acceptable and also, more realistic. But it is one of the contentions of this book that surveillance and treatment have not simply disappeared, or even become less popular with those trained to practise them. They find expression within the current enthusiasm for mediation. Many of the new mediators have a social work or counselling background. It is by no means clear that they will be keen to abandon their authority as experts in child welfare or family dynamics. In some cases it was the prospect of applying these skills in a new context which led them to take on a mediating role in the first place.

But it is not immediately clear why *mediation*, more than any other form of dispute resolution, should have something special to offer in the way of safeguarding children's interests. Mediation is said to provide the parties with encouragement and opportunity to retain control over their own case. It is true that this concept, usually termed 'client self-determination', also forms part of the rhetoric of social work. But it is by no means certain that it imbues the practice. Indeed, there is good reason why it should not do so, as social workers have to balance their clients' wishes against the constraints imposed on them by limited resources and agency responsibilities (such as, in certain circumstances, removing children from the care of their parents). They are used to *exercising* authority, rather than ensuring that this is retained by parents.

The same may be said of divorce court welfare officers, most of whom have had a generic training in social work. Like many other professionals in this field—including some solicitors—they are attracted by the aura of consensus which surrounds 'conciliation'. But welfare officers are used to excercising considerable influence with the court. It is only to be expected that they should seek to extend their traditional child-protective responsibilities so that they are applied to this supposedly new discipline. Certainly it is asking rather a lot of them that they be child-welfare experts for one half of their time and mediators, lacking any kind of formal authority, for the other half. Some welfare officers claim that they can perform both roles, even that they can perform them both at the same time (Shepherd, Howard, and Tonkinson 1984). But it has been demonstrated convincingly that these tasks and their associated objectives are theoretically quite distinct and may, in practice, conflict (Roberts 1983).

This usefully prompts the question: who is behind the recent chorus of support for mediation? The answer is that most of the press articles and television and radio reports flow from the strenuous efforts of a

此为试读,需要完整PDF请访问: www.ertongbook.com