# MAPPING PATHS TO FAMILY JUSTICE

## RESOLVING FAMILY DISPUTES IN NEOLIBERAL TIMES

Anne Barlow, Rosemary Hunter,
Janet Smithson and Jan Ewing

PALGRAVE **SOCIO-LEGAL STUDIES**

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## Palgrave Socio-Legal Studies

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# Authors' Note

This book is a product of the ESRC-funded study 'Mapping Paths to Family Justice' (2011–2014). Anne Barlow (University of Exeter) was the Principal Investigator on the project, with Rosemary Hunter (then University of Kent, now Queen Mary University of London) and Janet Smithson (University of Exeter) as Co-Investigators. Jan Ewing was employed on the project as a Research Associate at the University of Kent and later also at the University of Exeter. Their respective contributions to the writing of the book were: Rosemary Hunter – 50 per cent, Anne Barlow – 30 per cent, Jan Ewing – 10 per cent, and Janet Smithson – 10 per cent. A follow-on project, 'Creating Paths to Family Justice', funded by an ESRC impact accelerator award, is being conducted from the University of Exeter by Anne Barlow and Jan Ewing.

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Without doubt, we remain greatly indebted to you all and take this opportunity to thank you once again for your invaluable contributions. We should also make clear that all opinions expressed in the following pages, together with any errors or omissions, are solely those of the researchers and are not to be attributed to any other person or organisation except where otherwise indicated.

Anne Barlow, Rosemary Hunter, Janet Smithson, Jan Ewing

July 2016

# List of Abbreviations

| | |
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| ADR | Alternative Dispute Resolution |
| Cafcass | Children and Family Court Advisory and Support Service |
| CPD | Continuing Professional Development |
| CSJPS | Civil and Social Justice Panel Survey |
| ESRC | Economic and Social Research Council |
| EWCA Civ | England and Wales Court of Appeal, Civil Division |
| FDR | Family Dispute Resolution (Process) |
| FMA | Family Mediators Association |
| FMC | Family Mediation Council |
| FMCA | FMC Accredited Family Mediator |
| LAA | Legal Aid Agency |
| LASPO | Legal Aid, Sentencing and Punishment of Offenders Act 2012 |
| MIAM | Mediation Information and Assessment Meeting |
| MoJ | Ministry of Justice |
| MOU | Memorandum of Understanding |
| NACCC | National Association of Child Contact Centres |
| NFCC | National Family Conciliation Council |
| NFM | National Family Mediation |
| ONS | Office for National Statistics |
| POD | Local practice group of collaboratively trained lawyers and other collaboratively trained professionals |
| PPC | Professional Practice Consultant |
| SFLA | Solicitors Family Law Association (now Resolution) |
| SRA | Solicitors Regulation Authority |
| UKCFM | UK College of Family Mediators |

# 1
# Introduction

This is a book about the resolution of family disputes that arise from the end of marriages or marriage-like relationships. Our focus is on disputes between couples – whether married or cohabiting – over their finances and/or arrangements for their children, following the breakdown of their relationship, rather than on disputes that might arise within ongoing couple relationships. Post-separation disputes are the 'bread and butter' of family law. In fact, though, many couples deal with the consequences of their relationship breakdown without any kind of dispute. They sort things out between themselves and move on with their lives. Since this group flies below any official radar, it is difficult to put a figure on its size. The survey we conducted in 2011 (detailed in Chapter 3) suggested, however, that nationally, almost half of all couples divorcing or separating between 1996 and 2011 sought no legal advice about their situation, with couples separating from cohabitation less likely than divorcing couples to seek legal advice. Those who seek advice may then proceed, armed with that advice, to make their own arrangements. So those who end up in dispute may be a minority, but perhaps a substantial minority, of all divorcing and separating couples.

The things that people dispute about may also range widely. Family breakdown can be an emotionally devastating experience (e.g. Day Sclater 1999), and disputes can arise over issues such as lack of trust, feelings of betrayal or refusal to accept that the relationship is over. The focus of this book, however, is on disputes over practical arrangements for the future – how will the couple's property and other assets be divided between them; will one partner continue to pay maintenance to the other party, and if so how much and for how long; with whom will the children live, and if they will live predominantly with one parent, what arrangements will be made for them to spend time with the other parent? These are matters which are, to some extent, regulated by law – by the Children Act 1989 in the case of arrangements for children and by the Matrimonial Causes Act 1973 in the case of financial arrangements for divorcing couples. There are other practical matters which may also be the subject of dispute but which we do

not generally discuss. There may be a dispute over whether to get divorced and the grounds for divorce, but in practice, the vast majority of divorces are undefended. Disputes over child support occur more frequently, but during the period of our research, these were dealt with administratively, initially by the Child Maintenance and Enforcement Commission and subsequently by the Child Maintenance Service, which would determine the amount of child support owing according to a statutory formula, and could, if requested, also collect payments from the non-resident parent. Thus, disputes over child support had definite answers, whereas disputes over arrangements for finances and children were more dependent upon the circumstances of the particular family, and hence less readily determined.

The title and subtitle of the book, 'Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times', raise a number of questions. What are 'neoliberal times'? How may family disputes be resolved and what different 'paths' may people take to do so? And what do we mean by 'family justice'? This chapter addresses these questions. It first sets out what we mean by our three key concepts: 'neoliberalism', 'family dispute resolution' and 'family justice'. The discussion of what we mean by 'family justice' includes an explanation of the critical feminist theoretical approach we take in this book. In brief, this means that our analysis pays consistent attention to issues of gender and power. We ask, what are the gender effects of the policies and practices we study, and how do they contribute to (or subvert) existing gendered power differentials? The chapter then proceeds to describe the neoliberal transformation of the family justice system in England and Wales between 1996 and 2014, providing the necessary context for our study.

## Key concepts

### Neoliberalism

Neoliberalism is a political philosophy which has taken hold globally since the late 1970s (Brown 2015; Harvey 2005; Oksala 2012: 117). Although it has been implemented differently in different countries, it has several core features. Its primary feature is a commitment to market values rather than welfare values. It follows from this that states and public services should be minimal in scope – hence, for example, the Thatcher government's desire to 'roll back the frontiers of the state' (Stewart 2007: 28) – and that in the economic sphere, governments should promote private property rights, free markets and free trade (Harvey 2005). It also follows that in the social sphere, governments should promote an ethos of individualism and personal responsibility. Neoliberalism thus involves a broad governance agenda 'that encourages both institutions and individuals to

conform to the norms of the market' (Larner 2000: 12). It requires subjects to assume responsibility for 'navigating the social realm using rational choice and cost-benefit calculations grounded on market based principles' (Brown 2006: 694; Hamann 2009: 37; Shamir 2008). Public policy may, in turn, employ a variety of techniques – encouragement, incentives, 'nudges' or coercion – in order to steer individual behaviour towards desired outcomes, to encourage certain choices and to discourage others (Dean 2002; Dilts 2011: 131). Thus, while retreating from direct intervention, the state continues to govern citizens at a distance via a range of regulatory practices (Larner 2000; Rose and Miller 1992).

In the UK, the Thatcher-Major, Blair-Brown and Cameron governments might all be classified as neoliberal. The Thatcher government focused on reducing the size of the state and promoting free markets through public sector cuts, privatisation, deregulation and diminishing the power of trade unions. The New Labour government from 1997 focused on making public services more efficient through the use of private sector management techniques (Powell 2008; Power 1997), the targeting of scarce public resources to those in greatest need and insistence on individual responsibilities and duties to the community in exchange for 'the conditions of the good life' (Bridgeman and Keating 2008: 6–7; Rose 2000: 1398). The 2010–15 Coalition government continued these trends with further privatisations and cuts to public services and to welfare in the name of 'austerity', and continuing emphasis on the responsibility of individual citizens to work and to be self-sufficient, backed by incentives, coercive measures and the discursive stigmatisation of welfare recipients (Sommerlad 2015: 245). Neoliberal times thus span the entire period covered by this study – 1996–2014. Furthermore, although there have been some shifts of emphasis with different governments, neoliberal ideology shows no sign of waning. Indeed, while the family justice system was a relatively late target of neoliberal policy attention, it has come in for sustained attention in recent years, as outlined below, to the extent that it is now possible to say that it has undergone a neoliberal transformation.

## Family dispute resolution

Traditionally, legal disputes have been decided in court, or by negotiations between lawyers in the shadow of court proceedings. The 'alternative dispute resolution' (ADR) movement emerged in the United States in the 1960s and 1970s and was transplanted from there to many other countries, including the UK. A range of different 'alternatives' to adjudication have developed, but our focus is on 'facilitative' processes such as mediation and conciliation, which involve the intervention of a neutral third party who, rather than imposing a decision on the parties as a judge would

do, assists the parties to negotiate a resolution between themselves, either alone or with the involvement of their lawyers. The key differences from adjudication that ADR offers are that it is informal, non-adversarial, voluntary, confidential and the parties remain in control of decision-making. The advantages of 'private ordering' are said to be that it enhances party autonomy by empowering them to make their own decisions rather than having decision-making taken out of their hands; it is quicker and cheaper than traditional court proceedings; it aims to contain and reduce conflict, to take a conciliatory approach and find common ground between the parties, rather than inflaming conflict as adversarial court proceedings are prone to do; it can produce better, more creative results than would be possible in court proceedings; and agreements reached between the parties are more likely to endure than those imposed by a judge (e.g. King et al. 2009: 91–3; Mair et al. 2015: 175–6). For these reasons, both the process and the outcomes of ADR are considered likely to produce greater party satisfaction than are court proceedings.

The non-adversarial approach of ADR was seen to offer particular benefits in the field of family law (see e.g. Emery 2012; Parkinson 2014; Roberts 2014). A process that aimed to contain and reduce conflict would not only be better for the parties themselves, but also for their children, who would thereby avoid exposure to the damaging effects of parental conflict. Further, family mediation developed with a particular focus on improving communication and developing cooperation between the parties, skills which would help to preserve and enhance the parties' ongoing co-parenting relationship. Family mediation in England and Wales generally involves face-to-face discussions between the parties, facilitated by an impartial mediator. It generally takes a 'settlement-seeking' approach, focused on reaching agreement about future arrangements, based primarily on what is in the best interests of the children (Parkinson 2014).

At the same time, lawyers also grasped the benefits of non-adversarialism in the context of family disputes and, as discussed further below, there was a clear move by family solicitors towards a more conciliatory approach, with an emphasis on not inflaming conflict and negotiating with the other side (usually by correspondence rather than face to face) to reach a resolution without the need for court proceedings. In this context, a court application will only be initiated if negotiations break down, or if it is considered necessary to focus the mind of a reluctant party within a timetable provided by the court. The key differences between solicitor negotiations and mediation are that while the mediator is a neutral third party facilitating the parties' own negotiations, each solicitor in solicitor negotiations provides partisan support for their client's interests and can also act as a buffer between the client and the other side. Moreover, solicitors can give

their clients legal advice, while mediators cannot. Mediators may give both parties information about legal principles and how a court would approach their case, but they cannot give individual advice about legal rights or entitlements.

Two further additions to the forms of out-of-court family dispute resolution in England and Wales have been collaborative law and arbitration. Collaborative law is a type of dispute resolution which has developed specifically within family law (again, initially in the United States). It combines elements of both solicitor negotiations and mediation, in that each party has their own solicitor, but negotiations take place face to face in four-way meetings rather than at a distance. All participants agree at the outset that they will negotiate collaboratively, in an effort to reach an outcome that is best for the whole family, and crucially, that they will not resort to court proceedings. The solicitors' partisan role is therefore somewhat muted, although they can still give legal advice, and will also meet separately with their own clients to discuss goals and concerns. All participants have a strong incentive to reach a consensual settlement as the participation agreement specifies that if either party decides to back out of the collaborative process and initiate court proceedings, then both lawyers will cease to act and both clients must therefore instruct new solicitors.

Finally, at the time of our study, arbitration was available for disputes over finances (but not children) in England and Wales.[1] Unlike the other three forms of out-of-court dispute resolution, which all involve negotiations between the parties and/or their lawyers, arbitration replaces the public court system with a private judge who makes a final and binding determination of the dispute. The arbitrator is appointed by agreement between the parties, and the process is confidential, less formal, more flexible and quicker than normal court proceedings, which can also make it more cost-effective. We did not include arbitration in our study because of its essential difference from the other dispute resolution processes, plus the fact that it was very newly available and little used at the time we conducted our research, and the fact that it did not cover all kinds of family law disputes.

When we refer to 'family dispute resolution' (FDR) in this book, therefore, we mean methods of resolving family disputes out of court, and specifically, the three methods whereby parties and/or their lawyers engage in negotiations to reach an agreed settlement: solicitor negotiations, mediation and collaborative law. Each of these methods is discussed further in Chapter 2.

1 Arbitration in financial matters was introduced in England and Wales in February 2012, just after the start of our project, and in children's matters in July 2016, after the conclusion of our research.

## (Family) justice

The term 'family justice' has two different meanings, both in general and in this book. The first meaning is adjectival, as used in the phrases 'family justice system', 'family justice professional' or 'Family Justice Council'. It refers broadly to family law and to all the people and institutions associated with its operation, or, in the words of Eekelaar and Maclean, 'those institutions whose primary purpose is to define, protect and enforce the legal rights family members have *as family members* and to resolve conflicts between family members concerning those rights' (2013: 8). It includes family courts, judges, magistrates and legal advisers, family barristers and solicitors, Cafcass[2] officers, mediation services, psychological experts, providers of court-ordered contact activities, and local authority lawyers and social workers involved in care proceedings.

The second meaning is as a noun, 'family justice'. This is what parties (hopefully) receive from the family justice system. The emphasis is on the word 'justice', and it has a normative content. In other words, not every element of the family justice process and not every outcome parties get from it can necessarily be described as 'just'. Family dispute resolution follows particular procedures to produce agreements and family courts follow particular procedures to make decisions, but the mere fact of those procedures and of an agreement or a decision does not tell us whether they possess the quality of 'justice'. We have to measure them against a further yardstick to decide that.

This is not a universally accepted view. Many people think that whatever outcome emerges from a family justice process is by definition family justice. In other words, they do not see a need for any separate inquiry into the nature of either the process or the outcome; they accept the legitimacy of the process and, consequently, of the outcomes it produces (Eekelaar and Maclean 2013: 17). Some people would make this argument specifically in relation to mediation and collaborative law, where both parties have voluntarily entered into the process and voluntarily reached an agreement that they consider meets both of their interests, as a result of which the agreement should be respected. We disagree. We take the view that justice is not just about promoting parties' autonomy and self-determination. Rather, it has a separate meaning against which both processes and outcomes can (and should) be measured.

We take this view on the basis that if decisions are being made about how to resolve family disputes within the context of family law (as opposed to the people mentioned earlier who sort out post-separation

2 The Children and Family Courts Advisory and Support Service, which provides child welfare services in family courts.

issues between themselves without dispute), then society as well as the individuals involved has an interest in the outcome. As John Eekelaar puts it, 'Family justice is concerned with more than simply bargaining.... It is concerned with upholding and underwriting some elemental features of personal relationships' (2015: 353). Family law does not necessarily reflect the arrangements people would make if left to their own devices, but rather is concerned to express and uphold important social values (Leckey 2013: 187). Jonathan Herring has argued, for example, that post-divorce financial arrangements cannot simply be seen as a 'private' matter, since 'the wider community has a legitimate and powerful interest' in the distribution of income and assets between former spouses. These include interests in avoiding parties becoming unnecessarily dependent on welfare benefits; encouraging family members to engage in the care of children, elderly parents and others requiring care despite the financial risks involved; sending a message about the value of care work; combating gender inequality and post-divorce poverty for women due to their general assumption of the greater share of caring labour in the family; and promoting values of mutual sharing and cooperative interdependence in marriage rather than market individualism (Herring 2005). Likewise, society has an interest in ensuring that children's welfare is promoted after their parents separate, and that they are not deprived of resources or made unnecessarily dependent on the state. Decisions made by individuals in family disputes operate within a public, social context and have public, social consequences (Diduck 2014b: 618).

Fundamentally, individual and social well-being is not only a private but also a public responsibility (Diduck 2010: 204). Indeed, from a feminist perspective, so-called 'private' family relations are a matter of crucial public and political importance, since they are a key site for the balancing of social and economic power (Diduck and O'Donovan 2006: 1). Susan Moller Okin (1989) has also drawn attention to the importance of practising justice within the family as a means of nurturing children's sense of justice. We therefore do not accept the contention that in resolving family disputes 'there are no rights that cannot be compromised and that every conflict represents merely a clash of morally equivalent interests' (Genn 2010: 25). To the extent that autonomy in dispute resolution entails freedom *from* law and its values, freedom from social obligations, freedom to pursue one's own interests and exert one's own power regardless of the disadvantage to others, or simply reconciling the weaker party to an unjust fate, then this, in our view, is the antithesis of justice (Diduck 2014a: 102, 112; Smith 2015: 23).

So what, then, is the normative meaning of 'family justice'? This has both a procedural aspect and a substantive aspect. A just process is one

which is 'readily accessible and effective', which provides reasonable access to legal advice and representation, to appropriate form(s) of dispute resolution, and to the courts, without undue delay or cost and not dependent on personal resources (Genn 2010: 18, 115). It is also a process which allows for equal participation, for the voices of the parties – and of children who are old enough to express a view – to be heard with equal respect, which seeks to overcome rather than perpetuate or magnify power imbalances, and which does not exert undue pressure (including financial pressure) to compromise legal rights (Eekelaar and Maclean 2013: 8; Grillo 1991; Wallbank 2014: 92).

Substantive justice is more difficult to define. Eekelaar and Maclean argue that the outcomes of family dispute resolution should be assessed against the law in force at the time, since legal rules, rights and entitlements represent 'the values, goals and policies of the social context in which the dispute arises' (2013: 17). They acknowledge, but dismiss, two difficulties with this position. First, it fails to subject the legal rules themselves to a yardstick of justice. But legal rules are not always just. For example, a rule that specified that men should always receive two-thirds of the property or that children should always spend half their time with both parents would not be just. Eekelaar and Maclean argue that the quality of the law is a political question raising 'issues of justice at another level' (2013: 17). This is true, but we think it necessary to tackle rather than sidestep this political question. Part of the reason for this is the second difficulty, which is that family law does not always provide clear-cut solutions. Notoriously, it applies indeterminate standards such as 'fairness' in financial cases (*White v White* [2001] 1 AC 596) and 'the welfare of the child' in children's cases (Children Act 1989, s. 1). There is a good reason for this: it allows outcomes to be tailored to the circumstances of each individual family. But it does not take us very far in our quest for justice. We can certainly say that a financial outcome that was not 'fair' or a children's outcome that did not promote the children's welfare would not be just, but that still leaves fairly wide parameters of possibility. Eekelaar and Maclean acknowledge that in applying the law, judges may have to exercise judgement (2013: 17). However, the family justice process in fact involves very little judgement by judges. In the great majority of cases people settle their disputes with the help of lawyers or mediators. So how do we know whether those agreements are just?

In formulating our substantive conception of family justice, feminist theories provide a useful source of inspiration. The traditional heterosexual family is a fundamentally gendered institution and feminists have engaged in the most sustained and advanced thinking about gender justice in general, and about family roles, relationships and dynamics in particular. An influential feminist theory of justice has been articulated by Nancy Fraser, in

terms of the need to remove 'institutionalised obstacles that prevent some people from participating on a par with others, as full partners in social interaction' (Fraser 2009: 16). For Fraser, overcoming such obstacles requires both *redistribution* (of economic resources) and *recognition* (of identities and status) (Fraser 1997). Following Fraser, a feminist approach to family justice would involve paying attention to the social and economic context of decision-making and ensuring substantive (rather than merely formal) equality (redistribution), and also valuing care work, understanding relationality, and ensuring safety and freedom from violence and abuse (recognition).

To elaborate on this framework, in assessing financial outcomes in family disputes, it is necessary to be aware of the gender division of labour in families, which often results in the man acting as primary breadwinner and the woman acting as primary carer. While many modern couples may aspire to greater 'role convergence', the gender division of labour remains an empirical reality (Harris-Short 2011: 349; Park et al. 2013: 127). Following separation, therefore, the woman is likely to remain as the primary carer, but as a result of the role she assumed and continues to assume within the family, she is likely to have a reduced income, earning capacity and pension entitlements. In this context, a simple 50/50 split of the assets and a 'clean break' after separation, or anything less than that, is likely to result in long-term poverty for the woman and children (Mair et al. 2015: 192–4; Weitzman 1985). Of course the gender roles in a particular family may be reversed, or the parties may have contributed equally both economically and in terms of care, but in each case it is necessary to consider the particular circumstances of each party within the broader social and economic context of their future lives, which may include more limited opportunities for women in the labour market, women's generally lower pay, and gendered cultural expectations about work and homemaking (Diduck 2010: 205; Leckey 2013: 187; Scott et al. 2010: 9). Within this context, financial outcomes should ensure as far as possible that any relationship-generated disadvantage is not perpetuated and that ongoing care work is appropriately acknowledged and valued (Choudhry et al. 2010: 20; Diduck 2014a: 110). In other words, the outcome should, as far as possible, ensure substantive equality between the parties, that is, an outcome which provides each party with an equal ability to move on with their lives, taking into account all the circumstances and the surrounding context. The House of Lords' decision in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 which elaborated the notion of 'fairness' in financial division by reference to the three principles of meeting needs, compensation for relationship-generated disadvantage and equal sharing (non-discrimination between breadwinning and homemaking/caring), expresses this notion of substantive equality well.

In assessing outcomes in relation to child arrangements, while the primary consideration must be the welfare of the child, this does not mean 'focus[ing] on the child in isolation from those caring for him' or her (Choudhry et al. 2010: 8). Children are raised in relationships; thus a relational concept of welfare takes into account the child's needs in the context of relationships and the interests of caregivers (Choudhry et al. 2010: 11, 23). In doing so, it is important again to guard against gender discrimination, for example in valuing fathers' interest in caring for their children more highly than the hands-on care given by mothers, or in casting disproportionate responsibility on mothers to ensure children's welfare (Choudhry et al. 2010: 8–9) or in discounting fathers' contribution to children's welfare because they spend less time with them. In particular, Harris-Short points out the injustice of failing to recognise the heavy investment made by many primary carers in motherhood as part of their identity (2011: 353–4). The welfare of the child also includes valuing the child's physical and emotional safety, and the safety, well-being and protective parenting capacity of their primary carer, above 'contact at any cost' (Hester 2011; Jaffe et al. 2003; Sturge and Glaser 2000). Violent parents should be held accountable for the harm they have caused and should be encouraged and supported to change their behaviour. Thus, child arrangements should not entail the risk of exposure to ongoing violence, abuse or other forms of unsafe parenting.

In summary, although some feminist accounts of justice have contrasted the (masculine) 'ethic of justice' with a (feminine) 'ethic of care' (e.g. Gilligan 1982), our conception of justice incorporates care and the recognition and valuing of care as a central element (Choudhry et al. 2010: 21–22; West 1999). At the same time, it pays attention to gender differences and gendered power and resource differentials. A 'just' outcome is not one which is simply an outcome of inequalities of power and resources, nor of any kind of abuse (Smith 2015: 22–23). Combining the procedural and substantive aspects of family justice, we might say that family dispute resolution which is an occasion of oppression for either party is unjust, while a just resolution is one which is an occasion of respect for both parties (Hunter 2007). Both parties should have the resources and support needed to participate effectively in the process, and agreements should achieve substantive equality between the parties, by reference to needs for both recognition and redistribution.

## The neoliberal transformation of the family justice system

Neoliberal policies have played out in a range of ways in the family justice field since the mid-1990s, in the UK and in a number of other countries

(see e.g. Atkin 2015; Picontó-Novales 2015; Treloar 2015). Arguably, the first neoliberal reform to family justice in England and Wales was the Children Act 1989. As Eekelaar noted, this Act replaced the notion of parental rights with the concept of parental responsibility, and restructured the state's relationship to families, taking a more hands-off approach in which it had obligations only to children 'in need' and would only intervene in families where there was a risk of 'significant harm' to a child (2000: 24). The concept of parental responsibility has morphed over time, however. For example, Jo Bridgeman has identified a shift in meaning under the New Labour government, which invested parental responsibility with a definite content and direction – something exercised by parents not only for the good of their children but also for the benefit of society (2008: 238–42).

A less ambiguous (attempted) neoliberal reform came with the Family Law Act 1996. This Act, introduced by the Major government but supported by the Blair government when it came to power, intended to introduce a system of no-fault divorce, in which the divorce process would involve initial information meetings advising people on the consequences of divorce and encouraging reconciliation, followed by a nine-month period of reflection and consideration during which the parties would make arrangements for the future concerning their finances and children, followed finally by the grant of a divorce. Divorce was thus to be consensual and conflict-free. The information meetings steered parties who might need assistance making future arrangements towards mediation and away from solicitors and court proceedings. In her analysis of these reforms, Helen Reece (2003) dubbed compliance with the new process as 'divorcing responsibly'. Unfortunately, however, those who took part in the pilot schemes under the new Act displayed insufficient responsibility in responding to the steers provided. Too few reconciled; and of those proceeding with divorce, most continued to consult solicitors and too few took up the option of mediation (Walker et al. 2004). As a result, the government decided not to implement the reforms.

Nevertheless, one enduring effect of the Family Law Act 1996 which survived the demise of divorce reform was the introduction of public funding for mediation. As a result, both not-for-profit mediation services and private mediation providers obtained a more stable source of income and mediation became widely available nationally. Section 29 of the Family Law Act required applicants for legal aid for divorce and related matters to first attend a meeting with a mediator to receive information about how mediation could help to resolve their dispute, and stated that the Legal Aid Board would make decisions about funding in light of that meeting. By the mid-2000s, the Legal Aid Funding Code included the provision that if the mediator at the intake session assessed the matter as being suitable for mediation, then the client would only be funded to attend mediation, and

not for legal representation or court proceedings. Those reliant on legal aid, therefore, were becoming subject to increasing pressure to mediate their disputes in preference to any other form of resolution or determination. However, take-up of mediation remained relatively low, with a major reason for assessments of unsuitability being that the other party refused to participate (Davis 1999).

A report by the National Audit Office in 2007 concluded that there was 'scope for greater take-up of mediation in England and Wales', and consequently, for the Legal Services Commission to make significant cost savings (2007: 10). According to the report, cases funded by legal aid in which mediation was attempted cost an average of £930 less than cases in which mediation was not attempted, and 95 per cent of mediated cases were completed within 12 months compared to only 70 per cent of solicitor cases completed within 18 months (2007: 8, 10). There were obvious problems with these figures, not least in comparing apples and oranges. Cases in which mediation was attempted were likely to be more amenable to resolution than those in which it was not attempted, but the statistics did not control for level of conflict between the parties or case complexity. Moreover, cases 'completed' in mediation did not mean they were resolved, only that mediation was concluded, whereas solicitor cases remained with solicitors until they were resolved. Further, there was the possibility of overlap between the two categories when mediation failed and the case was then taken forward by a solicitor. Yet the message that mediation was a more efficient use of public resources than payments to solicitors was taken up with alacrity by the House of Commons Public Accounts Committee (2007), which maintained that the Legal Services Commission should highlight the benefits of mediation in guidance and information directed to the general public; work with solicitors and other advisers to encourage them to promote mediation to their clients; monitor solicitors' rates of referral to mediation; and set performance targets for solicitors and advisers for the number of cases expected to be resolved by mediation. The Legal Services Commission (2008) responded that it was committed to family mediation, was actively trying to promote it wherever possible, and would introduce contracting and remuneration arrangements for solicitors to provide incentives to refer clients to mediation. As will be seen in Chapters 4 and 5, these measures were effective – arguably too effective – in encouraging solicitors to direct their legally aided clients into mediation, with clients reliant on legal aid feeling they had little option but to attempt to mediate their disputes.

In April 2011, 'encouragement' to attend mediation was extended from legal aid clients to all potential family law litigants regardless of funding source. The Pre-Application Protocol for Mediation Information and Assessment, introduced as part of the Family Procedure Rules (Practice Direction

3A), required *all* applicants wishing to issue court proceedings for financial or children's matters to first attend a Mediation Information and Assessment Meeting (MIAM), to be informed about how they could be helped to resolve the matter and keep it out of court by means of mediation, and to be assessed for suitability for mediation and eligibility for legal aid. Once one party arranged a MIAM, the mediation service would contact the other party to invite them to attend a MIAM as well, with the Protocol expressing an 'expectation' (though not a requirement) that they would attend. A very limited list of exemptions was provided from the obligation to attend a MIAM, confined to those who had urgent applications, could provide evidence of being subjected to recent physical violence, or were bankrupt. If one party was eligible for legal aid, the other party's MIAM would also be publicly funded, but if neither party was eligible, they were required to bear the cost of the MIAMs themselves.

The Pre-Application Protocol made it clear that the policy preference for mediation was no longer simply a matter of cost-saving for the legal aid fund. Although there was also a cost-saving element in terms of reducing the consumption of public court resources, it was also about the redirection of behaviour. Separating couples should now eschew adversarial court proceedings and reliance on court orders, and rather seek to reach agreement between themselves, away from the courts, in the calmer and more cooperative atmosphere of mediation. In other words, they were expected to take responsibility for resolving their own disputes, without the involvement of courts, solicitors or the law. These same themes of delegalisation and private responsibility were highlighted in simultaneous developments in relation to family justice and legal aid (as well as child support: see Wallbank 2014: 74–75).

In the dying days of the Brown government in March 2010, a major review of family justice was launched under the chairmanship, significantly, of David Norgrove, an economist and former private secretary to Margaret Thatcher. The perceived ills of the family justice system included that it was inefficient, incoherent and, in the case of private law, over-used (Family Justice Review 2011a: 3). The Terms of Reference for the Review included the principles that:

- The court's role should be focused on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so;
- Individuals should have the right information and support to enable them to take responsibility for the consequences of their relationship breakdown; and

- Mediation and similar support should be used as far as possible to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts (Family Justice Review 2011a: 190).

The Review ultimately included recommendations for better management of the family justice system as a whole, more efficient court proceedings, and the provision of information, support and services to enable people to resolve disputes over post-separation arrangements out of court wherever possible (Family Justice Review 2011b).

These recommendations produced a range of results. A new Family Justice Board was established, also chaired by David Norgrove, with the aim of overseeing and improving the performance of the family courts. Performance indicators for public and private law proceedings were established and monitored. The Crime and Courts Act 2013 established a single family court in place of the previously separate County Courts and Family Proceedings Courts (Magistrates Courts), and the judiciary responded to the Family Justice Review with a set of proposals for modernising family justice, including the more streamlined and rational deployment of judicial resources within the Single Family Court, and the robust judicial case management of proceedings to ensure performance targets were met (Ryder 2011). The Children and Families Act 2014 enshrined the requirement that before commencing private law proceedings, an applicant must have attended a MIAM. It also repealed the former requirement that before a divorce would be granted, the court must be satisfied that satisfactory arrangements had been made for the welfare of any children, including their residence, education and financial support. These matters are, apparently, no longer a matter of state concern. Finally, the Family Procedure Rules were revised, with the new Child Arrangements Programme for private law proceedings (Practice Direction 12B) emphasising both the possibilities of diversion to mediation, and the speedy and streamlined disposal of cases remaining in the court. The judicial representative on the Family Justice Review and the President of the Family Division have described the objective of the Child Arrangements Programme as 'making parental responsibility work' (McFarlane 2014).

The most far-reaching change to the family justice system, however, was brought about by the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (the LASPO Act), which came into force on 1 April 2013. When the Coalition government came to power in 2010 and announced cuts to departmental budgets of up to 25 per cent, it seemed inevitable that legal aid would be one of the casualties. The Ministry of Justice Consultation Paper, *Proposals for the Reform of Legal Aid in England and Wales* (2010) based

its proposal to remove all private family law matters from the scope of legal aid not only on the need to contribute to deficit reduction, but also on ideological grounds. As John Eekelaar has noted, if it had simply been an austerity measure there would have been an acknowledgement of the hardships likely to be caused by the withdrawal of legal aid and a commitment to restoring it as far as possible once the fiscal crisis had passed (2011: 315). Instead, legal aid was constructed as an over-generous welfare benefit which encouraged people to rely on the courts rather than their own resources to solve their problems. This irresponsible behaviour was to be cured by the removal of legal aid from all but the most vulnerable and deserving:

> [T]he Government's proposed reforms to legal aid are intended to encourage people, rather than going to court too readily at the taxpayer's expense, to seek alternative methods of dispute resolution, reserving the courts as a last resort for legal issues where there is a public interest in providing access to public funding. (Ministry of Justice 2010: para 1.8)

In relation to private law children's matters, the Consultation Paper stated:

> We do not consider that it will generally be in the best interest of the children involved for these essentially personal matters to be resolved in the adversarial forum of a court. The Government's view is that people should take responsibility for resolving such issues themselves, and that this is best for both the parents and the children involved.…
>
> Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available. In such cases, we would like to move to a position where parties are encouraged to settle using mediation, rather than protracting disputes unnecessarily by having a lawyer paid for by legal aid. (Ministry of Justice 2010: paras 4.210–4.211)

And in relation to financial matters:

> We do not consider that these cases will generally be of sufficiently high priority routinely to receive legal aid support, when compared with those cases which concern issues such as liberty or physical safety.… While the home, or a share in the home, is frequently at issue in these cases, we do not consider that in general litigants face the same issues as clients who are at immediate risk of being made homeless. (Ministry of Justice 2010: para 4.155)

The Consultation Paper proposed that legal aid should remain generally available only for mediation in private family law matters, with legally aided advice and representation remaining available only to those who were victims of domestic violence or who were seeking to protect a child at risk of child abuse (subject to strict evidential requirements). Despite almost universal objection to these proposals, the Government subsequently announced its intention to proceed with them (Ministry of Justice 2011: 8). In response to concerns raised in the consultation that the withdrawal of legal aid would result in a rise in the number of people attempting to represent themselves in court, the Government accepted:

> the likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising. But it is not the case that everyone is entitled to legal representation, provided by the taxpayer, for any dispute or to a particular outcome in litigation. In individual cases where the failure to provide legal aid would result in a breach of an individual's rights under the Human Rights Act 1998 or European Union law, exceptional funding will be available. As necessary access to justice is protected by exceptional funding, taxpayer funded representation has to be targeted on priority areas. (Ministry of Justice 2011: 158)

On this view, there is no longer a public interest in ensuring that legal rights and entitlements can be effectively enforced, other than in the 'exceptional' case where the inability to do so would result in a breach of human rights. Legal aid is no longer perceived as an important mechanism for ensuring access to justice and upholding the rule of law, but as a residual welfare benefit available only for the most serious cases. The majority of family disputes are characterised as essentially private, of interest or significance only for the family members themselves (Wallbank 2014: 76) and to be resolved by means of mediation.

It can be seen that the 'delegalisation' or 'reprivatisation' of family disputes has been at the heart of the neoliberal agenda in relation to family justice. Mediation fits neatly with this agenda because it removes disputes from the courts, lawyers and the law; promotes self-reliance and individual responsibility in solving family problems; and saves costs for the public purse. As Diduck has observed, the 'A' in ADR has come to mean 'autonomous' dispute resolution, that is, autonomous from the state and the legal system. Family law claims are reconstructed as merely personal problems, and parties are free to base their decisions on their own private norms (Diduck 2014b: 616). This is not to suggest that mediation or ADR more generally has been a neoliberal Trojan horse. Its origins were

more traditionally liberal and anti-authoritarian (e.g. Roberts 2014: 3), and indeed, early initiatives such as the no-fault divorce regime proposed by the Family Law Act 1996 were greeted with considerable optimism, appearing to offer a fresh and more enlightened approach to the breakdown of relationships (Hale 2000: 143). By the end of our period, however, the neoliberal agenda in family justice had become much more coercive and punitive of those who were seen as social failures – unwilling or unable to take individual responsibility for sorting out their post-separation difficulties (Wallbank 2014: 77) – and mediation had become thoroughly co-opted into the neoliberal policy apparatus.

Feminists have been particularly concerned to critique the gender implications of neoliberal delegalisation and privatisation processes (e.g. Hunter 2013: 21). Too often, it is women's and children's (recently won) legal rights which are sidelined, and they are expected to protect their interests within privatised dispute resolution processes which reproduce and perpetuate gendered familial inequalities and power relations (Bottomley 1985; Eekelaar 2015: 348; Sommerlad 2015; Wallbank 2014: 76). Moreover, this is taking place within a context in which women have been the primary victims of cuts to public sector employment, to public services and to welfare benefits, which have exacerbated their social inequality. While this book primarily focuses on the period before the LASPO Act came into force, our research was undertaken in the shadow of the Family Justice Review and the proposals for legal aid reform, and so the pace and direction of change were an unavoidable backdrop to our work.

## Chapter outline

In the following chapter we provide a brief history of each of the three forms of family dispute resolution which are the subject of the study: solicitor negotiations, mediation and collaborative law. The chapter outlines the origins and nature of each dispute resolution process; the organisation, training and regulation of its practitioners; and the existing research in the UK and internationally on practices and experiences within each process. In Chapter 3 we describe our research project, including the aims of the study and our research questions, the research design, the methods used to gather both quantitative (survey) and qualitative (interview and observational) data, the scope of the data gathered and the methods used to analyse it.

Chapter 4 addresses awareness of the three FDRs. As outlined above, within the neoliberal framework, people with family law disputes are encouraged to choose to resolve those disputes responsibly, that is, out of court and ideally by mediation. But this is premised on people being

aware of mediation and other out-of-court options, which has proved to be a perennial problem for policy-makers. Chapter 4 first sets out our research findings on awareness and understanding of FDRs among both the general population and those with experience of divorce or separation. It then examines the fate of mediation following the LASPO Act. While the Act intended to promote mediation as the primary method for resolving family disputes, it spectacularly failed to achieve that goal for reasons which our research findings help to explain. Chapter 5 moves on to the process of choosing to attempt one or other form of FDR, drawing on our survey and interview data, considering the constraints under which most people make these choices, and the extent to which those constraints may be mitigated and individual agency promoted by good information and advice. It then examines our findings in relation to the consistency and effectiveness of screening prior to mediation, highlighting structural problems with the screening process, and contesting the notion that mediation will always offer a better process than other alternatives in domestic violence cases. The experiences in mediation of our interviewees who had been victims of violence clearly demonstrate why mediation is inappropriate in such cases, resulting in traumatic processes and unsafe and unjust outcomes.

Chapter 6 discusses parties' experiences of each FDR process, as well as the comparative assessments made by parties who experienced more than one FDR, considering what parties liked and disliked about each process, the extent to which experiences of FDR were gendered, the way emotions and conflict were dealt with in each process, the extent to which each process was child-focused or child-inclusive, and the roles of practitioners within each process. The findings of this chapter highlight the complementary nature of the three FDRs rather than any of them being obviously superior to the others. Chapter 7 turns to the outcomes of FDRs, examining resolution rates within each process, reasons for settlement, satisfaction with outcomes and longer-term outcomes of FDR, as well as the outcomes of cases that were not resolved by FDR. It observes that different settlement rates between processes are likely to be related to the nature of the parties who attempt each process, and that longer-term outcomes such as improved communication and reduced conflict may result from solicitor negotiations as well as from mediation. It also examines gendered experiences of settlement, and in particular the problematic phenomenon of women (but not men) agreeing to poor financial outcomes in the interests of closure or other priorities.

Chapter 8 finally interrogates the outcomes of FDR in normative terms. It identifies the strongly gendered norms brought into the dispute resolution process by the parties, considers the question of the extent to which the 'shadow of the law' (Mnookin and Kornhauser 1979) falls upon each

of the three FDRs, and also considers the extent to which the agreements reached were regarded as 'fair' in parties' own terms, and might be regarded as 'just' in the terms outlined earlier in this chapter. The findings concerning the dynamics of settlement, and the outcomes which tend to flow from the encounter between parties' and practitioners' norms, reveal gendered patterns of resolution in which women and children are more prone to be disadvantaged by objectively unjust outcomes.

The concluding chapter draws together the themes and arguments made in the preceding chapters in relation to the operation of the three FDRs within the framework of neoliberal family justice policy. Our evidence does not support the exclusive neoliberal policy focus on mediation, but rather finds each of the FDRs to have its own strengths and weaknesses, and for the three in combination to complement each other as dispute resolution options. There is room for improvement in all three FDRs – in particular, each falls short in its own way in relation to consulting with children and protecting vulnerable parties. Given the emphasis on mediation after the LASPO Act, however, it is mediation which generates the greatest level of concern and which appears to have the greatest need and scope for development, as detailed in the following chapters.

# 2
# The Three FDRs

In the previous chapter we gave a brief explanation of the three FDRs which are the focus of this book: solicitor negotiations, mediation and collaborative law. This chapter traces the history of each FDR in England and Wales, including professional membership, training, organisations and regulation, developments in practice, and findings of previous studies. This material provides necessary factual background to our study and also introduces many of the earlier research findings which our study set out to test, to see whether they still held true. Previous research generally focused on individual FDRs. Ours was the first study to consider the three FDRs side by side and in comparison with each other.

## Family solicitors

Traditionally, solicitors were the first port of call for those experiencing divorce or separation. In a major national survey of how members of the public responded to 'justiciable problems' (that is, problems with a potentially legal solution) conducted in 1996–97, Hazel Genn found that those who had experienced divorce or family problems since 1992 had the highest rate of advice-seeking of all problem types, with 92 per cent obtaining legal advice from either a solicitor, the police or a Citizens Advice Bureau. Sixty-one per cent went directly to a solicitor to obtain legal advice and 82 per cent consulted a solicitor in private practice at some point (Genn 1999: 115). Subsequent surveys conducted by the Legal Services Research Centre confirmed that those experiencing problems with divorce or relationship breakdown had a high rate of advice-seeking, although this rate had dropped to around 63 per cent in 2006–09 (Pleasence 2006: 91; Pleasence et al. 2010: 53). Although the figures for the use of solicitors are not directly comparable between surveys, the 2001 and 2004 surveys found that solicitors were consulted as the first adviser by around 80 per cent of people with problems related to divorce (the highest percentage for all problem types), and around 50 per cent of people with problems related to relationship breakdown (Pleasence 2006: 108–9).

### Qualifications, training, regulation and professional bodies

Family solicitors are qualified lawyers who have completed either an undergraduate law degree or an undergraduate degree in another discipline plus a one-year Graduate Diploma in Law. In addition, they have undertaken a year of vocational training (currently known as the Legal Practice Course), plus a two-year training contract in a firm of solicitors. Solicitors are trained to be legally knowledgeable and active, analytical problem-solvers, with strong communication skills and business and financial acumen (Webley 2010a: 112). Their duties to clients include acting in the client's best interests and providing frank, independent advice, but they also owe duties to the court to act with integrity, to uphold the rule of law and the proper administration of justice, and to maintain public trust in the legal profession. In acting for clients they are partisan and outcome oriented, concerned to protect their client's legal and financial interests and to guide them to an appropriate resolution within the framework of the law (Webley 2010a).

Entry to the legal profession and professional standards and conduct are regulated, previously by the Law Society (until 2011) and now by the Solicitors Regulation Authority (SRA). Solicitors are bound by the SRA Handbook and Code of Conduct and are subject to disciplinary action for breaches of the code. From 1985–2014, solicitors were also subject to a compulsory continuing professional development (CPD) scheme, under which they were required to undertake 16 hours of accredited CPD training relevant to their practice each year. In 2015 the SRA introduced a new approach to maintaining competence, which is less prescriptive but still requires solicitors to undertake regular learning and development to ensure their skills and knowledge remain up to date.[1]

In addition to its former regulatory role, the Law Society is the major professional organisation for solicitors, which represents their interests in legal and policy contexts and provides a range of services to its members and the general public. As a major area of legal practice, family law is well represented among the Law Society's policy and practice activities. The Society's Legal Affairs and Policy Board includes a Family Law Committee whose terms of reference are 'To keep under review, and to promote improvements in, family law, practice and procedure, including child care law and procedure' and 'To keep under review and monitor the development of relevant accreditation schemes'.[2] The Law Society administers three accreditation schemes for family solicitors: the Children Law Panel, the Family Law

1 See http://www.sra.org.uk/toolkit/.
2 See http://governance.lawsociety.org.uk/committees/view=groupdetail.law?COMMITTEEID=23.

Panel and the Advanced Family Law Panel. These schemes recognise and enable solicitors to market themselves as holding specialist expertise in the relevant areas. Applicants must demonstrate a specified level of family law practice experience over the previous two years, and must complete a written application and pass an interview. For the Advanced Family Law Panel, applicants must also demonstrate specialist expertise in two or more areas of family law. Accreditation is for a period of five years, after which members must apply for re-accreditation. The Children Law scheme relates to child protection and adoption, while the Family Law and Advanced Family Law Schemes relate to all other aspects of family law work. In addition, the Law Society issues a *Family Law Protocol* (4th edition 2015) which constitutes an 'authoritative set of best practice guidelines' for all solicitors practising in family law.

While the Law Society is a generalist professional body which includes family law committees and specialisations, Resolution is a professional body specifically for family law practitioners. Originally known as the Solicitors Family Law Association (SFLA), Resolution was founded in 1982 with the specific aim of promoting a constructive, non-confrontational approach to family law matters, in contrast to the then-dominant adversarial, court-based approach. It changed its name to Resolution in 2005. Resolution members adhere to a Code of Practice which sets out the principles of a non-confrontational approach, and 'requires lawyers to deal with each other in a civilised way and to encourage their clients to put their differences aside and reach fair agreements' which consider the needs of the whole family.[3] In 2015 Resolution had 6500 members and provided national and regional training programmes, publications and good practice guides, and its own accreditation scheme. Resolution accredited specialists practise exclusively or almost exclusively in family law, and have detailed knowledge, experience and expertise in two specialist areas, such as private children law, complex financial and property matters, domestic abuse, financial arrangements for children, pensions, or European and International law. Resolution also engages in law reform campaigns and provides extensive information to the public on post-separation issues through its online Advice Centre.

## Research and policy on family solicitors

### *The practices of family solicitors*

Research on the practices of family solicitors from the mid-1980s suggests that a conciliatory, settlement-oriented approach to family disputes has

3 http://www.resolution.org.uk/about_us/.

become the dominant paradigm. These studies have shown family solicitors to have a strong preference for resolving matters without recourse to litigation. They make considerable efforts to manage clients, modify their expectations and persuade them to see reason within the parameters of legal and practical possibility (although they may also persuade clients to increase their expectations in line with legal entitlements). And they issue court proceedings only as a last resort, and only in order to increase pressure on a reluctant party to negotiate, with a clear intention of reaching agreement rather than proceeding to adjudication (Davis 1988; Davis et al. 1994; Davis et al. 2000: 137; Eekelaar et al. 2000; Ingleby 1992; Walker 1996: 65; Wright 2004, 2007; see also Maclean and Eekelaar 2016: 53–4; Webley 2010a). Studies of family lawyers in other jurisdictions have made similar findings (e.g. Hunter et al. 2000; Mather et al. 2001; Myers and Wasoff 2000; Sarat and Felstiner 1995). The literature does suggest some variation in the extent to which solicitors will deal with their client's 'emotional' as opposed to 'legal' divorce and provide forms of non-legal support and assistance. It also suggests a divergence between legal aid practice, analogised by Eekelaar et al. to the work of a social worker or general practitioner, and higher end divorce practice, in which the lawyer may act more like a conventional, adversarial 'hired gun' (2000: 79; see also Hunter et al. 2000; Mather et al. 2001; Sarat and Felstiner 1995). Nevertheless, solicitors appear more likely to try to contain rather than escalate conflict and to minimise rather than inflate costs to clients (Eekelaar et al. 2000; Wright 2006, 2007), and recent studies have described family lawyers as 'hybrid practitioners' (Webley 2010a; Wright 2007) whose professional practices may be closer to those of mediators than to more traditional lawyers engaged in zealous advocacy on behalf of their clients. And indeed, both the Law Society's *Family Law Protocol* and the Resolution Code of Practice exhort their respective members in negotiating family disputes to adopt a child-centred focus, to make children's needs the paramount consideration, to minimise conflict, and to encourage parties to agree matters and avoid court proceedings as far as possible.

*The policy image of family solicitors*

The empirical evidence concerning the practices of family solicitors stands in sharp contrast to the image of lawyers found in government policy documents since the mid-1990s. The proposals for divorce reform in the Family Law Act 1996 and the push towards mediation which began at that time were accompanied by an anti-lawyer rhetoric which characterised them as inexorably adversarial and prone to inflame conflict (Davis et al. 2000: 137–8; Webley 2010a: 3). In a report published in 2000, Phillip Lewis identified a number of false or questionable assumptions made by

government policy-makers about the activities of family lawyers, including that arm's length negotiation between solicitors often increased tension and conflict, that solicitors were only concerned to 'get the best deal' for their clients at the other party's expense and that lawyers would 'unpick' or 'interfere with' agreements reached without their involvement (Lewis 2000). Other claims include that lawyers deliberately inflame conflict and run up costs in their own interests, and that going to a lawyer inevitably means going to court (see e.g. Davis et al. 2000: 271; Hunter 2003). These assertions endured despite the mounting evidence to the contrary, and can be seen clearly in the Coalition's proposals for the reform of legal aid, discussed in the previous chapter, in which 'having a lawyer paid for by legal aid' was associated with 'protracting disputes unnecessarily' (Ministry of Justice 2010: para 4.211). There was a persistent dichotomy drawn between resolving disputes by mediation and going to court, as if these were the only available options and solicitor negotiations did not exist. Indeed, the Consultation Paper on proposals for the reform of legal aid effectively erased solicitors from the family justice scene, for example asserting that: 'In 2008, 73 per cent of ancillary relief orders were not contested, indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown' (Ministry of Justice 2010: para 4.157), ignoring the fact that the great majority of these applications for consent orders had been negotiated and lodged with the court by solicitors. The government's continued misrecognition of family solicitors and its determination to marginalise them from any publicly supported role in resolving family disputes had serious 'unintended consequences' in the aftermath of the LASPO Act, as discussed in Chapter 4.

*The enduring popularity of family solicitors*

Despite the policy rhetoric aimed at marginalising and discouraging the use of solicitors in resolving family disputes, people who can afford to do so persist in taking their family disputes to solicitors. Partly this is a matter of awareness: solicitors are firmly associated with the resolution of post-separation disputes in the public mind, as noted above and discussed further in Chapter 4. Partly it is because divorce itself (if not the associated financial arrangements and arrangements for children) is a legal process and so it makes sense to seek the assistance of a lawyer in getting divorced. Previous research has also shed light on the many good reasons why people choose to go to a lawyer. The research on the results of information meetings under the Family Law Act 1996 showed that people found the information provided about divorce helpful, but they wanted further information – particularly about financial issues – as well as more specific

legal advice tailored to their own situation, to protect their rights, and to have their divorce managed (Walker et al. 2004: 124). Eighty-five per cent of those who participated in the pilots employed a solicitor during their divorce proceedings, while only 10 per cent went to mediation, and 90 per cent of those also consulted a solicitor (Walker et al. 2004: 123, 131–2). Davis et al. concluded that solicitors' partisanship was highly valued by those facing the particular stresses of relationship separation (2000: 137). In Wright's study of family lawyers and their clients, solicitors equipped clients with legal knowledge which assisted them to engage in direct negotiations with the other party, and acted as a 'shield' for the other party's hostility and a 'fall back' if negotiations failed (2007: 487). Clients wanted 'someone on their side to help them get (what they saw as) their fair share regarding the finances and property' (Wright 2006: 110). Similarly, research by Ipsos MORI Social Research for the Ministry of Justice (MoJ) following the LASPO Act found that people preferred to consult solicitors in children's matters because they wanted to know their procedural options on separation and also wanted legal advice and knowledge of their legal rights. In relation to property and finances, people felt a strong need for professional legal advice and also needed procedural knowledge, and solicitors were considered the most dependable and accessible source of that information and advice. Moreover, solicitors were seen as being best able to deal with complex financial issues and to ensure fairness between the parties (Pereira et al. 2015: 43, 51–3).

*The downsides of solicitor negotiations*

Wright did observe that in their concern not to damage the relationship between the parties, lawyers could sometimes fail to protect their clients' longer-term interests (2007: 495). Likewise, some of those in Walker's study who were dissatisfied with their solicitors found them too conciliatory and insufficiently partisan (Walker et al. 2004: 127–8). There is a possibility, then, that contrary to the government's image of adversarial lawyers, family solicitors may in fact err on the side of insufficient adversarialism and fail to provide the benefits clients seek from engaging a solicitor. Other criticisms made of solicitor negotiations have included its costs and the amount of time taken (Walker et al. 2004: 125). Davis et al. (1994) observed that solicitors could conduct negotiations in a desultory fashion, allowing them to carry high caseloads with little activity on individual cases. This could result in a process of attrition, whereby the party who most wanted to change the status quo was forced to compromise regardless of fairness in order to bring negotiations to an end (Davis 1999). As discussed in Chapter 6, the time taken and costs of solicitor negotiations were also a theme of our party interviews.

## Mediation

Unlike the practice of law, the practice of mediation is not a regulated profession, and so the history and organisation of mediation in England and Wales has been much more ad hoc and fragmented. In 1974 the *Finer Report on One Parent Families* recommended the establishment of a unified system of family courts (not finally implemented until 2014, as mentioned in the previous chapter) with conciliation services attached to help parties deal with the consequences of their marriage breakdown without acrimony. While it became clear that these recommendations would not be immediately acted upon by government, small groups of professionals nevertheless decided to set up conciliation services to assist divorcing and separating couples (Parkinson 1986: 69–70). In doing so, they were animated by, among other things, growing evidence from mental health professionals about the damaging effects of post-separation conflict on children (Piper 1993: 10). The first service to be established was the Bristol Courts Family Conciliation Service in 1978 (subsequently Bristol Family Mediation), which despite its name was not connected to the courts but was an independent service. This was closely followed by the South East London Family Conciliation Bureau in 1979, and by the mid-1980s there were around 30 out-of-court conciliation services in England and Wales (Parkinson 1986: 69). These services were largely voluntary, with limited charitable funding and no financial security, although they were enthusiastically supported and encouraged by judges, family practitioners and the Probation Service, which at that time was responsible for family court welfare services. The *Finer Report* also acted as a catalyst for the establishment of in-court conciliation services, which were set up locally, on a range of different models, within a number of County Courts and Magistrates Courts (Parkinson 1986: 70). These in-court services thereafter developed along a different trajectory from out-of-court services (see e.g. Mantle 2001; Trinder et al. 2006; Trinder and Kellett 2007; Trinder 2008) and since our focus is on out-of-court mediation services, in-court conciliation will not be discussed further.

### Styles of mediation

According to Roberts, family mediation had to struggle to become recognised as a distinct activity separate from the practices of therapy and welfare and separate from the legal process (Roberts 2014: 54; see also Piper 1993: 18–19). Certainly the terms ‘conciliation’ and ‘mediation’ were used interchangeably until the late 1980s/early 1990s, when mediation became the dominant label. This term still covers a variety of models and styles of practice. For example, mediation may focus on enhancing communication

(getting the parties to talk to each other again) (Roberts 2014: 11), seeking settlement (assisting the parties to reach a mutually agreed outcome that is in the best interests of their children) or the empowerment of the parties ('transformative' mediation) (Parkinson 2014: 37). The early conciliation services typically used a model of co-mediation (that is, two mediators, usually from social work backgrounds) and dealt only with issues relating to post-separation arrangements for children. The report of the Conciliation Project Unit on *The Costs and Effectiveness of Conciliation in England and Wales* (1989), however, recommended that family mediation should not be restricted to child-care arrangements, and pilot projects were subsequently established in five mediation services to initiate 'all-issues' mediation, that is, mediation dealing with both children's and financial issues following separation (McCarthy and Walker 1996; Parkinson 2013). Following the introduction of public funding for mediation in 1998, a larger and more diverse mix of family mediation practices emerged, broadly divided between the private and not-for-profit sectors and lawyer and non-lawyer mediators.

The introduction of 'all-issues' mediation also saw the development of a model of cross-disciplinary co-mediation (Parkinson 2013). Having one mediator from a legal background and one from a social work/therapeutic background was seen to offer an ideal set of skills and knowledge for mediating both children and financial issues. During the 1990s, however, there was a gradual move away from co-mediation in favour of sole mediation, so that by the time of Hayes' survey of mediators in 2001, sole mediation was the dominant practice mode (Hayes 2002; see also Head et al. 2006: 29). Co-mediation continues to be seen as a useful strategy for high conflict couples whose interactions are highly antagonistic (Parkinson 2011c). The main drawback of co-mediation is that it is more expensive, both for private clients and for the legal aid fund. The current Legal Aid Agency (LAA) will pay a higher rate for co-mediation where it is justified, but as Parkinson notes, 'LAA auditors have become less accepting of co-mediation' (2013: 469).

The standard model of mediation involves both parties meeting together with the mediator(s), but in some situations, 'shuttle' mediation or 'caucusing' is considered appropriate. In shuttle mediation the parties are in separate rooms and the mediator meets with them separately and moves between them, sharing information and conveying suggestions and responses. This model may be used where parties are unwilling to be in the same room due to a history of violence or extreme animosity. The parties are kept physically apart, often with staggered arrival and departure times so they do not need to come into contact with each other. Caucusing, on the other hand, is where the mediator meets privately and confidentially

with each of the parties on a one-off or occasional basis during the mediation process, where it is considered strategically useful to do so. For example, the mediator may want to create a productive pause in the process if tensions are running high, or to intervene in a way that might cause one of the parties to 'lose face' if done in a joint session.

Finally, while all family mediation aims to be 'child-focused', in the sense of encouraging parents to agree on both the living and financial arrangements which will be best for their children, there is also the possibility of 'child inclusive' mediation, in which children are directly brought into the mediation process. This requires the consent of both parents and the mediator, and generally involves the child or children either meeting with the mediator (or one of the co-mediators) or with an independent children's consultant. The meeting is confidential, and the children and the mediator or consultant together agree on what information, if any, will be taken back to the adult mediation process (Parkinson 2006). Specialist training is available for mediators to engage in child-inclusive mediation. But for a variety of reasons, including both mediator and parental reluctance and cost, child-inclusive mediation had not, at the time of our research, been widely taken up in England and Wales (see Ewing et al. 2015).

### The mediation process

Despite potential variations, then, family mediation as it was practised at the time of our research was predominantly sole mediation, predominantly non-child-inclusive and predominantly settlement-seeking (see also Maclean and Eekelaar 2016: 108). A typical mediation process would involve separate MIAMs which functioned as intake and screening sessions to provide information about the mediation process, find out the issues in dispute and ensure that mediation would be suitable for the parties. Joint MIAMs/intake sessions could be held, but if so, the mediator was supposed to spend at least some time separately with each party to give them the opportunity to express any concerns they might have about participating with the other party (see further the discussion of entering FDR in Chapter 5). If both parties agreed to proceed, the remainder of the mediation would be conducted in one or more joint sessions. At the first joint session the parties would be reminded of the contents of the agreement to mediate provided at the MIAM, which set out the essentials of the process and basic ground rules, and they would be asked to sign the agreement. They would then be invited to set the agenda by stating the issues they wished to discuss. If there were several issues, the mediator might suggest a starting point. Thereafter, the mediator would assist the parties to identify their interests and their children's needs, develop and explore the feasibility of options for dealing with each issue and help them to find common

ground. In doing so, the mediator would attempt to facilitate communication between the parties and move them from conflict to cooperation, from a concern with individual rights and wrongs to mutual concerns and interests, and to maintain the focus on the future and what would be best for their children (Hayes 2002; Parkinson 2014: 164–5, 250). If agreement was reached, it would be encapsulated in a written Memorandum of Understanding (MOU). Mediation agreements are not legally binding. However, in the case of financial agreements, parties might be advised or encouraged to consult a lawyer to have the agreement drawn up into a consent order, which could be submitted to the court and, once approved, would become legally enforceable. Parties frequently also consulted a lawyer to obtain legal advice before mediation, although under the LASPO Act this option is no longer available to legally aided clients. Parties might also consult a lawyer between mediation sessions, but the extent to which this was encouraged varied between mediators and the nature of the dispute; in the case of legally aided clients, it was considerably constrained by the limited scope of legal aid available for 'help with mediation'.

### Qualifications, training, regulation and professional bodies

As indicated above, family mediators may come from a variety of disciplinary backgrounds. Their initial training may be in law, social work, psychology, counselling, teaching, business or indeed any other field, although these tend to be the main sources. Becoming a family mediator is then a matter of choosing to undertake mediation training and subsequently to obtain accreditation from a membership body and to practise as a mediator. There are a range of training providers, with somewhat different philosophies and approaches. This in turn leads into a discussion of the different mediation membership organisations, umbrella bodies and regulation.

The National Family Conciliation Council (NFCC) was established in 1983 as a network of the earliest voluntary/charitable conciliation services. It changed its name in 1992 to the National Association of Family Mediation and Conciliation Services, and subsequently to National Family Mediation (NFM). NFM remains the membership organisation of not-for-profit family mediation services. It developed a national family mediation training programme in 1989, and from 1991, introduced selection criteria for mediation training, based on values and aptitude for mediation, including personal qualities such as empathy and self-awareness, interpersonal skills, integrity and ethical standards (Parkinson 2013: 471; Roberts 2014: 54; Webley 2010a; 194–5). The Family Mediators Association (FMA) was founded in 1988 as a consequence of the development of all-issues mediation, and provides cross-disciplinary co-mediation training for mediators

from legal and social science backgrounds. It is an organisation of individual practitioners working in the private sector, rather than an organisation of services (Parkinson 2013; Roberts 2014: 54). Other training providers subsequently entered the field, including the Solicitor's Family Law Association (now Resolution), which introduced mediation training in 1996 and now runs its own foundation and post-qualification training programmes for lawyer-mediators, and the ADR Group, a commercial organisation which has been involved in general ADR training for over 25 years and which entered the family mediation training field in 2000 (McEldowney 2012: 24; Pirrie 2006).

According to Webley, mediation foundation training is values- and skills-based rather than knowledge-based (2010b: 124). Skills required by mediators include communication skills, skills to manage the mediation process, to address power imbalances, to manage conflict and to facilitate settlement (Parkinson 2013: 468). Mediators' ethical responsibilities include protecting the rights of parties to determine their own agreement, ensuring participation is fair and outcomes are mutually agreed, assisting parties to protect the interests of their children, understanding and not abusing the nature of their own power and authority and ensuring their own interests and values do not intrude into the process (Roberts 2014: 173–5). Other commentators also stress the need for interdisciplinary knowledge, including couple and family dynamics, family systems theory, child development and attachment theory (Parkinson 2013: 468).

Webley (2010a, b) notes, however, that training tends not to cover family law in any detail, creating a divide between mediators who are also or have been practising family lawyers and those from a non-legal background. While mediators do not give legal advice they may provide legal information, and Robinson (2012) argues that family mediators need the same depth of family law knowledge as other family justice practitioners in order to set parameters for exploring options. Indeed, concerns have been expressed about non-lawyer mediators brokering unworkable financial agreements, especially where third parties such as mortgage providers are involved (Maclean and Eekelaar 2016: 49–50). According to Webley, however, lawyer-mediators are trained to assist parties to reach consensus based on sufficient knowledge for informed agreement, while those trained under the auspices of the former UK College of Family Mediators (UKCFM, see below) were trained to facilitate consensual solutions in a relatively value-neutral system in which legal norms had no particular prominence (2010a: 95). Irvine (2009) has termed these respectively the 'norm-educating' versus 'norm-generating' models of mediation. In the former, legal norms 'provide a backstop to ensure fairness', although the choice to apply the norms remains with the parties. In the latter, the parties are responsible

for generating the norms by which choices are evaluated, although Irvine suggests this model is only appropriate where legal norms do not apply or are unclear.

Technically, there is no requirement to undertake any training or accreditation for someone to hold themselves out at as a mediator, since mediation is not subject to statutory regulation. In practice, it appears that the majority of family mediators belong to one or more of six membership organisations, comply with the organisation's requirements for membership and/or accreditation and are subject to the organisation's complaints procedure, although family mediation also takes place outside these organisations, for example by barristers and by mediators employed by Relate (Maclean and Eekelaar 2016: 74). At the time of our research there was no standardised national system of training, accreditation, certification, registration, quality control or complaints covering family mediators as there was for family solicitors (McEldowney 2012: 12). The six membership organisations are NFM, FMA, Resolution, the ADR Group, the Law Society and the College of Mediators. As noted above, NFM covers mediators in the not-for-profit sector, who also tend to come from non-legal backgrounds. The other organisations cover private sector mediators. Members of FMA and the College of Mediators come from mixed backgrounds, while most Resolution and all Law Society mediators come from legal backgrounds. While NFM, FMA, Resolution and Law Society members practise exclusively in family mediation, the ADR Group and the College of Mediators include members practising mediation in other areas (such as commercial or employment mediation) (Stevenson 2011: 1153). The Law Society does not have its own foundational training programme, but runs a specialist accreditation scheme in family mediation, which is open to family solicitors who meet the accreditation requirements. Likewise, the College of Mediators does not deliver training, but opens its membership to any mediator who meets its standards. All of the organisations broadly require their members to undertake a period of supervised practise and co-working with an experienced mediator following initial training and before working alone; to adhere to a Code of Practice; to receive regular support, professional guidance and mentoring from a senior mediator (known as a Professional Practice Consultant (PPC)); and to undertake CPD on an annual basis, although the details vary considerably between organisations (McEldowney 2012). In particular, variations in the length of required co-working and supervision led to concerns that where this was minimal, skills were not sufficiently embedded and there was insufficient opportunity for the necessary 'role transition' to mediator to occur (e.g. Stevenson 2011).

Attempts to set national standards and quality control mechanisms for family mediation have had a rocky history. NFM introduced standard

affiliation criteria for its services, a code of practice for mediators and national procedures for selection, training, supervision and accreditation of mediators in the 1990s (Roberts 2014: 279), but these applied only to its own affiliates. In 1996, NFM, the FMA and Family Mediation Scotland established the UKCFM as a regulatory umbrella body, with a remit to set and monitor common standards of training and practice for its members (Roberts 2014: 7). However, the Law Society did not sign up to the UKCFM and continued to regulate its own members and determine its own professional standards and accreditation procedure (Roberts 2014: 114). The UKCFM structure also proved unstable, and it ultimately ceased to act as an umbrella body and became another membership organisation, renamed the College of Mediators.

In fact, it was the advent of publicly funded mediation in 1996 which had the greatest influence on regulatory standards for mediation during the period covered by our study. The Legal Aid Board and subsequently Legal Services Commission developed stringent quality requirements both for mediation services wishing to obtain a legal aid contract – the Quality Mark Standards for Mediation – and for individual mediators working in those services in the provision of publicly funded mediation – the Professional Competence Scheme. The result was that while publicly funded mediation was subject to rigorous external quality standards, no such standards applied to privately funded mediation (Parkinson 2013: 471; Roberts 2005). Subsequently, both NFM and the UKCFM adopted the Legal Services Commission (LRC) standards and competence assessment processes for all of their members, regardless of whether their work was publicly funded (Roberts 2014: 281), but again these standards were not adopted by the other mediation organisations.

A new umbrella body, the Family Mediation Council (FMC), was established in 2007, made up of and funded by the six mediation membership organisations. Although it promulgated a common Code of Practice in 2010, it faced difficulties moving beyond that, since its member organisations were concerned to represent their own members' (differing) interests, and it also lacked resources, with all Council members, including the Convenor, acting on an unpaid basis (McEldowney 2012: 10, 41; Stevenson 2011). Thus, it was not initially able to bridge the gap between the minimum standards required for legally aided and privately funded mediation. In 2011–12 a review of the FMC firmly asserted that privately funded mediation should adopt similar standards to publicly funded mediation, and made a number of recommendations for achieving common standards, competencies, registration and certification systems (McEldowney 2012). The report also noted the Family Justice Review's suggestion of the potential need for an independent regulatory body to replace the FMC

(McEldowney 2012: 10) although it did not endorse this suggestion, noting the then government's [neoliberal] lack of appetite for new regulatory impositions and its more general concern to reduce regulatory red tape (McEldowney 2012: 52–3). Nevertheless, it made recommendations for strengthening the FMC's capacity to act independently.

With the assistance of funding from the Ministry of Justice, the FMC has now developed and approved a new common framework for professional standards and regulation which was implemented from 2015.[4] Under this framework, all individual members of the six organisations making up the FMC must be registered with the FMC in order to practise as a family mediator. Registration is open to those who have attained the status of FMC Accredited Family Mediator (FMCA) or who have undertaken an initial training course and are working towards accreditation (which must be achieved within three years of the completion of training). All training courses require approval by the FMC. Following initial training, accreditation requires a period of supervised practice followed by the submission and successful assessment of a portfolio of work. Accreditation meets the Legal Aid Agency's requirements for professional competence to undertake publicly funded mediation. Re-accreditation is required every three years, and requires specified consultation with a PPC and ongoing professional development. A Family Mediation Standards Board has been established to administer the new system. Thus, the call to lift mediation standards uniformly to meet the 'gold standard' required for legal aid practice appears to have been met, although it is notable that there is still a diffusion of regulatory responsibility, as accreditation may be provided by either the FMC or the Law Society. Complaints and discipline also remain in the province of the member organisations, although common responsibilities in this regard are spelt out within the standards framework. Finally, as is the case with solicitors, mediators are no longer required to undertake a specified number of hours of CPD each year, but rather must keep a record of ongoing professional development, demonstrating adequate steps to keep up to date.

Moreover, there is no specialist accreditation scheme in place for mediation as there is for solicitors, beyond the ability, noted above, to be trained in 'child inclusive' mediation. Given the policy expectation that mediation will deal with an increasingly wide range of parties and cases, beyond its original aspirations, as discussed in subsequent chapters, it is arguable that there is a need for mediators to develop greater skills and specialisations, supported by the introduction of further specialist training and accreditation, in areas such as domestic abuse, complex financial disputes, mental health and hybrid processes (Barlow et al. 2014: 26, 32).

4 See http://www.familymediationcouncil.org.uk/mediator-area/standards-assessment/.

## Family mediation in practice

One consequence of the lack of centralised regulation or a strong umbrella body for mediation has been that it has proved difficult to gain an accurate picture of mediation activity across the sector, particularly the respective proportions of legally trained and non-lawyer mediators, and of publicly versus privately funded mediation. It appears that around three-quarters of the approximately 1500 mediators now registered with the FMC are lawyer-mediators (Maclean and Eekelaar 2016: 72), a major turnaround from the foundations of family mediation by professionals from non-law disciplines. While the legal aid authorities record statistics for publicly funded mediation, there is no equivalent compilation of statistics for privately funded mediation, and efforts to determine the volume of privately funded mediation cases have encountered considerable difficulties (see Hamlyn et al. 2015; Head et al. 2006). A survey conducted in 2006 estimated that privately funded cases made up around 20 per cent of all of family mediation cases (Head et al. 2006: 5). This was before the introduction of MIAMs under the Pre-Application Protocol in 2011 which may have increased the proportion of privately funded cases. A more recent estimate suggests around one quarter of mediations are privately funded (Maclean and Eekelaar 2016: 72–3). These figures indicate the extent to which the sector had become reliant on public funding, an important point in understanding the impact of the LASPO Act as discussed in Chapter 4. The studies also suggest that privately funded cases are more likely to concern finances or all issues, while publicly funded cases are more likely to involve only issues relating to children (Hamlyn et al. 2015: 16–17; Head et al. 2006: 32).

## Research on family mediation

Research on family mediation in England and Wales began almost simultaneously with the advent of conciliation services, although it had petered out by the early 2000s, making ours the first major study of family mediation in a decade. Research has very broadly focused on one or both of two questions: What are clients' experiences of mediation (including short- and longer-term outcomes)? And what do mediators do? (See e.g. Kelly 1996.) In England and Wales there has also been some attention to the effects of diverse mediation practices and to the role of lawyers in mediation.

### *The enduring unpopularity of mediation*

In relation to client experiences, the first and most strikingly consistent observation is that, in contrast to great professional and policy enthusiasm for family mediation, the demand for mediation by people with family disputes has remained persistently low. As early as 1986, Parkinson complained that conciliation was 'underused' (1986: 81). The evaluation

of mediation under the 1996 Family Law Act pilot programmes had to be scaled back from the intended 33 mediation providers to 17 due to lack of clients, and it was only the introduction of s. 29 of the Family Law Act 1996 in September 1998, mandating legal aid clients to attend a meeting with a mediator, that generated a sufficient number of cases to evaluate (Davis 1999; Dingwall 2010: 108–9). Even so, while s. 29 resulted in a substantial increase in mediation intake sessions, it generated only a modest increase in mediation starts (Davis 1999), with only one in 3–4 intake interviews leading to mediation (Dingwall 2010: 108–9). Davis et al. concluded that:

> Recent government support for family mediation reflects professional enthusiasm, with little regard to the very low client base. This has come about because the 'story' of mediation – its association with reasonableness and compromise – is appealing, and secondly because government has accepted the mediators' argument that spiralling legal costs can be cut through diverting cases to mediation. (2000: 273)

At around the same time, Hazel Genn's national research on the incidence of and responses to justiciable problems found that only 5 per cent of those who had experienced problems with relationships or family matters and 8 per cent of those who had problems with child-care arrangements in 1992–97 went to mediation or conciliation (1999: 48, 50). She concluded generally that 'current ADR activity in the context of civil and family disputes appears to be negligible' (Genn 1999: 261). Media campaigns launched by the government in the wake of the pilot projects to boost the public understanding of mediation had little or no impact on take-up rates (Walker et al. 2004: 145). While it appeared that privately funded clients were more likely to 'convert' from an intake session to mediation (Head et al. 2006: 5, 25; see also Hamlyn et al. 2015: 23), they still made up a minority of mediation participants. A decade later, Mavis Maclean noted that the take-up of mediation services was still limited and commented on the apparent lack of attraction of mediation, as compared to solicitors, to those with family problems: 'At a time of stress, men and women seek information, advice and support from someone who is committed to helping them, in preference to an impartial facilitator whose primary task is to promote an agreement rather than meet the needs of the individual client' (2010: 105). Similar findings have been made in other jurisdictions (e.g. O'Callaghan 2010).

In this context, it appears that solicitors have been instrumental in referring clients to mediation. Although Genn found that only 9 per cent of first advisers recommended that family clients go to mediation or conciliation, and concluded that mediation had at that stage had a 'limited impact… on the approach of advisers to dealing with the problems that flow from

divorce and separation' (1999: 117–18), from the perspective of clients and mediation providers, solicitors played a key role. In their follow-up study from the 1996 pilots, Walker et al. found that 38 per cent of those who went to mediation did so because their solicitor suggested it, and they concluded that solicitor recommendations were more effective in encouraging clients to use mediation than merely providing information about mediation (2004: 132). In the pilots themselves, 70 per cent of mediation cases had been referred by solicitors, and in Hayes's survey of mediators in 2001, nearly two-thirds identified solicitors as their main source of referrals (Walker et al. 2004: 133). It is not surprising, then, that Parkinson argued in 2011 that the government's plans to remove public funding in many family law cases might have the opposite effect to that intended, since reduced access to family solicitors might lead to fewer referrals to mediation (2011a: 72). The prescience of this concern is discussed in Chapter 4.

*The benefits and downsides of mediation*

For those clients who did enter mediation, the results were generally positive in their own terms and compared to litigation, although less clearly superior compared to solicitor negotiations. McCarthy and Walker in 1996 found that reaching agreement was the most important predictor of long-term benefits of mediation. Those who reached agreement had better post-divorce relationships and communication than those who did not reach agreement (1996: 4). The direction of causation here might be questioned, however. Was it reaching agreement that caused the better relationships and communication, or was it the pre-existing fact of better relationships and communication which caused these parties to reach agreement in the first place?

While no UK studies have directly compared mediation with litigation due to the difficulties of comparing like with like (Davis et al. 2000: 98), two US studies have done so. In Pearson and Thoennes' (1984) study, court clients in Colorado were randomly offered mediation or not, although they still had a choice whether to enter mediation. Nevertheless, both groups included couples with very high levels of conflict. As with McCarthy and Walker's study, the major contrast emerged between those who successfully reached agreement in mediation (80 per cent of those who attempted it) and those who did not (whether they were unsuccessful in or never tried mediation). Those who did reach agreement proceeded through the system more quickly, were more satisfied with the process and outcomes, experienced greater compliance with the agreement and fewer serious disagreements with their ex-spouse about the terms of settlement, were more likely to feel they could resolve subsequent problems themselves without returning to court and had better relationships with their ex-spouses. These

beneficial effects proved to be durable over time. Mediated agreements were also qualitatively different from non-mediated agreements or court orders, involving more frequent visitation and more agreements for joint legal custody, although again, these outcomes may have resulted from those who agreed to mediation being more predisposed to the idea of shared custody and cooperative parenting. In terms of timing, the group who were unsuccessful in mediation took the longest to finalise their cases, with the purely adversarial group in the middle.

In the study by Emery et al. (2001), families who had commenced court proceedings in relation to children's issues in Virginia were randomly invited to participate either in mediation or in an evaluation of the court's services. Only those who agreed to one or the other were included, a total of 71 families (35 mediation, 36 litigation), with no meaningful differences between the two groups. Emery et al.'s results do not distinguish between those who did (80 per cent) or did not reach agreement in mediation. Those who opted for mediation resolved their cases in half the time of the adversarial group (see also Emery et al. 2005). Immediately following mediation and in an 18-months follow-up, no differences were found in the quality of family relationships or psychological well-being among parents in each group, and in the 18-months follow-up there were no differences found in children's adjustment, although the mediation group was less likely to engage in re-litigation within two years of initial proceedings. As with Pearson and Thoennes' study, mediation agreements were more likely to provide for joint legal custody between the parties. This may account for the fact that at a 12-year follow-up, non-resident parents in the mediation group were more likely to be involved in their children's lives, had more contact with their children and a greater influence in co-parenting than did those in the adversarial group. Mediation parents also appeared to have demonstrated greater cooperation and flexibility over time. Interestingly, the study also found significant gender differences in satisfaction with dispute resolution. Both immediately after proceedings and in the longer term, fathers who mediated were more satisfied with dispute resolution than those who did not, while there was no difference between mothers' levels of satisfaction in the mediation and adversarial groups. This was primarily due to the fact that mothers were highly satisfied with litigation on a variety of measures (see also Emery et al. 2005). Emery et al. concluded that mediation was not bad for women, but rather fathers were disadvantaged in litigation (or conversely, legal rules tended to favour mothers, who consequently gave up more in mediation).

While US research has compared mediation and litigation, the UK research surrounding the 1996 Family Law Act pilot programmes compared mediation (mainly by not-for-profit providers and mainly children issues

only: Davis 1999) with consulting a solicitor. The initial evaluation found that parties were generally positive about the experience of mediation, but the full settlement rate was below 40 per cent, and as a result, mediation tended to increase costs as it became simply an additional step in the legal process (Davis et al. 2000: vii, 273). People who negotiated a settlement via a solicitor had greater confidence in the agreements reached and their future flexibility (Davis 1999; Davis et al. 2000: xi; Dingwall 2010: 109). The research concluded that 'mediation is probably better viewed as a potentially valuable supplement to (and part replacement of) lawyer negotiation, not as a complete alternative' (Davis 1999: 634). In the follow-up study undertaken by Walker et al., only 47 per cent of mediation clients were satisfied with the mediation process, compared to 69 per cent who were satisfied with the service provided by their solicitors (2004: 130, 137). Those who did not reach agreement in mediation or who were left with outstanding issues unresolved were especially likely to be dissatisfied. Concerns included agreements being unenforceable, feeling pressured to make agreements and the mediator being unable to provide legal advice. Neither were mediation clients positive about achieving wider benefits from mediation, with only one quarter or fewer feeling that mediation had helped to make their divorce less distressing, to reduce conflict, to improve communication or to share decision-making. The perception of having obtained wider benefits was correlated with having reached agreement, although not all those who reached agreement felt they had achieved such benefits (Walker et al. 2004: 137–41). The researchers again concluded that only a minority of divorcing or separating couples were likely to use mediation, and even those who did would continue to depend on legal services as well (Walker et al. 2004: 145).

Davis et al.'s attempt during the evaluation of the post-1996 pilot programmes to compare mediation by not-for-profit and private sector providers was stymied by the fact that the pilots involved too few private sector providers to enable meaningful comparison (Davis 1999). However, Walker and McCarthy earlier compared children-only and all-issues mediation, and found both greater levels of satisfaction with and greater long-term benefits from all-issues mediation. Those who engaged in all-issues mediation were more likely to reach agreement, more likely to be glad they had used mediation, and experienced better outcomes in terms of reduced conflict and bitterness, maintaining a good relationship with their ex-spouse, contentment with child-care arrangements and lower likelihood of seeking help outside the family for child-related problems (McCarthy and Walker 1996). Subsequently, Sherrill Hayes conducted a survey of UKCFM members, with one third of the respondents being mediators with legal training working in private practice. According to the self-reports of these mediators, there

was no pattern of difference in either settlement rates or mediation practices by reference to sole or co-mediation, or the mediator's professional background, training body, practice location, level of experience, proportion of their practice devoted to mediation or average length of mediations (Hayes 2002). Parkinson (2011c), however, cites research which suggests that more experienced mediators and those who are proactive rather than passive facilitators have higher settlement rates (see also Butlin 2000).

*The practices of family mediators*

UK research on the behaviour of family mediators has focused on the question of mediator impartiality in the mediation process and neutrality as to the outcome agreed by the parties. It has raised the questions of whether impartiality and neutrality are possible or whether mediator norms and preferences inevitably (unconsciously or consciously) intrude, and if so, what are those norms and preferences. As Dingwall and Greatbatch note, there is an unresolved tension within mediation between a commitment to party self-determination and commitment to an overriding ethical code (Greatbatch and Dingwall 1989: 615). For example Roberts states in her text on mediation that 'If it turns out that an outcome is being consented to that is patently unjust, the mediator must say so and recommend the party in the more vulnerable position not to agree without taking legal advice or further consideration' (Roberts 2014: 197). However, no guidance is given as to when an agreement will be considered 'patently unjust', or what level of injustice might be tolerated short of that point. As Emery puts it, 'mediators must overlook *any* power imbalances, ignore *any* accusation, and accept *any* agreement – or admit to limitations on their neutrality' (2012: 140). In his view, 'since complete neutrality is not possible, mediators instead should strive to recognize and admit to their biases, including to their clients' (Emery 2012: 141; see also Irvine 2009). Mulcahy (2001) goes further and argues that while claims to neutrality may serve to bolster professional status, the attainment of neutrality is neither achievable nor, from the perspective of the disadvantaged, desirable, suggesting instead that mediators adopt an ethic of 'responsible partiality' (Mulcahy 2001: 516).

Dingwall and Greatbatch recorded over 100 divorce mediation sessions at not-for-profit and probation-based services across England during the period 1983–93. The great majority of the sessions involved co-mediation, all mediators were from social science rather than legal backgrounds and all cases dealt only with post-divorce arrangements for children. Notably, the great majority of the sessions occurred before any national mediation training was introduced. Dingwall and Greatbatch analysed the recordings using conversation analysis. Rather than acting as 'purely neutral facilitators of party-driven agreements', they identified mediators engaging in

what they called 'selective facilitation', in which clients were steered in particular directions chosen by the mediator. This was done by differentially creating opportunities to talk through different options, with some options given plenty of space while others were marginalised or ignored. In this way, mediators could encourage and discourage particular outcomes (those they considered morally un/acceptable) while continuing to present themselves as neutral (Dingwall and Greatbatch 1991; Greatbatch and Dingwall 1989; see also Maclean and Eekelaar 2016: 106–7). In this context, Dingwall and Greatbatch noted that co-mediation involved a greater risk of pressure on parties from the concerted action of two mediators to arrive at their preferred outcome (1991).

Christine Piper's research took up the same theme. She observed 24 divorce mediation cases (a total of 50 sessions) in one probation-based service around 1990, and also interviewed the mediators and clients involved. Again, all of the sessions involved co-mediation, all the mediators were from social work, probation or court welfare backgrounds and all of the cases concerned children rather than finances. Again, she observed multiple mediator interventions to constrain the process (e.g. side-lining past grievances, disputed situations and parental relationship difficulties), to transform the dispute (reframing the problem to produce an 'accepted' version to be discussed) and to suggest solutions (Piper 1993: 189–90), although this mediator control was characterised as 'gentle' and 'subtle' (Piper 1993: 131, 173). Beyond observing these processes, she also identified the normative content of mediator interventions as being to promote the concept of the responsible parent, that is, a parent who is willing and able to 'uphold harmonious co-parenting after separation', 'able to understand the child's needs' (especially their need for agreeing parents), 'able to agree and communicate with the other parent', able to 'resolve conflict without recourse to the courts' and who 'wishes to share the children with the other parent', 'wishes to restrict individual responsibility and principles for the sake of this post-separation parenting and who believes that people may act very differently in their parental and spousal roles' (Piper 1993: 188–9). This normative framework was drawn from mediators' interdisciplinary knowledge about 'good' parenting (Piper 1993: 191), and Piper noted that mediation therefore functioned as an important 'site for the transmission of norms about parenting' (1993: 197).

According to Piper, the 'agreements' she observed were 'often a mediator-articulated compromise' – a mix of client wishes or a third option not thought of by either parent (1993: 190). In particular, there was an insistence by mediators on joint parental responsibility, and hence attempts to constitute as equal (responsibility for problems and for future caretaking) what parents often perceived as unequal. Consequently, some parents expressed feelings

of injustice in follow-up interviews, although these had not been articulated in the mediation itself (Piper 1993: 191–2). Piper especially observed examples of real disadvantage to caretaking mothers in having their caretaking devalued and legitimate concerns about the father's parenting dismissed in the interests of manufacturing parental equality (1993: 193). She also noted that mothers might be seen as more amenable to change and compromise than fathers because of their greater feeling of responsibility towards their children, and if they absorbed this message (although some resisted it), they could again be disadvantaged (Piper 1993: 194). This chimes with Grillo's (1991) concern that mediation would be disadvantageous to women because their greater relationality would make them more likely to give ground and surrender their rights in the interests of their children and/or of remaining on good terms with their ex-spouse. Piper cautioned against essentialist claims that mediation was necessarily bad for *all* women, but she did highlight the possibility that *some* women could be disadvantaged (1993: 199). Dingwall and Greatbatch likewise concluded that mediation did not generically advantage or disadvantage either sex, finding that it tended to inhibit rather than magnify gendered differences in communication. They observed that appearances of gender differences tended to reflect men's and women's different structural positions – the holder of the status quo (the primary carer) versus the one wanting change (the non-resident parent) – and that when the typical gender of these positions was reversed, conduct followed structure rather than gender (Dingwall et al. 1998). It remains the case, however, that these structural positions *are* gendered rather than randomly distributed, so, for example, if greater pressure is consistently brought to bear on the primary carer, then that is likely to have gendered effects.

*The 'shadow of the law' (and of child welfare norms) in mediation*

Piper's research suggested that mediation was 'not value free' but operated 'centrally in the shadow of social welfare ideology' (Neale and Smart 1997: 383). This formulation refers to Mnookin and Kornhauser's famous article 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979), in which they argued that out-of-court solicitor negotiations in divorce cases inevitably occur within 'the shadow of the law', with legal entitlements functioning as bargaining chips for the relevant parties. In a system which provides a legal framework for discretionary decision-making, it might more accurately be said that the legal principles set the parameters of possibility for negotiated outcomes. This has raised the question of the extent to which 'the shadow of the law' falls on mediation, particularly in England and Wales with the split between legally trained and non-legally-trained mediators. Surprisingly, however, there has been little empirical research attempting to answer this question.

In a recent observational study, Maclean and Eekelaar found both lawyer- and non-lawyer mediators in essence giving legal advice, and concluded that the distinction between information and advice was designed to maintain professional boundaries but was unsustainable – and unsustained – in practice (2016: Chapters 5 and 6, 124). In Australia, Becky Batagol and Thea Brown (2011) undertook a small-scale study of the shadow of the law in family mediation which produced a complex picture. They found that rather than their legal position conferring power on mediating parties, 'the power of the law was often eclipsed by other forms of power in mediation' (Batagol and Brown 2011: 258). One issue was the uncertainty of the law, in a context in which parties had no access to specialist legal advice and mediators were unable to fill the gap, or in which the parties had received conflicting legal advice (Batagol and Brown 2011: 200–11, 257–8). More generally, a party's legal position was often mitigated by moral issues of blame and fault (Batagol and Brown 2011: 212–16, 257), and in any event, was only as good as their willingness to go to court to enforce it. If they were averse to doing so, for whatever reason, the other party could exploit the situation to bargain them down (Batagol and Brown 2011: 183–200, 257). And aversion to litigation was a gendered phenomenon, leading Batagol and Brown to conclude that the shadow of the law is weaker for women than for men (2011: 196–9, 267). Overall, they found that law played a fairly minimal role in mediation, and did not operate in a simple, top-down manner but was actively constructed or marginalised in the mediation process (Batagol and Brown 2011: 259, 264, 270). The (gendered) power relationship between the parties, rather than law, was the central factor driving the process and determining outcomes (Batagol and Brown 2011: 184–92, 265). Our findings regarding mediator neutrality and the operation of the 'shadow of the law' in mediation are discussed in Chapters 6 and 8.

*Screening for and handling cases of domestic violence*

Batagol and Brown observed mediators employing a variety of strategies to address power imbalances between the parties, not always successfully (2011: 258). Indeed, the axioms of mediator impartiality and party self-determination dictate that mediation is not suitable where the power imbalance between the parties is so great that it would simply reproduce the will of one party rather than facilitate mutual agreement (Roberts 2014: 174). This question of when mediation will be unsuitable, and the screening processes employed to determine un/suitability, have also become contested, particularly in relation to relationships where there has been a history of domestic abuse. A person who has been or continues to be in fear of, intimidated or controlled by the other party, whether physically,

emotionally, financially or in any other way, is not in a position to assert their own or their children's interests in negotiations with that party, and 'agreements' reached may be unsafe for both the abused party and the children. But family mediation has been criticised for being insufficiently sensitive to issues of violence. For example, Dingwall and Greatbatch found that 15 per cent of the cases in their data set included reports of physical assault, but mediators treated this as a side issue and tried to minimise its impact on mediation, saying it was beyond the scope of the mediation or changing the topic (Greatbatch and Dingwall 1999).

A 1995–96 survey of voluntary sector mediators and follow-up interviews by Hester et al. (1997) found that very few mediators attempted to identify the presence of domestic violence, and did so in inconsistent and ad hoc ways. There was also a general reluctance to take a more active role in identifying the presence of domestic violence, with some respondents not wishing to raise the issue in order to avoid clients being embarrassed or alienated, and some arguing that any prior knowledge about clients would compromise their impartiality. There was a tendency to define domestic violence narrowly to exclude what might be considered 'common behaviours', despite their potential effects, and a failure to link the safety of mothers to the safety of children. The majority of respondents assumed that mediation could always be attempted in situations of domestic violence, and that priority should be given to the 'principle' that children should have ongoing contact with both parents. Despite the existence of NFM's recent national policy on domestic violence, which included recommended practices for screening by means of separate meetings with each party to identify domestic violence, only 8 per cent of respondents had adopted this practice systematically. The researchers argued that there was an urgent need to develop systematic screening processes for all cases, which should take full account of the impact of the violence or abuse on the victim; that safety considerations also needed to be monitored during mediation and in the context of the final decision; and that there may be a need for specialist training to develop awareness of issues surrounding domestic violence and how it might affect the mediation process.

Nevertheless, in Davis et al.'s slightly later study of publicly funded mediation, the researchers found that 57 per cent of cases in which a fear of violence was raised by one of the parties were deemed suitable for mediation, with assessments of suitability generally based only on whether both parties were willing to mediate, and solicitors less rigorous than NFM mediators in their approach to screening (2000: vi, 216–17). Disclosures of violence tended to be met by suggestions of separate waiting rooms, staggered arrival and departure times and possibly shuttle mediation, with potential clients having to make 'strong claims' about their level of fear of the

other party in order for the case to be considered unsuitable (Davis et al. 2000: 217). Moreover, once mediation commenced, allegations of violence tended to be marginalised (Davis et al. 2000: ix).

Parkinson maintained in 2011 that all members of the six family mediation organisations should have received specialist training in screening for domestic violence and abuse and child protection issues (2011b: 90). There remain potential weaknesses in the screening process, however. First, in line with respect for party self-determination, Roberts notes NFM's policy that screening should focus on the individual client's *perception* of violence rather than the mediator making a priori judgements about levels of severity or types of violence (Roberts 2014: 274–5). Yet this could have profoundly adverse consequences for victims for whom abuse is so normalised that they do not perceive it as such, or apprehend its severity (see Piper and Kaganas 1997: 272). When police, domestic violence services, social workers and Cafcass officers make risk assessments in domestic violence cases, they use objective, not subjective, indicators of risk. Moreover, as demonstrated by Dingwall and Greatbatch's research, the mediation context with its norms of cooperative behaviour is one in which people tend to minimise the issue of violence. They observed clients using indirect and tentative constructions to constitute violence as an interactionally sensitive issue, but instead of challenging this, mediators downplayed the issue further, so that the marginalisation of violence became a collaborative effort (Greatbatch and Dingwall 1999). A screening process which likewise unquestioningly accepts client minimisation of violence would not be effective in keeping unsuitable cases out of mediation. Secondly, Paulette Morris's research on MIAMs (2013) has demonstrated the time pressure under which they are conducted, with a long checklist of items to be addressed within a one-hour, 20-minute single or two-hour joint appointment. As a result, in the MIAMs she recorded, screening for domestic violence took on average less than three minutes. And while the screening questions asked met the NFM guidelines, according to Morris they 'reflect[ed] a simplistic exploration of abuse in a relationship and [left] the question of effective screening unanswered' (2013: 453). Similarly, questions concerning the client's ability to negotiate did 'not take into consideration the broader dynamics of the relationship, including any power and control' (Morris 2013: 454). Further, in joint MIAMs, while the assessment/screening component was conducted separately, the fact that there was less time to devote to these individual discussions, and the fact that the meeting began and ended with the parties together 'reduce[d] the opportunity for a spouse to disclose abuse' (Morris 2013: 455; see also Davis et al. 2000: 217). Morris concluded that 'the limited scope of questioning observed suggests that the client's perception [of abuse] is not adequately interrogated during the MIAM and that

more work needs to be done to make the screening process more robust and fit for purpose' (2013: 456). Further discussion of the limitations of screening processes and the experiences of screening in our study can be found in Chapter 5.

*The role of solicitors in mediation*

Finally, research has addressed the role of solicitors in mediation (other than as a key source of referrals noted above). Unlike lawyer-led family dispute resolution processes, mediation is not necessarily a stand-alone process. If parties wish to make their MOU legally binding, they must engage a solicitor to turn it into an application for consent orders to be submitted to the court. In addition, parties may choose, or be advised, to seek legal advice before, during and at the conclusion of mediation. In Davis et al.'s study, 72 per cent of those attending mediation had received preliminary advice from a solicitor which was 'generally felt to be helpful' (2000: 57). Walker et al.'s research on all-issues mediation found that mediators strongly encouraged parties to seek legal advice before and/or after mediation, and the majority of mediating couples both received legal advice and checked with independent lawyers whether the settlements reached in mediation were 'sensible'. Mediation clients sought reassurance and protection from lawyers to ensure they were not selling themselves short and that agreements would be acceptable to the court (Walker 1996). For some clients, lawyers provided comfort and security, 'a safety check on private ordering' (Walker 1996: 72). In their 'shadow of the law' research, Batagol and Brown found lawyers to be the 'most effective mechanism' for making the law relevant to mediated agreements (2011: 260). In post-mediation consultations lawyers tried to offer their clients the protection of the law while balancing this against the client's wishes. Unfair or unjust agreements might be modified, but this was always a matter of negotiation between the lawyer and the client (Batagol and Brown 2011: 241–2, 245, 260). Along similar lines, Parkinson maintains that 'legal advisors provide a system of checks and balances' and that clients are encouraged to seek advice between mediation sessions and at the conclusion of mediation, although she adds that 'legal advice is not invariably needed on minor details of contact arrangements' (2011b: 92). In their recent research, Maclean and Eekelaar also observed an expectation on the part of mediators that clients were getting legal advice alongside mediation (2016: 108). Following the LASPO Act, however, in Parkinson's words, Legal Help to accompany mediation has been 'pared to the bone' (2013: 467). As noted in the previous chapter, those reliant on legal aid are still eligible for a small amount of funding to pay for a lawyer to draw up consent orders but comprehensive review and potential fine-tuning of the agreement are not covered. There is

also no provision for legal advice before mediation and very little during, which may raise problems of uncertainty of the kind identified by Batagol and Brown. This is consistent, however, with the general delegalisation of family justice within neoliberalism.

In summary, research on family mediation in England and Wales has been relatively sparse, particularly in recent years. Most research has focused on children-only mediation in the not-for-profit sector by mediators from social work backgrounds. There has been very little research on privately funded mediation or legally trained mediators. The research on client experiences suggests that the claimed benefits of mediation are not always achieved and are highly correlated with reaching agreement. It also suggests gender differences in the experiences of mediation. The research on mediator behaviour suggests that mediators do steer clients in accordance with child welfare norms, though the influence of legal norms in mediation in England and Wales is unknown. Ours is the first study to examine mediation in England and Wales since the early 2000s, and the first to address some of these questions at all.

## Collaborative law

Collaborative law was developed in the United States in 1990 and from there has been taken up in a number of jurisdictions, including Canada, Scotland, Ireland and Australia (Family Law Council 2006). It was introduced in England and Wales in 2003. As a dispute resolution method it is used exclusively in family law, although is not confined to divorce or separation issues, but may also be used to negotiate pre-nuptial or cohabitation agreements (Pirrie 2006).

### Qualifications, training, regulation and professional bodies

Collaborative lawyers are solicitors regulated by the SRA. Resolution is the only organisation which provides training in collaborative law, with training in the initial years delivered by the US collaborative law guru Pauline Tesler. Family lawyers must have three years' post-qualification experience to be eligible for training, and demand for training was initially high (Pirrie 2006) although it has subsequently levelled out. According to the Resolution website, around 1700 of its 6500 members are now collaboratively trained. One of the potential features of collaborative law is the ability to incorporate other professionals such as financial advisers, counsellors or child experts into the collaborative process. These professionals must also have been collaboratively trained. Following training, collaborative practitioners join a local practice group called a 'POD'. Collaborative PODs meet on a monthly basis to discuss practice issues, and these frequent interactions in

turn help to build familiarity and trust between professionals to assist them in working together on collaborative cases.

## The collaborative process

Collaborative law advocates have identified a number of differences between the collaborative process and traditional solicitor negotiations in terms of objectives, procedure and the roles of lawyers and clients. Rather than aiming for a negotiated agreement which reflects what a court might decide, the objective of the collaborative process is to identify and agree upon the needs of the family and the solutions the parties can devise to meet those needs (Denny 2011: 11). In this context, the law is relevant, but is one consideration among a raft of possible solutions for the particular family (Denny 2011: 199). Significantly, the participants 'contract out of the court process' (Pirrie 2006) and commit to reach a negotiated solution. The fact that negotiations take place in four-way meetings 'in real time' rather than by arm's length correspondence means that all issues are raised in the presence of the parties and their legal advisers. This is said to maximise transparency, accountability and the possibilities of reaching a creative agreement, while minimising the possibility of control by one lawyer or party (Mallon 2009; Tesler 2004). There is also the option to bring in interdisciplinary expertise and skills to assist the parties in working through particular issues. As evocatively described by James Pirrie (2006), the collaborative process involves attempting to untangle rather than slice through the Gordian knot of family separation.

In terms of the roles of lawyers and clients, Denny notes that the collaborative process moves from one of delegated responsibility (from the client to the lawyer in traditional negotiations) to one of mutual responsibility (2011: 115). The traditional hierarchical relationship between lawyer and client, in which the lawyer acts as expert and 'paternalistic guardian of the client' (Denny 2011: 57), is replaced by one in which clients are repositioned as central and as the experts in their family. They retain responsibility for obtaining information and making decisions, and thus are not passive as in the conventional process (Denny 2011: 114). The lawyer does not have to vigorously argue points or defend their client if accusations are made, but can ask questions to unearth explanations or motivations and so help to defuse the issue (Denny 2011: 118). This also effects a shift in the working relationship between the lawyers, so they are working collaboratively, alongside their clients, for the common good of the family. Further, the participation agreement in which the lawyers agree to cease to act if either party initiates court proceedings, has the effect of distributing the risk of failure of the process to the lawyers as well as the clients, which

gives them a strong incentive to remain at the negotiating table working with their clients to find ways out of any impasse (Tesler 2004).

Because the collaborative process requires clients to work cooperatively together, there is a need for initial screening to ensure the parties are suited to the process. If they are unwilling to work together and commit to the process, if there are issues of anger or positional stances, threats of violence or potential for oppression within the process, or unwillingness to make full, frank and timely disclosure, then the collaborative process is unlikely to be appropriate (Denny 2011: 58). Screening is particularly important because of the requirements of the participation agreement and the high costs that will be incurred if the process does break down (Denny 2011: 59).

The central element of the collaborative process is the participation agreement, which as well as committing everyone not to engage in court proceedings also involves agreement to work cordially and with courtesy, to search for fair solutions, and to be transparent and honest in disclosure and dealings (Pirrie 2006). At the first four-way meeting, both lawyers and clients are invited to make an 'anchor statement', in which they explain why they have chosen to engage in the collaborative process. According to Denny, anchor statements are important for outlining aspirations and setting the tone, particularly emphasising that it is a forward-looking process and that it is client-led (2011: 168). The clients will usually have met with their lawyers separately prior to the first meeting, and the lawyers may also have conferred together, so the issues to be addressed are known and any necessary fact-gathering may have begun. The agenda will be set in the first four-way meeting, and the issues are then discussed and solutions explored at the clients' pace. Unlike mediation, the lawyers can give legal advice and can also draw up legal documents – the application for divorce, if relevant, and for consent orders reflecting the property settlement – as part of the process.

Concerns that have been raised about the collaborative process relate primarily to its cost. With the four-way meetings, plus separate pre-meetings and possibly interim meetings between individual clients and their lawyers, plus sometimes the involvement of additional interdisciplinary experts, costs can mount up (Davy 2009; Lande 2011). Costs may also escalate due to the lack of an enforceable time limit (Family Law Council 2006; Macfarlane 2004) or if the process breaks down and parties must then instruct new lawyers. Some lawyers have also been concerned that clients might find the disqualification clause in the participation agreement off-putting and have developed so-called 'collab lite' or 'cooperative law', which follows the collaborative process but without the disqualification clause. This practice has been roundly condemned by collaborative purists, who argue that the disqualification clause is critical because it confirms the

commitment of all participants to find solutions without going to court, gives the lawyers the freedom to work with rather than against each other, builds trust between clients and lawyers and encourages clients to address the root causes of issues, all within their own rather than a court-imposed timescale. Above all, it is 'the glue that holds the process together' in difficult moments (Bishop et al. 2011). A further step down from 'collab lite' is the round table conference, an option which has always been available within conventional solicitor negotiations, and which involves the lawyers and parties meeting together, often to finalise an agreement, but without any departure from traditional lawyer/client roles or philosophy. A number of respondents to Grant Thornton's survey of leading family lawyers in 2014 noted that round table discussions were widely used in preference to a formalised [collaborative] process, but this appears to reflect a misunderstanding of the nature of collaborative law.

**Collaborative law in practice**

Launching a collaborative process entails quite a strenuous effort. Usually, one party will consult a collaboratively trained solicitor (by choice or inadvertently), be informed about the collaborative option and decide it is the best method of dispute resolution for their case. They must then convince their ex-partner to the same effect, and the ex-partner must engage a collaboratively trained solicitor of their own (who may be recommended by the first solicitor). Identifying suitable clients and getting 'buy in' from all participants can be even more difficult than getting parties to engage in mediation, which helps to explain the fact that collaborative numbers seem to have remained relatively low. In Grant Thornton's 2012 survey of 139 leading family lawyers, 58 per cent of respondents were collaboratively trained, but over half of them had dealt with no collaborative cases during the 2011 calendar year, 42 per cent had dealt with one to five collaborative cases, and only 4 per cent had dealt with six or more collaborative cases. Overall, only approximately 2 per cent of divorces handled by these lawyers had taken the collaborative route (Thompson 2013). Thirty-five per cent of respondents thought the lack of clients for whom the process would be suitable was the main hurdle to collaborative practice, while a further 27 per cent thought the main hurdle was lack of awareness of collaborative law (Grant Thornton 2012). In the 2014 survey, 74 per cent of collaboratively trained respondents had dealt with three or fewer collaborative cases in the 2013 calendar year (Grant Thornton 2014). Very few if any collaboratively trained lawyers practise exclusively in collaborative law. In the 2014 Grant Thornton survey, for example, only 4 per cent said that collaborative law was their most frequently used method of resolving disputes in family cases. Many collaboratively trained lawyers are also

trained mediators, and practise a mix of mediation and conventional family law, with a small number of collaborative cases as part of the mix. A further difficulty in the take-up of collaborative law is that it has never been covered by legal aid in England and Wales, and so is practically available only to those who can afford to pay for their own solicitors. Shortly before we commenced our research, the Legal Services Commission announced that collaborative law would become available to legally aided clients from November 2011, but this was reversed prior to implementation.

## Research on collaborative law

Research on collaborative law is still in its infancy both in England and Wales and internationally, and as with early research on mediation, has thus far focused on questions such as case numbers, settlement rates and client experiences.

### *Case numbers, client demographics and client experiences*

The research establishes a general picture of collaborative supply outstripping demand, with large numbers of collaboratively trained lawyers undertaking small numbers of cases (Healy 2013; Lande 2011; Macfarlane 2004; Maclean and Eekelaar 2016: 55; Sefton 2009; Wright 2011). Clients tend to be well-educated, articulate, middle-aged and affluent (Lande 2011; Sefton 2009; Wright 2011). Settlement rates are high, in the range of 80 to 90 per cent (Healy 2013; Lande 2011; Lloyd et al. 2010; Schwab 2004; Sefton 2009), and clients have generally reported high levels of satisfaction with the process and outcomes (Lande 2011; Lloyd et al. 2010; Macfarlane 2005; Schwab 2004; Sefton 2009).

Clients interviewed by Sefton in England and Wales gave their main reasons for choosing collaborative law as wanting to avoid going to court, wanting to avoid the stress of an acrimonious divorce and wanting to maintain good future parenting and family relationships (2009: 4; see also Wright 2011: 377). By contrast, clients interviewed by Macfarlane in Canada and the United States primarily wanted to reduce expenses and get speedier results (Macfarlane 2005: 23). The evidence as to the cost of collaborative law compared to solicitor negotiations or litigation, however, has thus far been equivocal (Lande 2011; Macfarlane 2005). The research suggests that clients do have greater control of the agenda and the direction of discussions in collaborative law than in traditional solicitor negotiations (Lande 2011: 264; Wright 2011: 382), although clients interviewed by Sefton were more negative about the process where they felt they had been expected to shoulder too much individual responsibility for negotiations (2009: 5). Most of Sefton's interviewees also said they had found the process emotionally difficult at some point (2009: 4).

*The practices of collaborative lawyers*

Macfarlane found that the primary motivation for solicitors to train in collaborative law was to find a way to practise law that better fitted their beliefs and values, as well as to provide a better client experience and to offer what they perceived to be a better alternative to mediation (2005: viii). She also identified variations in lawyer orientations to collaborative law, ranging from those who maintained a fairly traditional partisan role blended with a cooperative stance, to those who fully embraced the collaborative ideology and were concerned to promote the integrity of the process above all (Macfarlane 2005: viii). Regardless of lawyer orientation, however, there does appear to be a fundamental tension in the role of collaborative lawyers which mirrors the tension within mediation, in this instance between the lawyers' obligations to represent their own client and to attend to the wider interests of the family as a whole, including the other party (Macfarlane 2004: 203; Sefton 2009: 3). As a result, some collaborative clients have wanted more partisanship from their lawyer, and have felt vulnerable and unprotected, frustrated at the lack of advice provided to them and uneasy about the relationship between their lawyer, the other lawyer and the other party (Keet et al. 2008; Lande 2011: 266; Macfarlane 2004: 207). Solicitors may feel more constrained in challenging potentially unfair agreements, and indeed, if a proposed settlement is outside what a lawyer would regard as reasonable, they can only advise and not proceed with a court application (Maclean and Eekelaar 2016: 55; Wright 2011: 391). Consequently, there is potential for outcomes to reflect imbalances of emotional power in the parties' relationship, especially guilt and control (Keet et al. 2008; Wright 2011: 385), and there has been some suggestion that dominant men tend to do better in the collaborative process (Keet et al. 2008; Maclean and Eekelaar 2016: 55).

## Conclusion

The discussion in this chapter delineates the histories and structures of the three FDRs in England and Wales, their relative scales, and differences and similarities between their practices. It can be seen that the three FDRs at the time of our study did not stand on an equal footing. Solicitor negotiations had a longer history and a larger practitioner and client base than the other two FDRs, and family solicitors enjoyed a much greater level of public recognition as the 'go to' service for problems following relationship breakdown. In turn, mediation had a longer history and a larger client base than collaborative law, although the numbers of mediators and collaborative law practitioners were similar. Given the differences in what the three processes offered, it might have been expected that they would appeal to different clients or be more or less suitable to different kinds of cases.

The chapter has also identified the issues which have been raised in previous research concerning the relative popularity, client experiences, benefits and drawbacks of each process, and the ways in which practitioners operate within each process. This research indicates that solicitors tend to take a conciliatory approach which may be partisan but is not aggressively adversarial, and that mediators may well steer parties towards preferred outcomes. However, questions remain about the extent to which the shadow of the law falls on mediation and the effectiveness of screening prior to mediation. Research on collaborative law is very new, but it has raised potential concerns regarding insufficient partisanship on the part of collaborative lawyers. Ours is the first study to our knowledge which has tested lawyers' self-reports about their practices and clients' accounts of their experiences by recording and analysing transcripts of collaborative law processes. The various research findings set out in this chapter were followed up in our study, as discussed in Chapters 5, 6, 7 and 8.

# 3
# The Research Project

## Introduction

Our three-year empirical study *Mapping Paths to Family Justice* was conducted in 2011–2014 and funded by the Economic and Social Research Council (ESRC) (grant number ES/I031812/1). In 2009–10 when the Mapping Paths to Family Justice project was conceived, there was a widespread perception that the family justice system was in crisis, with diminishing resources available for courts and legal aid and increasing pressure on an already overstretched court system resulting in unacceptable delays. In this context it was hardly surprising that policy-makers should strongly encourage out-of-court resolution of family disputes. In 2010 the then Labour government appointed a board led by Sir David Norgrove to carry out a fundamental review of the family justice system, a process which was endorsed by the subsequent Coalition government which took office in May of that year. The Family Justice Review included the 'guiding principle' that 'Mediation and similar support should be used as far as possible to support individuals themselves to reach agreements about arrangements, rather than having an arrangement imposed by the courts' (Family Justice Review 2011a; see also Coalition 2010). The Coalition government was also foreshadowing public funding cuts and economic austerity, which would further intensify the pressure to resolve family disputes out of court. As we have seen in the previous chapters, however, the policy (and practitioner) enthusiasm for family mediation had not been matched by any solid evidence around its efficacy as a primary means of family dispute resolution in England and Wales. Nor, indeed, had there been recent large-scale research on lawyer-led out-of-court family dispute resolution processes. One of the key objectives of our study, therefore, was to fill this research gap. In this chapter we first set out the aims of the study and our research questions, and explain how we responded to shifts in the policy context during the course of the research. We then provide details about the study's research design and methodology, our survey, interview and 'observational' samples, and the way we analysed the very rich body of data obtained from these sources.

## Aims of the study

### Creating an evidence base

In the face of the radical and very clear intent of the Family Justice Review to try to shift perceived normative behaviours around resolving private family law disputes away from the court arena, family lawyers and even, potentially, the shadow of the law, the lack of recent research evidence on a national scale into people's experiences of out-of-court family dispute resolution was particularly striking. Our study, which began in July 2011 when the Family Justice Review was still ongoing, therefore aimed to provide critical empirical evidence around the public awareness and party experience of the three major forms of out-of-court family dispute resolution, whilst at the same time exploring the visions, expectations, norms and practices of practitioners of the three FDRs. There had not been any other large-scale recent research to inform how well, if at all, out-of-court FDR was going to be able to fulfil the aim of improving family justice *writ large* in England and Wales. As discussed in Chapter 2, such evidence as there was from the piloting of the ill-fated Family Law Act 1996 Part II had shown low levels of willingness to mediate, even after mediation intake sessions were made requisite for legally aided applicants (Davis 1999; Dingwall 2010), and Hazel Genn's *Paths to Justice* study, which had been the last attempt to research the national picture on how people find their way to 'justice', had found that problems relating to separation and divorce were most likely to be taken to a solicitor (1999: 115). Nonetheless, both Davis's family mediation research and Genn's wider study of approaches to justiciable problems were undertaken at a time when family mediation was still relatively new and smaller-scale, purposefully non-adversarial solicitor negotiation was a fairly recent innovation and collaborative law had yet to be recognised as a formal FDR.

Subsequent changes to legal aid rules and solicitors' increasing familiarity with mediation led us to hypothesise that mediation was likely to have become better known as an option for family dispute resolution. We also anticipated that the take-up of collaborative law, which had also been relatively low (Sefton 2009), was likely to increase following the planned extension of legal aid for this process in 2011, creating the potential for collaborative law to grow into a more mainstream FDR.

The chosen focus for the empirical element of our study was therefore a national comparison of the available out-of-court FDR options of solicitor negotiation, mediation and collaborative law with a view to providing a substantial, up-to-date evidence base. We particularly wanted to undertake a 'bottom-up' analysis of these processes in order to form an understanding of the client experience and client journeys through them, and to compare

this with the policy and practitioner expectations of these FDRs. A key issue, given the policy agenda, was awareness of FDR as an alternative to court and the extent to which mediation and collaborative law had even permeated the public consciousness as forms of family dispute resolution. Such an assessment was only achievable using a nationally representative study. It was also clear that little was known nationally about current party satisfaction levels with either the process or outcomes achieved within different FDRs, given that previous research, as discussed in Chapter 2, was mainly undertaken in the 1990s, was primarily focused on mediation and was dating fast. Only one study had previously attempted to directly compare the experiences of clients with lawyers and mediators (Walker et al. 2004) and this was based on relatively small-scale data which was by then 10 years old. Similarly, Sefton's (2009) study of collaborative law was small scale. Thus, from a user perspective, it was not at all clear whether increased use of mediation or a policy shift from lawyers to mediators to resolve family disputes was justified at all, and the need for new national data to inform the changes in family justice being proposed for England and Wales was unquestionable. At the same time, research in the United States and Australia, where mandatory mediation for family disputes had been embraced, raised considerable doubts about the wisdom of that approach (Kaspiew et al. 2010; Rhoades 2010; Salem 2009). Indeed in Australia, there had been a renewed recognition of the importance of the role of lawyers (Rhoades 2010) and questions had been raised more widely about a 'one size fits all' approach and the need to find which, among the range of dispute resolution processes on offer, is most suitable for particular types of case (Maclean 2010; Salem 2009).

### Exploring normative issues

In addition, we were interested in exploring the normative content of FDR. Writing in 1998, John Dewar highlighted the 'normative pluralism of family law' (1998: 470), which seeks to achieve a range of policy objectives and hence incorporates a number of different and sometimes incompatible standards and grounds for decision-making. Whereas when a court decides a particular family law dispute, the norms to be applied are relatively clearly set out in legislation and case law, in FDR any number of normative expectations may be brought to the table by the parties, and may be promoted by the lawyers and/or mediators involved. These may include competing interpretations of children's welfare, children's rights, fathers' rights, formal equality, parental responsibility, care ethics and notions of moral fault and guilt (Wallbank et al. 2010; Wright 2006). We therefore wanted to see whether there was any evidence that the fragmentation and individualisation of life course trajectories associated with reflexive modernisation had

intensified the proliferation of normative expectations at the point of family break-up (Beck and Beck-Gernsheim 1995). Furthermore, were such normative views expressed within FDR still gendered given, for example, Smart and Neale's (1999) suggestion that fathers in contact disputes tend to think in terms of rights, while mothers tend to think in terms of care?

Dewar argued that in solicitor negotiations, lawyers engage in 'stabilising practices of interpretation' which 'hold the [normative] chaos of family law at bay' by providing clients with a singular interpretation of what the law states or requires in their case (1998: 475, 469; see also Sarat and Felstiner 1995). And indeed, the previous research demonstrates that family lawyers spend a good deal of time attempting to adjust their clients' expectations to the range of legally achievable outcomes (Dewar and Parker 1999; Ingleby 1992; Wright 2006, 2007). Solicitor negotiations might thus be seen as a form of governance, in which parties are encouraged to bring their settlement horizons into line with 'official' norms, as represented by the lawyers involved. But little was known about which of the plurality of norms were represented by lawyers, and to what effect.

By contrast to solicitor negotiations, collaborative law deliberately removes the default option of court proceedings, and lawyers therefore cannot directly discipline their clients by reference to what a court might decide. The normative strategies and outcomes in collaborative law were therefore likely to be different from those associated with solicitor negotiations, but none of the existing research had focused on the content of agreements reached in collaborative law. At a further step removed from the 'shadow of the law', mediation in its classic form promotes party autonomy and encourages parties to generate their own norms to guide the resolution of their dispute (e.g. Genn 2010: 116–18; Irvine 2009; Mulcahy 2001). As discussed in Chapter 2, family mediation may in fact employ a 'norm-educating' rather than a 'norm-generating' model, in which the mediator educates the parties about the norms that may apply to their situation (such as the paramount importance of child welfare, or other legal rules), however the choice to apply these norms remains with the parties (Irvine 2009; Wilson 2009). It was unknown which of these models was actually adopted by family mediators, nor which norms were put forward in the 'norm-educating' model or how parties responded to them. And while Greatbatch and Dingwall's research (1989) suggested that mediators did sometimes formulate preferred outcomes and steer the parties in that direction, they did not systematically investigate the normative positions promoted by mediators.

A further unknown the study aimed to explore was whether there was any pattern of particular family law norms being associated with particular forms of FDR. This, we hypothesised, may arise either because couples

who share particular norms tend to find a particular process more congenial than others, or because when couples bring different norms to their dispute, one or other of those norms tends to prevail. Alternatively, particular norms espoused by lawyers and mediators may tend to prevail in a particular process regardless of the parties' desires or expectations. The normative outcomes of FDR processes matter because of their fairness or otherwise to the parties (e.g. if some parties are systematically advantaged or disadvantaged), their impact on the parties' children and the commitment of public funds to these processes. A finding that a particular FDR process consistently put the interests of one or both parents above those of children, or emphasised fault or formal equality at the expense of children's welfare or the protection of vulnerable parties, would potentially justify a call for a regulatory or policy response.

In summary, the study set out to consider not only parties' and practitioners' expectations and experiences with the three FDRs, but also the type of family justice which was being achieved through these processes, in a context in which the often gendered power dynamics around discourses of rights, fairness, equality and welfare were potentially guided by different norms or extra-legal considerations and by actors other than those within traditional family law legal practice (Diduck 2010), with fewer professional and process safeguards.

### Research questions

It was against this background that the research questions were framed. By undertaking a comparative analysis of solicitor negotiation, mediation and collaborative law, we sought to answer the following four questions:

1. How widely is each FDR process actually used and how embedded has it become in the public mind as a means of resolving family disputes?
2. How positive or negative have people's experiences of these FDRs been in the short and longer term?
3. What norms of family dispute resolution are embedded in the different alternatives?
4. Are particular approaches more or less appropriate for particular kinds of cases and parties?

In addressing these questions empirically, our specific objectives were to provide an up-to-date picture of awareness and experiences of the three FDRs to inform policy and best practice, to produce a 'map' of dispute resolution pathways and to consider which pathways are most appropriate for which cases and parties, taking account of which (if any) norms are embedded in the different FDR processes. Ultimately we wished this research to

facilitate an informed choice for policy-makers, practitioners and parties which was not merely based on 'evangelical' claims, untested assumptions and hearsay.

### Subsequent policy developments

The time between the conceptualisation of the study and its completion saw major changes to the family justice system, as outlined in Chapter 1. These included the interim and final reports of the Family Justice Review (Family Justice Review 2011a, 2011b), the introduction of the Pre-Application Protocol for Mediation Information and Assessment, abandonment of the proposals to provide legal aid for collaborative law,[1] the consultation on proposed reforms to legal aid and the enactment of the LASPO Act and the Children and Families Act 2014. These changes collectively effected a seismic shift in the infrastructure and delivery of family justice. It is a familiar experience for socio-legal researchers to find themselves working within a shifting research environment, but even by these standards the degree of change was exceptional.

The major implication from the perspective of the project was that the relative status of the three FDRs was dramatically realigned. At the outset, with the envisaged extension of legal aid to collaborative law, each of the three FDRs was (or soon would be) an option available to all divorcing or separating couples, and so the aim of our comparative analysis was to identify which processes were most suitable for which types of cases and parties. After LASPO, however, the three FDRs remained an option only for parties with sufficient resources to pay for legal services themselves. For those without the means to do so, mediation was left standing as the only form of out-of-court dispute resolution realistically available. This also had implications for issues such as screening for domestic violence in mediation, since the point of screening is undermined if people do not have alternative processes available. While continuing to consider the relative merits of each FDR for parties with options, therefore, it also became necessary to consider whether mediation could function as a one-size-fits-all process for those without options, and by implication, whether the exclusive investment of public funding in mediation was justifiable. Ironically, then, the elevation of mediation as the sole policy preference for divorcing and separating couples invited greater critical scrutiny of mediation than it might have attracted had it remained one among several options.

In practical terms, as we conducted our research, we encountered changes in experiences and practices as a result of the changing policy environment. Mediation intake processes changed in April 2011 with the introduction of

1 By contrast, legal aid is available for collaborative law in Ireland (see Healy 2015).

MIAMs, some parties who would not previously have considered mediation were compelled to do so prior to commencing court proceedings as a result of the Pre-Application Protocol, and in one of our recorded solicitor-client interviews after LASPO, the solicitor was concerned to ensure that the client had provided the necessary evidence required to enable her to consult him on a legally-aided basis. Practitioners in interviews were concerned about the potential impacts of the forthcoming legal aid reforms. For the most part, however, our interviews and observations concerned pre-LASPO experience or were not affected by LASPO. We did not record any mediations, for example, where there were difficulties because the parties had been or would be unable to obtain complementary legal advice. The study therefore largely represents a pre- and extra-LASPO world, though we have noted points at which we think our conclusions might be qualified by the impact of LASPO.

## Research design and methods

In order to answer the research questions, we adopted a mixed-methods approach in the three distinct yet interlinking phases described below. In this way the research questions around awareness and experiences of FDRs from the general public, party and practitioner perspectives could be addressed, and the complementary sets of data collected would provide a solid platform for an integrated approach to analysis. An expert Advisory Group was also appointed, comprising a range of practitioners and academics (see Acknowledgements), to ensure the project had interdisciplinary input from relevant stakeholder communities. Research ethics approval was applied for and formally granted by the University of Exeter Social Sciences Ethics Committee. In accordance with that approval, all data gathered were anonymised and stored securely with written informed consent obtained from every participant.[2]

Given that the different FDRs had emerged at different times, it was decided that the study should focus on capturing FDR experience in the period after 1996, as by this date mediation had become nationally available due to the piloting of the Family Law Act 1996 Part II. It was also agreed

2 In accordance with the requirements of the ESRC, the fully anonymised data, the Phase 1 Omnibus questionnaire and Phase 2 interview schedules used for the semi-structured interviews with parties and practitioners have been deposited with the UK Data Service with the Persistent Identifier 10.5255/UKDA-SN-851538. This is freely accessible to those who register (free of charge) with the UK Data Service at https://discover.ukdataservice.ac.uk/. A description of the data and data instruments available from this project are set out in Appendix 1. The Phase 3 data (our recorded sessions) were granted a waiver from the requirement and not deposited to protect confidentiality.

in consultation with our Advisory Group to define the three FDRs using plain English to make them easily understood by our general public and party participants, and to keep these definitions consistent between the survey in Phase 1 of the project and the party interviews in Phase 2, despite the different nature of the questions being asked. We therefore defined the three FDR processes as follows, explaining them verbally in interviews and on a survey showcard:

> Solicitor negotiation (in which solicitors engage in a process of correspondence and discussion to broker a solution on behalf of their clients *without going to court*).
>
> Mediation (in which both parties attempt to resolve issues relating to their separation with the assistance of a professional family mediator).
>
> Collaborative law (in which each party is represented by their own lawyer; and negotiations are conducted face to face in four-way meetings between the parties and their lawyers, with all parties agreeing not to go to court).

**Phase 1 – the quantitative national survey**

In order to explore questions on general awareness, choice, use and experience of FDRs in England and Wales, we conducted a quantitative, nationally representative study using a structured questionnaire,[3] as part of the well-known TNS-BMRB Omnibus survey (see their Methodology Summary in Appendix 2). This comprised 2974 respondents over two cycles of the Omnibus conducted in November 2011 and January 2012. The survey's standard collection of demographics enabled data to be easily analysed according to key variables such as age, gender, socio-demographic group and relationship status. The questionnaire was piloted and refined before the first Omnibus wave went into the field.

We asked general questions about awareness of the FDRs of all survey respondents, and further questions focused on experience of FDRs of those respondents who had been divorced or separated between 1996–2011 (n=288), including where appropriate those in the process of separation (total n=315). As the initial prediction of the number of post-1996 separated and divorced respondents to the survey (n=500) proved to be overoptimistic, we also took steps to supplement our sample by asking the same awareness questions as part of the Legal Services Research Centre's Civil and Social Justice Panel Survey (CSJPS) (N=3700) in Spring 2012. This gave

3 All the project data instruments are available online from the UK Data Service – see note 2 above and Appendix 1.

us a further national sample of people who were regularly surveyed on legal issues.[4] Differences between these survey populations are discussed further in Chapter 4.

In terms of probing awareness of the three FDRs, we asked whether survey respondents had heard of each or any of them as defined above and if so, what their initial source of information about them had been:

> Q.A1 Have you heard of any of the following forms of Alternative Dispute Resolution for people to use after a couple divorces or separates? (please answer for all that apply) …
>
> Q.A2a Where did you first hear of mediation/solicitor negotiation/collaborative law?
>
> 1: A solicitor
> 2: The Citizens' Advice Bureau or other advice agency
> 3: Family/friends
> 4: The media or internet
> 5: Other (PEN WRITE IN)]

We then went on to ask all those who had divorced or separated from a relationship of more than two years' duration since 1996 about their use and experience of one or more FDR, covering the nature of issues in dispute, reasons for choice of FDR, satisfaction with process and outcome in the short and longer term, the durability of agreed outcomes and views on any tangential benefits from the process such as improved communication between the parties.

Phase 1 was used to map the FDR awareness and experience landscape but, as is the nature of structured surveys, was only able to do this in a broad brush way, with a fixed range of standard answers and limited ability to prompt and probe further. Nevertheless, no other existing data set has provided such information. Part of the function of this phase was also to recruit a nationally spread sample of participants who had experienced one or more FDRs to the second phase of the study.

### Phase 2 – qualitative party and practitioner interviews

In this phase we used qualitative research interviews (conducted by telephone or face to face) to gain further and more in-depth insights into

4 This survey is separately deposited with the UK Data Service at https://discover.ukdataservice.ac.uk/ with Persistent Identifier 10.5255/UKDA-SN-7643-1 and is freely available to registered users. For full details of the methodology employed in relation to the questions used by the *Mapping Paths to Family Justice* study on the CSJPS follow the link in the UK Data Service file to the *Wave Two Technical Report*.

the three FDR processes and understandings and experiences of these from the party and practitioner perspectives. Interviews were conducted between 2011 and 2013. Our party sample comprised 95 parties (44 men and 51 women) who had experienced one or more FDRs since 1996. These were recruited in part from the national surveys and in part from referrals from mediation services and practitioners around the country to whom we advertised the project and who advertised it, in turn, to their clients. The majority (76) were divorced or in the process of divorce, 17 had separated from a cohabiting relationship and two had separated from a civil partnership. Fifty-nine interviewees had experienced mediation (27 men and 32 women), 53 solicitor negotiation (25 men and 28 women) and 9 collaborative law (4 men and 5 women). Over one quarter (27) had used more than one process. Two had not used any of the three FDRs, but discussed in the interview their reasons for rejecting FDR and preferring to negotiate directly with the other party. We had a mixture of legally aided and privately funded parties for mediation and solicitor negotiation and a spread of representation between mediators accredited with the different mediation bodies – National Family Mediation (NFM), Family Mediators Association (FMA) and Resolution – as reported to us by the parties. There was also a range of successful and unsuccessful attempts at FDR. The party interview schedule first asked general questions about the party's separation, level of conflict, issues in dispute and dispute resolution journey. It then focused on decisions about seeking legal advice and experience of taking up dispute resolution, and for each FDR attempted, why the party had chosen that form of dispute resolution, what they thought of the process, what they had thought would be a fair outcome and what they thought of the outcomes achieved. Parties who had experienced two or more FDRs were also asked to compare the FDRs. Because the interviews were semi-structured, the interviewer was able to tailor the questions to the interviewee's circumstances and probe further and ask for elaborations of answers where relevant.

Our practitioner sample comprised 40 practitioners. Twenty-five were practising lawyers, 31 were practising mediators, and 16 were practising collaborative lawyers. It can be seen, therefore, that many were 'hybrid' professionals practising across more than one FDR process (see Figure 3.1). Among the 25 lawyers, 22 were members of Resolution, but only 7 undertook legal aid work. Among the 31 mediators, the majority (25) had a professional background in law, although 10 of these worked exclusively as mediators and were no longer practising law. Most of the non-lawyer mediators came from a therapeutic background. Twenty-two of the mediators were qualified to undertake publicly funded mediation, although the majority (27) worked in the private sector. Their mediation training and

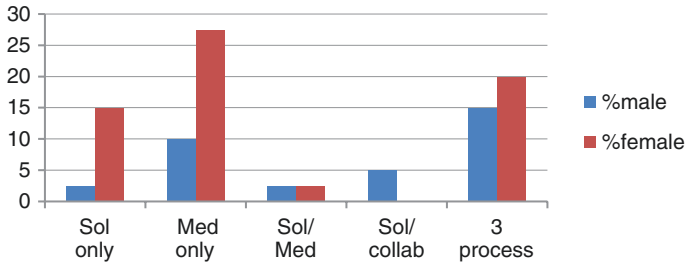


**Figure 3.1** Practitioner sample

current affiliations were spread between Resolution, the FMA and NFM, although two had been trained by the ADR Group and one had commenced mediating before training was available. Twenty-six of the practitioners were women and 14 men, a gender split reflecting that within the wider family practitioner community. A good geographical spread across England and Wales was also achieved for both the practitioner and party samples in Phase 2.

The practitioner interview schedule was tailored to the particular process/es in which the practitioner worked. For those practising in more than one process, we found it impossible to discuss each process in the same level of detail within the time practitioners generally had available, so at the outset of the interview we asked each interviewee which process they primarily identified with, and then asked detailed questions about that process, inviting the interviewee to comment at the end about any differences they wished to highlight between the process on which they had focused and the others of which they had experience. The interview schedule commenced with general questions about the interviewee's qualifications, experience, memberships and accreditations, together with information about the firm or organisation for which they worked, followed by questions about how they referred clients to dispute resolution and the factors determining which FDR a client would use. The interview then moved to the specific FDR chosen by the practitioner and covered their general approach, questions about the process and outcomes of that FDR and, finally, questions about whether particular kinds of parties and/or cases were especially suited to that FDR or to other FDRs.

The identities of all party and practitioner participants were anonymised when the interviews were transcribed, and all names of participants referred to in later chapters are pseudonyms. The interview schedules for parties and practitioners were piloted and refined before going into the field. Interviews for both party and practitioner samples lasted around an hour on average.

Research on the relative quality of telephone and face-to-face interviews suggests little difference between the two (Carr and Worth 2001; Holt 2010). We were pleased to find that our experience confirmed that a mix of telephone and face-to-face interviews did not result in any significant variability in terms of interview length or the depth of discussion, although landline rather than mobile phone was insisted upon following our initial pilot in order to guard against drop-outs and to ensure the party's full attention to the interview.

**Phase 3 – recorded sessions**

In the final phase of the study undertaken between summer 2012 and spring 2014, we made audio recordings of a small number of examples of each FDR process, with the consent of all participants, in order to gain a better understanding of parties' and practitioners' normative stances and the dynamics of party-practitioner interactions, to triangulate with the self-reports gained from party and practitioner interviews, and to identify good practices. This was an innovative approach to capture the 'natural talk' within FDR sessions unaffected by the presence of the researcher. We recorded five mediation processes (four concerning children's matters and one financial, four sole and one co-mediation, involving a total of nine separate sessions) and three collaborative law processes (all concerning divorce and financial matters, involving a total of 11 separate sessions).

For solicitor negotiations we made the pragmatic decision only to record lawyer-client first interviews, and we ultimately recorded five such interviews: two concerning children's matters, two divorce and finances and one focused primarily on divorce. Although mediation sessions and collaborative law meetings are clearly the venues in which disputes are resolved, it was difficult to identify a precise equivalent in relation to solicitor negotiations. As noted previously, much of lawyers' work involves explaining options to and regulating their own client as opposed to negotiating with the other party's lawyer, and this was the aspect of the process on which we aimed to focus by recording solicitors' first interviews with new family law clients, on the basis that these interviews were most likely to capture the client's expressed wishes or expectations for resolving post-separation issues and the lawyer's account of what s/he perceived to be the operative legal norms governing the client's case.

In addition, in many instances and in accordance with good practice, clients are given space by the solicitor after the first interview to consider their options, and it is often unclear whether or when there will be a second meeting. Even where it is clear that a client will proceed, there is a less predictable pattern to the meetings that will be scheduled than is the case

with mediation or collaborative law. Much solicitor negotiation and reporting back to clients is done by telephone or email rather than in face-to-face meetings. The first meeting is therefore likely to be the only constant in a negotiated case. Previous studies that had attempted to capture the whole divorce process (Sarat and Felstiner 1995; Wright 2006) have demonstrated the often lengthy and intensive nature of such research, which would have been impractical within our timeframe and the geographical spread of our study.

### Analysis and synthesis

The survey data was imported into an SPSS database and analysed statistically, using frequencies and cross-tabulations involving chi-squared tests for significant associations between variables. While the entire samples were analysed with regard to the awareness questions, much of the analysis focused on the sub-sample of the Omnibus survey who had experienced divorce or separation in the last 15 years, and had therefore also answered the questions concerning experiences with FDRs. This data is mainly reported in Chapter 4.

All interviews were recorded, then transcribed and anonymised and entered into an NVivo project for coding and analysis. The thematic analysis of the interview transcripts consisted of the extraction, synthesis and comparison of respondents' answers to the various interview questions, with further themes drawn out concerning gendered experiences, relationship dynamics, party-practitioner dynamics and good practices. Party participants recruited via the practitioner sample provided some triangulation of practitioner interviews, while the recorded sessions enabled access to experiences of different FDR processes and different approaches within each process, as well as clearer understandings of the embedded norms and normative stances of parties and practitioners within the different FDR processes.

The recorded sessions were transcribed and analysed manually. Initially, all members of the research team read through the transcripts, followed by a discussion among the members of the team to identify key themes, good or poor practices, and interpretations of normative positions and interactions. The transcripts were also discursively analysed, drawing on elements of discursive psychology and conversation analysis, in which language is understood to be a resource in the hands of conversational partners through which all sorts of interactional work can be accomplished (Edwards 1997; Potter 1996; Potter and Edwards 2001). The findings from all three phases were finally synthesised in order to produce a 'map' of FDR pathways and an assessment of which parties and cases were best suited to particular FDRs.

The findings of our thematic analysis of interviews and recorded sessions are discussed in Chapters 4–8. Overall, the book focuses primarily on the experiences of parties in the FDR process, in the context of the policy settings and normative concerns outlined in Chapter 1 and in light of the previous research summarised in Chapter 2. Other findings of the project have been and will be published elsewhere, including a discussion of the discursive analysis of recorded mediation sessions (Smithson et al. 2015), our assessment of which parties and cases are most suited to which FDR process/es (Hunter et al. 2014) and our recommendations concerning good practices in FDR (e.g. Barlow et al. 2014; Ewing et al. 2015).

# 4
# Awareness of FDRs: The Policy Challenge

As outlined in Chapter 2, within the neoliberal policy framework, the exercise of autonomy through freedom of choice is a key justification for abandoning more traditional and welfarist approaches to many matters, including family dispute resolution. But at the same time, as we have noted, people with family law disputes are encouraged in various ways to make the 'right' choices about how best to resolve their disputes – preferably out of court, and ideally by mediation. However, both these positions assume a high level of awareness of the range of options available for out-of-court dispute resolution in general, and of family mediation in particular. Such awareness needs also to include an understanding of the nature of these processes – what they involve and aim to achieve. This has proved to be a perennial problem for policy-makers. Post-separation dispute resolution options are not something to which people tend to pay much attention when their relationships are intact. When relationships do break down, how do people become aware of their options? Whom do they consult and what information do they receive? What levels of awareness of out-of-court dispute resolution, and of different forms of dispute resolution, exist within the general community?

Hazel Genn's *Paths to Justice* research undertaken in the late 1990s identified a variety of responses people might have to potential legal problems, including doing nothing and putting up with it, handling it themselves, and seeking advice (1999: 68). Those with divorce or separation problems were most likely of all to obtain advice (Genn 1999: 88, 115). The potential sources of advice ranged from solicitors, the Citizens Advice Bureau, other advice agencies, and court staff to police, MPs, social workers and friends and relatives (Genn 1999: 83, 85). Solicitors emerged as the major source of advice for those with divorce and separation problems (Genn 1999: 115). Since the time of Genn's research, however, the mediation sector had expanded considerably as a response to the requirement for legally aided parties to attend a compulsory mediation intake session. By 2007,

78 per cent of the population were reported to be living within five miles of a professional mediator (House of Commons Public Accounts Committee 2007), and in the five years from 2009–2014 the number of publicly funded mediation providers authorised by the Legal Services Commission (later Legal Aid Agency) increased by a further 40 per cent (Family Mediation Task Force 2014: para 14). But how far had this expansion of family mediation services raised national awareness of family mediation as a dispute resolution option? It seemed likely that by 2011, when our study began, the substantial exposure of legally aided parties to family mediation for over 10 years might have resulted in a growing awareness of the existence of mediation as a process through which family disputes could be resolved. The government view was also optimistic, with Justice Minister Jonathan Djanogly setting out the government's support for mediation in November 2010 and stating, 'I think we're beginning to see a shift. Awareness of mediation is growing, albeit slowly' (Djanogly 2010). On the other hand, the still fragmented nature of the mediation sector as outlined in Chapter 2, and the absence of a national mediation agency, may have had a limiting effect on the level of public awareness.

In terms of the lawyer-led FDRs, we assumed that since the default option when people experienced family disputes was to consult a solicitor, the existence of solicitor negotiations as a form of FDR would be widely known. By contrast, it seemed likely that collaborative law would not have entered public consciousness and we anticipated very low levels of awareness. Given its introduction in England and Wales only in 2003 and the unavailability of legal aid, it was an option restricted in practice to an elite group of better-off separating couples. This likely outcome was reinforced by the perception that whilst collaborative law can be used to settle arrangements for children, it was initially seen as being most ideally suited to settling complex financial disputes on divorce, narrowing possible experience of it yet further.

In addition to investigating general levels of awareness, we were also concerned to distil what exactly people understood by the terms 'mediation', 'solicitor negotiation' and 'collaborative law'. From a policy point of view the challenge is not only whether people have heard of these FDRs, but whether they are aware of the nature of what is involved – a more substantive form of awareness. With regard to out-of-court family mediation, there were some known risks around this. First, there had been a deliberate change in terminology away from 'conciliation', a term which had been widely used in the family law context to describe *in-court* mediation of mainly children disputes at County Courts (Trinder et al. 2006). Secondly, given the discussions around the proposed 1996 divorce reforms, where the period of 'consideration and reflection' after filing for divorce

was assigned the dual function of testing whether the marriage had broken down and of making the financial and children arrangements (Lord Chancellor's Department 1995: para 5.4), there was a suspicion that mediation could have become conflated with relationship counselling in the public mind. It was important to find out how clearly understood mediation was purely as a process for settling post-separation issues when a relationship was beyond repair.

In the first part of this chapter we describe the research evidence from our study on public awareness of and understandings around the three out-of-court FDRs, derived from the national surveys and the party and practitioner interviews outlined in Chapter 3. As noted in Chapter 3, the two surveys were conducted in 2011–12 and the party and practitioner interviews were conducted in 2012–13. While we found differences in levels and sources of awareness of the FDRs between the general and the divorced or separated populations, awareness of mediation was relatively high in both groups. The party interviews highlighted the importance not only of awareness but also of understanding of the FDR options, and the central role played by solicitors in providing such understanding and encouragement to attempt mediation or collaborative law. In the second part of the chapter we bring the story up to date with an account of the drop in family mediation and subsequent attempts by the government to increase public awareness of mediation following the introduction of the LASPO Act 2012. Our findings suggest, however, that the issue is not lack of public awareness but the removal of solicitors as the key source of initial advice and referrals to mediation, a factor which the development of alternative sources of information for separating couples cannot adequately replace.

## Research findings on awareness

The first phase of our study, as indicated in Chapter 3, involved a block of questions within two national surveys on awareness of the three FDRs among the general public and among people who had divorced or separated from a cohabiting relationship between 1996 and 2011. The sources of their information about FDRs were also investigated to gain a national picture. This was complemented by information on awareness gained from party interviews about their divorce or separation journey and practitioners' accounts of their explanations of options to clients in the study's second phase of in-depth interviews. Here it was possible to probe people's awareness and understandings of FDRs in a more nuanced way. This was then considered in the light of the individual practices reported by practitioners.

### Survey findings

In general and unsurprisingly, awareness of all of the FDRs was much higher among the divorced and separated population than among the general population (see Figure 4.1). Heightened awareness was also associated with higher socio-economic groups and the older age ranges (peaking at 45–54), but not with whether participants lived in a rural or urban location. Women in the general population were significantly more likely to have heard of mediation than men, although gender did not affect awareness of the two lawyer-led FDRs.

In our nationally representative Omnibus study (N=2974), where we explained our definitions of the three FDR processes and asked which of these respondents had heard of, we found that almost half (45 per cent) had not heard of any of them (see Figure 4.1). That this was the largest response group within this general population is quite telling in itself, indicating the lack of relevance of FDR to the lives and consciousness of many people. Added to this, given awareness systematically declined from higher to lower socio-economic groups, it seems those eligible for legal aid are therefore among the most likely never to have heard of these FDR options. Conversely, although the average age of people divorcing is under 45 (Office for National Statistics (ONS) 2015), the 45–54 age group may represent those with the greatest experience of divorce and separation among family and friends, as well as personal experience in some cases.

Even among those who had divorced or separated since 1996 or were in the process of doing so (n=315), 22 per cent had heard of none of the FDRs

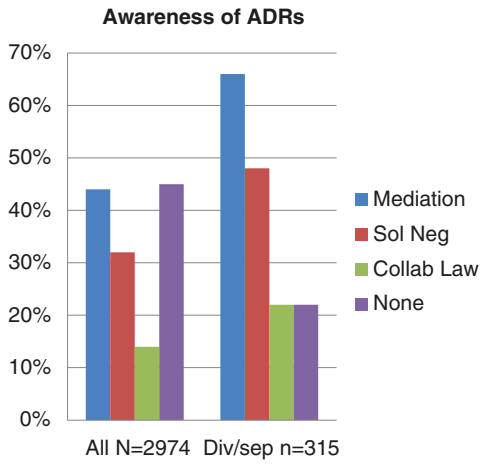


**Figure 4.1** Awareness of ADRs in the general (Omnibus) population

(see Figure 4.1). At the same time we found that many divorcing/separating respondents (47 per cent of our sample) had sought no legal advice. Thus at least half of the divorced/separated sub-sample presumably felt able to sort matters out for themselves. In neoliberal terms this result should be celebrated as an indication of people taking responsibility for resolving matters autonomously and without calling on public resources. It appears, however, that this may have occurred in at least some cases without full knowledge of the range of FDR support that is available.

Given the aims of government policy, it was interesting to observe that the highest rate of positive FDR awareness in the general population was in fact for mediation, with 44 per cent indicating they had heard of family mediation (see Figure 4.1). Each of the lawyer-led FDRs, at least on the face of it, were less well recognised. Among the divorced and separated sub-sample, the percentage who had heard of mediation rose to 66 per cent (see Figure 4.1), but this still left a third of those who had gone through the process of divorce or separation unaware of it as an option. There was slightly higher awareness of mediation (71 per cent) recorded in the Civil and Social Justice Panel Survey (CSJPS) (N=3700). However, the CSJPS was not nationally representative. Participants in the CSJPS were on average older and included more women than the nationally representative Omnibus survey, and as the Omnibus survey found, both of these groups were more likely to have heard of mediation. In addition, the very nature of the panel survey meant participants were recruited specifically to answer questions about legal issues, with many having experience of answering previous surveys on legal topics. Thus, they were generally more 'primed' to think about legal issues than the population sample tapped by the Omnibus survey. Nevertheless, the CSJPS reproduced the same pattern as the Omnibus survey in terms of mediation attracting a higher level of awareness than the lawyer-led processes. We can estimate, therefore, that at least half of the general population have heard of mediation,[1] and a significant majority of the divorced and separated population recognise it as an FDR option. From a policy perspective, whilst there is no room for complacency, such figures should be providing a solid base of awareness on which to build a successful family mediation pathway for those who do separate or divorce. If this is not occurring, the problem may not be lack of basic awareness of the existence of family mediation but rather lack of understanding of what it entails, and/or lack of attraction to mediation once that understanding is attained.

With regard to awareness of the lawyer-led FDRs, the survey results were in some ways more surprising. Less than a third (32 per cent) of

1 This is consistent with findings from the Crime Survey for England and Wales April 2012–March 2013, that 53 per cent of adults said they were aware that individuals could use mediation as a way of settling disputes as an alternative to going to court. They also found that awareness of mediation was higher among women and among both more highly education and divorced people (Summerfield and Freeman 2014: 8).

the Omnibus population recognised solicitor negotiation as an out-of-court FDR (see Figure 4.1). Within the divorced and separated population, awareness of solicitor negotiation rose to 48 per cent (see Figure 4.1), with 58 per cent of CSJPS respondents recognising it as an FDR. At a time when legal aid was still available for private family law advice, only 10 per cent of cases were adjudicated (Family Justice Review 2011b) and relatively few were being mediated fully (as opposed to mediation intake/information sessions being held), this figure was lower than we expected. Our subsequent interviews suggested two possible reasons for the relatively low level of reported awareness of solicitor negotiations. First, prior to first consulting a solicitor, people were generally aware that solicitors would engage in court proceedings, but were not so aware of the role played by solicitors in brokering out-of-court resolutions. In other words, people generally shared the government's understanding of solicitors as largely adversarial. Secondly, even those who had experienced solicitor negotiations did not necessarily perceive it as an FDR as such. The process of solicitors exchanging correspondence in an attempt to arrive at a resolution without the need for court proceedings did not have the same boundedness and clear definition, and was not visible to individual parties, in the same way as mediation or collaborative law. Thus, consciousness of solicitor negotiations as a form of FDR may have remained relatively low.

In contrast, however, a surprisingly high 14 per cent of people in the Omnibus survey said they had heard of collaborative law, with 22 per cent of the divorced and separated Omnibus sub-sample (see Figure 4.1) and 23 per cent of CSJPS participants indicating they were aware of this FDR process. Whilst initially puzzling given its position as an FDR option for an elite who could afford it, it became apparent from our interviews with practitioners that solicitors who advocated a non-adversarial approach to dispute resolution when undertaking solicitor negotiation in accordance with, for example, the Resolution Code of Practice or the Law Society's *Family Law Protocol*, would explain this to their clients as a 'collaborative approach' or 'collaborative practice'. In addition, some four-way 'without prejudice' meetings involving both clients and their solicitors could have been mistaken by parties for formal collaborative law. We therefore concluded that the term 'collaborative law' is not only taken to mean the bespoke and technical form of FDR which was established in 2003 and which we had identified as a distinct FDR process, but it is also widely understood as a phrase which denotes any non-adversarial approach to solicitor negotiation. Thus in general terms, whilst we can say some one third of Omnibus participants and around half of the divorced/separated sub-sample indicated they were aware of lawyer-led FDRs, it is not

possible to distinguish precisely collaborative law from solicitor negotiation in these figures.

In terms of how people became aware of the different FDR options, the two categories of media and Internet and family and friends (each averaging around a third of participants) were the largest sources of initial information for all FDRs in both the Omnibus and CSJPS surveys. Mediation awareness was mainly attributed to the media and Internet (36 per cent Omnibus, 45 per cent CSJPS) followed fairly closely by family and friends (32 per cent Omnibus, 38 per cent CSJPS). Eleven per cent of Omnibus respondents and 10 per cent of CSJPS respondents indicated that a solicitor was the source of awareness of mediation in this general population, compared with just 3 per cent in both surveys who found out about it at the Citizens Advice Bureau or other advice agency. Among the divorced and separated sub-sample, however, a solicitor was the most likely way a party had first heard about mediation (39 per cent) as well as solicitor negotiation (49 per cent) and collaborative law (47 per cent) as shown in Table 4.1. Thus we found that solicitors were in fact critically important in raising FDR awareness and providing understanding of process options, including mediation, for those separating and divorcing. While family and friends also remained important sources of information for this group, the media and Internet fell substantially in importance, and advice agencies remained a fairly minor source of information.

We finally sought to determine from the Omnibus survey whether there had been any changes over time in levels of awareness of FDRs. We were only able to test this in relation to the divorced/separated sub-sample, whom we divided into those who had separated in three roughly equal time

**Table 4.1** For those in the separated/divorced sub-sample who had heard of each ADR: Where did you first hear of...?

| | *Mediation n=209* | *Solicitor negotiation n=152* | *Collaborative law n=69* |
|---|---|---|---|
| Solicitor | 39% | 49% | 47% |
| Family/friends | 28% | 24% | 17% |
| Media/Internet | 15% | 9% | 14% |
| Work/education/personal experience | 6% | 6% | 12% |
| CAB or other advice agency | 5% | 5% | 7% |
| Don't know | 5% | 6% | 3% |

periods: 1996–2000, 2001–05, and 2006–11. We expected there may have been patterns of increasing awareness of mediation over time, or changes in the relative levels of awareness of solicitor negotiations and mediation. In fact, neither of these predictions eventuated. Mediation maintained its position as the FDR with the highest level of awareness across the whole period, and those who had separated in 2001–05 reported higher levels of awareness of both mediation and solicitor negotiations than those who had separated in either the earlier or later time period. In the case of mediation awareness, there was a statistically significant difference between the three time periods. It is possible that the higher levels of awareness for the 2001–05 group may have been a result of the early push towards mediation after the introduction of s. 29 of the Family Law Act 1996 and the failure of the pilot projects associated with the 1996 Act (Walker et al. 2004), as discussed in Chapter 2.

### Interview findings

As indicated above, quite a few parties were not aware that solicitors engaged in out-of-court dispute resolution; they thought going to a solicitor meant going to court. People sought advice from a solicitor about getting a divorce and their legal position following separation, and were also advised about processes. The perceived naturalness of this avenue was well expressed by Ernest: 'if you are getting divorced or if there's the threat of divorce, then you get a solicitor. It's like night follows day.' Some people were well informed about the process of solicitor negotiations but others just went along with the solicitor's suggestions without viewing it as a distinct FDR. As discussed further in the following chapter, engaging in solicitor negotiations was thus a more passive process than the need to actively 'choose' mediation or collaborative law. In Dominic's words, 'I just appointed the solicitor and I knew that they would do what they had to do'. For parties who divorced early in our time period, such as Eve who separated in 1998, solicitor negotiation was effectively the only out-of-court dispute resolution option, since mediation 'wasn't really trendy then' and collaborative law did not yet exist. For those separating more recently, solicitor negotiations typically became the default option after they or their ex-partner declined mediation, or mediation was attempted and failed. Ruth, for example, rejected both mediation and collaborative law as not being suitable to her situation, which left solicitor negotiations as the only way forward while attempting to keep her case out of court.

As well as lack of recognition of solicitor negotiations as a distinct FDR, we also encountered in our interviews the conflation of mediation with relationship counselling. Patty described how her husband attended a

mediation session hoping for reconciliation, but when it became clear this was not her intention, refused to attend any further:

> And I do remember that at one point, before we really engaged lawyers, I suggested to my former husband that we try, you know, sitting down, talking with somebody, getting some sort of mediation done. He came, I think, to the first session and after that, as far as he was concerned, it was a waste of time and money because I was adamant that I wanted a divorce and he didn't see any point in us discussing any further with another person.

Sandra said of her ex-husband: 'I think he always saw it as a mediation that I wanted him to come home and he wasn't having it. So, any sort of the word "mediation", he just went, "No, no, no."' Only a small number of parties, however, reported this view.

Some of the parties we interviewed informed themselves about mediation, knew about it professionally, or had it recommended by colleagues, friends or family members. For example Mary had a friend who had been divorced six or seven years earlier and had used mediation, but had also run up very high legal costs. Mary bought books on divorce – including *The Which? Guide to Divorce* – and researched her options, deciding that she wanted to mediate as a way to save costs and avoid her friend's experience. Robert found out about mediation from online groups and the CAB. Leo was recommended to mediation by colleagues at his former workplace who had professional dispute resolution experience. Sandra had initial advice from a friend of her sister who was a mediator, and Dora was herself a commercial mediator and thought mediation would be the best way forward in sorting out her divorce. Seth and his ex-wife jointly decided to mediate on their own initiative, with Seth explaining: 'I am not sure where we got the idea of going to mediation but we obviously did some research or something and thought we'd try that'. There were also some instances of parties being referred to mediation following personal or relationship counselling. The great majority of party interviewees, however, were referred to mediation by a solicitor. Even if they had known of the existence of mediation beforehand, it was the solicitor's explanation which made the difference between awareness and understanding, between having heard of mediation and knowing enough about it to know whether it appealed to them and was a realistic option for their case.

As a relative newcomer in the FDR field, collaborative law was not well known. Again, most of the interviewees who used collaborative law had found out about it from a solicitor, usually because either they or their expartner happened to consult a solicitor who was collaboratively trained.

However, a higher proportion of this group had heard about and decided to use collaborative law from other sources. For example, Glenys had a friend who told her about the collaborative process and recommended her to a collaborative lawyer. Jane had a friend who was a law lecturer and who suggested the collaborative process. Jane and her ex-husband looked online at mediation, collaborative law and solicitor negotiations and jointly decided to try collaborative law. Similarly, Joshua and his ex-wife jointly researched processes to progress their divorce and both agreed on collaborative law. Clearly, some form of prior knowledge and understanding by the parties facilitated the collaborative process, but it is also likely that the relatively well-resourced people who used collaborative law also possessed the skills and resources to undertake successful research about their dispute resolution options.

This group were fairly unusual, however, and in fact, awareness of the full range of FDRs and feeling they had a real choice of options was a relatively rare experience in the party interview accounts. Both party and practitioner interviews suggested that practitioners often did not explain the full range of options to clients, leaving them unaware of other possible FDR pathways. For example Miranda did not recall her solicitor mentioning mediation and thought solicitor negotiations had been her only option, and Ernest, who separated from his wife in 2003, said, 'I didn't make an informed choice, I thought there was only one choice'. Even in 2010, Gwen's solicitor did not mention mediation and she was not aware of any process other than solicitor negotiations. And Pauline engaged in collaborative law without being aware of the other options, after her husband had initiated the process and persuaded her to participate:

> *Were you aware that there are other methods of resolving the dispute apart from collaborative law?*
>
> Erm, only in court. That was the only thing I was aware of.

In some situations, limited information about dispute resolution options was justified by the fact that in practical terms, collaborative law, for example, was beyond a party's means, or a view was formed that the matter was not suitable for mediation. But in others, the practitioner motivations were more centred on their own interests or preferences and many parties felt steered towards a particular FDR, potentially limiting their awareness and ultimate choice. It was clear that in a number of cases solicitors had referred legally aided parties directly for mediation (sometimes regardless of suitability) and would only attempt to negotiate, if at all, if mediation failed. Tilda, for instance, separated from her husband in 2012 and was referred to her solicitors by a domestic violence service, but the solicitors still sent her to mediation, saying it was the only way to get legal aid. Lynn,

who mediated on legal aid, was unaware of other alternatives to court and felt pushed into mediation by her solicitor: 'My solicitor said, "You have to go for mediation before you can go to court."'

As indicated in the previous chapter, most of the practitioners we interviewed were trained in two or more processes and were able to make privately funded clients aware of the full range of alternatives. However, some practitioners were more familiar than others with different alternatives, effectively limiting client choice to the practitioner's own comfort zone. Judy O'Leary, for example, admitted: 'to be honest, if I had better information available to me and I had a better working knowledge of the mediators that are around me that I felt comfortable in referring, then probably I would refer more'. Those who were not trained in collaborative law sometimes struggled to understand the point of it or to explain the process, and it was clear that this option would not be offered to their clients, either at all or in a way that presented it as an attractive option. Child-inclusive mediation was often an overlooked option which mediators themselves did not suggest despite 20 of the 31 mediators we interviewed being qualified to undertake it. They put this down to a lack of confidence around the benefits of the process for children and the difficulties of getting both parents' consent. But this had the knock-on effect of limiting awareness of this option and ultimately client choice, as only two of our 95 parties interviewed recalled being offered this option.

Conversely, some practitioners were passionate about a particular process and promoted it strongly. Glenys felt she was steered by her lawyer towards collaborative law when mediation later felt a better option for her. A number of practitioner interviewees felt that the potential of mediation to improve communication skills and provide a constructive arena for dispute resolution at far less cost than the alternatives meant that it was the right default process. In Lorna Denton's words, 'Any decent family lawyer would always refer a client to mediation right from the outset if that client is appropriate'. Within the MIAM process, many mediators understood their role as 'selling' mediation to clients. Laura Gurney indicated that although she would always express the pros and cons of different FDRs, she felt she had a duty to sell mediation, and Sally Fenton went so far as to confide that she felt she had failed when after a MIAM a client did not choose mediation. The feeling of being subjected to a sales pitch in MIAMs did not go unnoticed by some of the parties we interviewed. For example, Helen said, 'You get bombarded with mediation companies that just want to jump on the bandwagon and get you to mediate'.

A further barrier to the provision of real options and choices for clients with family disputes is the inability of parties to absorb all the information offered to them while they are undergoing the emotional trauma of

recent relationship breakdown. Policies seeking to reduce and redirect the support available to those experiencing separation and divorce are in danger of overlooking this point. Glenys, for example, was in the privileged position of being able to pay for her choice of FDR. But when asked if the FDR options were fully explained by her lawyer to allow her an informed choice, she hesitated, confessing: 'Um...Um...I'm not sure. He [solicitor] could have explained it incredibly well, but at that point in time, it's really hard to…to know what the hell's [*laughter*] going on'.

In summary, the party and practitioner interviews confirm and add detail to the survey findings. Since interviewees had experience of divorce or separation, the fact that solicitors played such a prominent role in making them aware of each of the dispute resolution options is consistent with the Omnibus survey findings. In particular, the interviews reinforce the importance of solicitors in referring parties to mediation, often as a result of legal aid requirements, but this was not the only motivation. Many solicitors were personally committed to the value of mediation and were just as willing to refer privately funded clients. The interviews also illustrated the important difference between awareness and understanding of FDR processes. In order to make an informed choice, parties need to have a good understanding of the various processes and the differences between them. Again, even if parties may have had some background awareness of say, mediation or collaborative law, solicitors played a crucial role in converting that awareness into understanding and enabling parties to make informed decisions. This was not a role either ascribed to or assumed by mediators. Finally, it seemed to be fairly rare for parties to be fully informed about all of the dispute resolution options available to them even if they did consult a solicitor. Legally aided parties tended to receive the least amount of information, being routinely referred to mediation and defaulting to solicitor negotiations if mediation failed or proved to be unsuitable. Privately funded clients were given more options, but might again not be fully informed about collaborative law, or might receive information heavily slanted towards one option or another. Individuals' understanding of out-of-court dispute resolution was thus a contingent product of what they had picked up from the media or Internet, the experiences and knowledge of their family members and friends, the particular practitioner (whether solicitor or mediator) they happened to consult at the point of separation and their capacity to take in information at a time of considerable emotional turmoil.

## The trials and tribulations of family mediation after LASPO

Since the completion of our study and as discussed in Chapter 2, government policy following the Family Justice Review and reinforced by the

LASPO Act has had the specific aim of removing as many private family disputes from the court arena as possible and of making mediation the default FDR, not only for all those reliant on public funding to settle family disputes but also for privately paying couples. Those requiring legal aid can only choose mediation to resolve their dispute unless they litigate in person at court or manage to pay for legal advice or representation. Anyone else who wishes to issue court proceedings for a private family law matter must also now first attend a MIAM and be unsuitable for or unable to mediate their dispute. Our research and subsequent developments suggest that this policy ignores inconvenient facts about how people react to relationship breakdown, the sources of information available to them and the consequent support they feel they need to resolve disputes.

As we have seen in Chapter 2, the LASPO Act effectively withdrew legal aid for court proceedings and solicitor assistance out of court in private family law matters with effect from April 2013, while retaining the availability of legal aid for family mediation. The intention was to steer parties away from contested disputes involving lawyers and courts towards consensual resolutions with the help of mediators. Making parties responsible for the conduct and resolution of their own family law disputes was to be immediate, and the role of lawyers was seen as completely dispensable for those who could not afford to pay. To replace people's reliance on lawyers, some self-help tools were devised – notably the Sorting out Separation Web App, launched by the Department for Work and Pensions in November 2012. However, this was very quickly judged by its own 2013 evaluation (undertaken with 18 public focus groups) to be woefully inadequate in the blunt generic information it could offer (Connors and Thomas 2014). A raft of other ideas of how to fill what became known as 'the LASPO gap' (Hunter 2014) were then announced ad hoc. Government funding of £6.5 million was announced by the Department for Work and Pensions on 10 April 2013 to provide a number of projects around the country to be delivered through a range of voluntary sector agencies for innovative support (but not legal advice) for separating parents. At the same time, preparations were made for the expected significant increase in mediation. The Legal Aid Agency budgeted for a £10 million annual increase in spending on mediation after the introduction of LASPO. Annual spending was expected to increase from around £14 million to around £25 million, and the number of MIAMs was expected to increase by 9,000 per year (Family Mediation Task Force 2014: 8; National Audit Office 2014: 4).

What actually happened was precisely the opposite, as shown in Figure 4.2. The number of publicly funded MIAMs plummeted from 30,662 in 2012–13 to 13,354 in 2013–14, a drop of 56 per cent (Legal Aid Agency 2015: 23; National Audit Office 2014: 4). The number of publicly funded

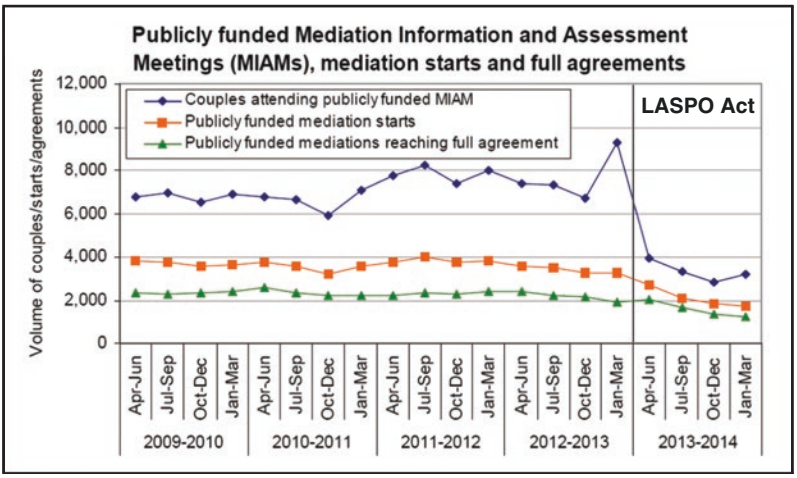


**Figure 4.2** Publicly funded MIAMs, mediation starts and full agreements reached

Source: Family Mediation Task Force (2014) p.8, reproduced in accordance with the Open Government Licence v3.0.

mediation starts also fell, although not as dramatically, from 13,609 in 2012–13 to 8438 in 2013–14, a drop of 38 per cent (Legal Aid Agency 2015: 24). Public spending on mediation was further reduced due to the removal of payments to mediation services to contact respondents (Family Mediation Task Force 2014: 8). The National Audit Office estimated that the Legal Aid Agency underspent on mediation by £20 million in 2013–14 (National Audit Office 2014: 13). Some mediation services – especially not-for-profit services, including the two oldest and largest services in Bristol – went out of business (House of Commons Justice Committee 2015: 57; Parkinson 2015).

The explanation for this 'unintended consequence' of the LASPO Act was fairly readily apparent. By taking solicitors out of the picture for legally aided clients, the government had cut off the crucial pipeline into mediation. As our research indicated, parties were far more likely to be referred to mediation by a solicitor than to initiate mediation of their own accord. And while some of these referrals were of privately funded clients unaffected by the LASPO Act, a substantial proportion were of legally aided clients as required by the Legal Aid Funding Code. Once this referral source was removed, mediation services found themselves bereft of clients. The House of Commons Justice Committee in its report on the impact of changes to civil legal aid under the LASPO Act noted evidence that in the 12 months before the Act, solicitors had made 62,390 referrals for mediation information and assessment. But the Act had substantially curtailed the number of referrals, as well as the information about mediation and encouragement to mediate provided by

solicitors generally (House of Commons Justice Committee 2015: 54–5). A study conducted at around the same time as the LASPO reforms found that private clients were somewhat more likely to self-refer to mediation than to be referred by a solicitor (Hamlyn et al. 2015: 21), reinforcing the fact that the drop in mediation was a result of the cuts to legal aid and consequent drop in solicitor referrals of legally aided clients. Added to this, the numbers of litigants in person taking their family law disputes to court rose sharply. Between the first quarter of 2013 and the first quarter of 2014 the number of private family law cases in which both parties were unrepresented increased from 11 to 26 per cent (Ministry of Justice 2014). In short, rather than going to mediation, many of the people affected by the legal aid cuts were choosing instead to go to court as litigants in person.

The government was now faced with the need to take urgent steps to revive the fortunes of family mediation. A serious national attempt at awareness raising was begun, although the fragmented mediation sector perhaps made such efforts seem more scattergun than co-ordinated. In December 2013, the Ministry of Justice launched a campaign on its website and produced a more user-friendly leaflet available in hard copy and online to promote the advantages of mediation. This was followed by high visibility media campaigns by the different mediation organisations at different times, such as the annual Family Dispute Resolution week organised by Resolution and a National Family Dispute Resolution week led by NFM. Again, the patchwork nature of the mediation sector in England and Wales with its different approaches to mediation could be identified as a hindrance to getting a consistent message across about the nature of mediation, if not to awareness of mediation per se. It was against this background that the McEldowney Report (2012) advocated strengthening the role of the Family Mediation Council, as discussed in Chapter 2.

The government also established a Family Mediation Task Force which reported in June 2014. The Task Force made a series of recommendations including a sustained low-level awareness campaign, free MIAMs for all for a one-year period, the funding of the first mediation session for both parties where only one party was legally aided and improved training for child-inclusive mediation. Whilst the government response did agree to fund the first mediation session for both parties for a limited period, the other recommendations were not responded to in full and any plans by the then Minister, Simon Hughes MP, to take other matters forward, ultimately fell victim to the fall of the Coalition government in the 2015 general election. Most recently to the time of writing, a concerted effort by the Ministry of Justice alongside the FMC was made to co-ordinate and plan activities for Family Mediation Week in January 2016, when extensive publicity was given to mediation, including the launch of re-designed and

more targeted Ministry of Justice material advertising 'Help for Separated Families'. This had been developed with a range of stakeholders and public feedback obtained before it was rolled out by all family mediation providers affiliated to the Family Mediation Council. The group of most concern were those eligible for legal aid.

It has become apparent, however, that these intensified attempts to reverse the decline in the uptake of mediation and the increase in litigants in person have had little effect. The most recent statistics on publicly funded mediation (Legal Aid Agency 2016a: 28–9) indicate that the number of MIAMs fell 14 per cent over the first quarter of 2016 compared to the same quarter in 2015 and appear to be stabilising, but only at around half of pre-LASPO Act levels. There are signs that the numbers of mediation starts are improving but these and full agreements reached remain at just 60 per cent of pre-LASPO Act levels. An interview study carried out by Ipsos MORI in October 2014-February 2015 (Pereira et al. 2015: 43–53) found that people with private family law disputes strongly preferred to avoid going to court but did not perceive mediation as a viable point of entry into the family justice system. Following relationship breakdown, people identified needs for knowledge of both procedural options and their legal rights, and solicitors continued to be considered the most dependable and accessible source of advice on both of these issues. People with child-related disputes took advantage of a free hour's legal advice provided by solicitors firms, consulted Citizens Advice, or searched for information online. However, those who searched online found it difficult to determine the authority and reliability of the wealth of information available. Those with financial disputes felt they needed legal representation to deal with the complexity of their financial matters and to ensure a fair outcome.

## Conclusion

The policy challenge to make mediation a truly mainstream FDR remains very much unfulfilled, and indeed has been substantially set back by the LASPO Act. Our research shows that lack of general awareness was not the principal reason for the low uptake of mediation pre-LASPO. Developments post-LASPO have also shown that whilst solicitors may not have been the perfect gateway into mediation, they did support rather than undermine mediation and were a more effective conduit than leaving people to their own devices. The effect of removing the option of lawyers' role at the outset of relationship breakdown from those who cannot afford to pay was that people did not find their way to mediation at all.

Neither can the advice gap left by LASPO be filled by media campaigns promoting mediation, online information or compulsory MIAMs prior

to court proceedings. Our research suggests that media campaigns can be effective to raise general public awareness, but have less impact as a source of information for those experiencing divorce or separation. The plethora of information now available online is easy to find but difficult to differentiate in terms of its authority and reliability. The fact remains that solicitors are a trusted brand at the point of relationship breakdown, while mediation simply does not provide what many people want. As Chapters 5 and 6 will show, the inherent trauma and conflict of interests that is routinely felt and experienced by a significant tranche of the separating and divorcing population makes mediation less attractive than lawyer-led partisan support for many, at least at the initial stages when anger, shock, guilt and grief are common emotions. This emotional state makes a policy strategy of autonomy and responsibilisation around private family law disputes high risk. The experience following the LASPO Act clearly exposes several of the flawed assumptions – about lawyers, mediation and individual autonomy – underpinning neoliberal family law policies (Hunter 2003). Meanwhile the ideal of fully informed choices for all those experiencing family disputes remains further away than ever, available to only a minority lucky enough to encounter a genuinely open-minded practitioner, and with the means to pay.

# 5
# Entering Family Dispute Resolution

## Introduction

Chapter 4 showed that for people experiencing relationship breakdown, their awareness and understanding of dispute resolution options was often serendipitous, in terms of what information they discovered before making a decision to approach a professional and which professional they consulted. In this chapter we examine the process of choosing to attempt one or other form of FDR, drawing on data from the national Omnibus survey and from interviews with parties and practitioners. These, taken together, enable a clearer picture to be drawn of the FDR routes offered and chosen and the drivers behind these choices. In particular, and in the bigger frame of the study, we were concerned to explore the ways in which different parties and cases were (or were not) being matched to *appropriate* dispute resolution processes.

One key issue for the study was to examine whether those who would not typically be considered suitable for mediation, especially in cases involving domestic violence, were effectively and consistently screened out and referred on to a more appropriate FDR including, if necessary, to court. Given the changes that had been put in place by all mediation organisations between 1996 and 2013 to improve mediator training and screening of domestic violence issues (Parkinson 2011b) following earlier research findings which had criticised the at best passive approach to domestic violence disclosure (Hester et al. 1997), we anticipated finding fewer unsuitable cases filtering through to mediation. This should have been particularly true for those who had divorced or separated more recently. Yet, as noted in Chapter 2, we were also aware that for legally aided clients at least, domestic violence screening was allocated an extremely limited amount of time within the MIAM process and had been recently critcised for employing simplistic and ineffective questions unlikely consistently to expose violent situations or dangerously uneven power dynamics (Morris 2013: 453). Added to this, different mediation organisations had traditionally held different views on which types of cases could and should be

mediated (McEldowney 2012: para 18) and earlier research had also drawn attention to the way that the underlying tenets of cooperative behaviour during mediation risked marginalising violence as an issue (Greatbatch and Dingwall 1999; Piper and Kaganas 1997). It was thus important to examine how much had changed or whether earlier criticisms continued to be salient.

## Choosing an FDR process

In terms of the national picture and as noted in Chapter 4, the high number of people who did not explicitly seek any form of FDR on relationship breakdown was particularly striking. Indeed, the most popular choice people made was to make no FDR choice at all. As many as 47 per cent of people in the Omnibus survey who had divorced or separated between 1996 and 2011 sought no legal advice about their situation, with less than 1 per cent going directly to mediation. Thus almost half of all couples separating over this period either felt able to sort things out for themselves without recourse to any FDR process, or otherwise did not attempt to resolve any issues beyond (where relevant) obtaining a legal divorce. The preference and ability of couples to agree matters themselves in a majority of cases has also been reflected in other recent research findings. In Hitchings et al.'s court-based study of financial consent orders, over half the couples in their sample of consent orders (54 per cent) reported 'informal discussions' to be their method for achieving an agreement (2013: 36–7).

Turning to those who did seek advice or support on relationship breakdown, we found that almost two thirds (65 per cent) of those in the Omnibus survey were offered one or more FDR option. Our data also showed, however, that the offer of a lawyer-led process was more likely to be taken up than the offer of mediation. Whilst roughly similar proportions (around 30 per cent) of those who had divorced or separated since 1996 were offered mediation and solicitor negotiation, proportionately far fewer took up the offer of mediation (38 per cent) than those who took up solicitor negotiation (89 per cent). Given the different requirements and restrictions within the three FDR options, however, these statistics by themselves do not tell the whole story. Choices whether to accept or reject an FDR offered may be limited, for example, by affordability or a partner's reluctance to engage with a process. We found that the 'choice' of FDR process, whilst sometimes very positive, was often in reality not unconstrained. Thus, rather than a choice being made as to which process was most suitable for the case and the parties involved, in practice, as discussed in the sections below, for some it was a question of finding any process which would enable a resolution of the dispute.

**Exercising autonomy – positive choice**

The most common reason given in the Omnibus survey for not pursuing an FDR was a positive one, where half of our respondents offered solicitor negotiation and 21 per cent of those offered mediation preferred to settle matters without outside help.

Aside from this group, there were also many parties who had freely chosen their FDR for clear reasons linked to their assessment of what would work best for them; and in our party interviews, such people were typically the most satisfied with their choice of process. Thus Dora who had worked as a commercial mediator was very happy with her choice of family mediation as she was already a strong believer in its virtues. Geraldine said of mediation that: 'It seemed to be quite a good fit because we are quite amicable...and [it] seemed to be perhaps a good thing for us to try and also to have a third party'. Glenys, who was initially steered towards collaborative law but later used, and preferred, mediation, thought that the process of mediation was better than 'going to war'. David had similarly gone to mediation against his solicitor's advice but had a very positive experience and wished he had chosen it sooner.

In terms of why people made positive choices to use a particular FDR, the interviews yielded many reasons for taking one track rather than another. Many people were attracted to one process, feeling it best met their needs. Some mentioned speed or cost as a positive reason for choosing mediation, or as a reason for rejecting solicitor negotiation. Seth, for example, explained why solicitor negotiation was rejected for a combination of reasons:

> We wanted to try and do it if possible without too much animosity and once you get solicitors involved...at the time we thought…it's like a war really.…So we were trying to do it without solicitors and possibly it was a cost thing as well. Once you get solicitors involved we just felt it was going to be writing cheques to solicitors and why should we go and do that if we can go and sort something out ourselves?

The low cost of mediation was seen as a positive by many choosing this FDR. Raymond, for example, was very clearly guided by cost. Asked if he felt well informed before making his choice, his positive response also reveals the sense of greater agency good information brings to such a decision:

> Yes…I suspect like most men entering this situation, one of the burning questions in my mind going in there was, 'How much is this going to cost me?' And she kind of laid out for me that 'Right, well you know, if it goes easily then it could be simply a

> case of this and if it is going to be really difficult on both fronts then we could be looking at that'.

Whilst some parties, like Seth, wanted to keep solicitors out of the process, others wanted the support of a solicitor. Freda, who had been in a classic homemaker-breadwinner marriage with now grown-up children, actively wanted the support of a solicitor to sort out her financial claim. She lacked confidence and welcomed the buffer between her and her ex-husband. Alan, who had initially been attracted to the empowerment of mediation, was appreciative of some of the different strengths solicitor negotiation had to offer. 'Well it was direct and to the point, it was almost sort of like an adult to child rather than adult to adult and that was quite nice. It as "well, these are your options, this is what you can do and this is what will be the result".' Similarly, David was attracted to the partisan support offered by solicitor negotiation: 'I thought it was useful to have the one-on-one time of having a lawyer who was acting for yourself that you could talk candidly to.' A joint decision was then made to go to mediation, but he chose to continue with the support of the lawyer, a combination which he felt gave him confidence. He explained, 'and thereafter, appointing a joint mediator.... If there is something which you are uncertain about which is suggested by the mediator and you can actually go back to your solicitor, just check back in with the person who is mostly on your side.'

Collaborative law was most often a positive choice. Jenny was very glad she discovered it: 'The fact that it existed was the most important thing and that gave me hope in human nature, the fact that someone had thought of collaborative rather than adversarial'. Sebastian liked the incentives it offered the lawyers to settle as well as speed and relative value for money. He explained:

> I liked the concept...what I bought into was the fact that it would be speedy if it was going to work…and by modern-day descriptions it would be considered to be a very cost-effective way of doing it. But I [also] bought into it because I knew if it didn't work the lawyers both had to take a step back and they couldn't carry on milking the deal. So I could see the financial imperative for the lawyers to actually get it settled, and that was the unique selling point for me.

Like solicitor negotiations, collaborative law also offered the benefit of legal support. Explaining why she opted for non-adversarial collaborative law rather than mediation, Jane identified her wish for the security of legal advice as key: 'I wanted the knowledge. I wanted to be safer in the knowledge that what I was doing wasn't going to cause any problems for me later

on down the line'. Similarly Tracy, whilst not wanting to be adversarial, needed the support: 'The reason I wanted to do collaborative rather than mediation...was because I thought I wanted someone in my corner...and I know the lawyers obviously work together, but at the same time you still have someone, essentially, there for you'. Marcus's reasons for choosing collaborative law over mediation are illustrative:

> I think mediation would have been difficult as I felt I needed legal representation as there was a lot of money involved and quite a complicated financial setup and I needed some advice in dealing with that, sort of like irrelevant of where I was at emotionally. And because I was emotionally still in quite a weak space, I didn't feel in a strong enough position to negotiate on my own behalf with just a mediator, say. I needed someone as I was distraught and struggling with digesting all the information, as my head was spinning with what was going on emotionally, and so yes, I felt that I needed someone with me to guide me through it.

In general, the choice to attempt collaborative law was determined by awareness, access to two collaboratively trained solicitors, and affordability. This combination of factors was difficult to achieve, hence the relatively low numbers undertaking collaborative law. Those who were given this option typically made a well-informed choice, based on their desire for an amicable process and on having significant assets to discuss, and sometimes the perceived benefit of having their own lawyer involved. Thus unlike the other two processes, the decision to use collaborative law was always an active choice for at least one party (if not for both parties as discussed below).

Some people did also exercise their autonomy to reject unsuitable FDRs in the context of their personal situation. Such 'positive' reasons for rejection of mediation included a history or fear of violence or abuse, as indicated by 17 per cent of our nationally representative sample. This underlines the importance of effective domestic violence screening to facilitate appropriate choice, as will be developed below.

### Limited autonomy – constrained choice

We found clear evidence from our interviews with parties and practitioners that many decisions were instances of constrained choice rather than positive acceptances or rejections of an FDR. Constraints on choice came from many directions and could be founded on personal, situational or structural reasons. They could come from the other party who pushed or refused a particular FDR; from practitioners, who might steer a party

towards or away from a particular FDR; from affordability of the desired FDR or the legal aid situation of one or both parties, which limited choice or required certain steps to be taken. Sometimes there was a court-imposed constraint, where even after proceedings had been issued, the matter could be adjourned to attempt out-of-court FDR. We also identified different constraints on choice for each FDR, although these sometimes overlapped.

*Lawyer-led FDRs*

Affordability was a key constraining issue preventing entry for many into both solicitor negotiations and collaborative law. Given the high cost of collaborative law and the unavailability of legal aid for it, most people would not even be offered this as a choice by their practitioner. Whilst legal aid was still available for solicitor negotiation when this study was undertaken, with financial eligibility limits set low, people who were not eligible for legal aid would often not be able to afford to engage a solicitor for the whole process and this was reflected in our findings. In the national Omnibus survey, after the wish to settle without outside help, lack of finance was the next most common reason for not taking up an FDR. This was cited by almost a quarter of respondents (24 per cent) to explain rejecting solicitor negotiation, even at a time when legal aid was available. The cost of legal advice at a moment in life when a couple are having to establish two homes following relationship breakdown is a clear practical constraint on the lawyer-led FDR choices (and particularly that of collaborative law), and is one reason why the lower cost of (successful) mediation is an important part of its marketing. Interestingly, only a small number of those offered solicitor negotiation (5 per cent) gave their intention to opt for a different FDR process as their reason for not pursuing it. We did not therefore find any large-scale rejection of solicitor negotiation by those who were attracted to the virtues of mediation or collaborative law as a process, although as discussed above there were examples of this in our party interviews.

In contrast, however, and as discussed below, many of those who did choose solicitor negotiation did so because their partner refused to engage in mediation, and thus they felt that solicitor negotiation was the FDR of last resort rather than their own positive choice. For example Richard, whose partner refused to mediate, was left with one default option. Rather than making what he felt was the most appropriate choice for his situation, solicitor negotiation 'was the only option I was left with'. Interestingly, collaborative law and mediation both suffered from suspicion and potential rejection where these FDRs were suggested by an ex-partner, with distrust as to the other party's motivations leading to lower entry into these processes.

On the other hand, two of the nine parties interviewed who had used collaborative law described feeling coerced into using that process because it had been chosen by their ex-partner. This was Pauline's position. She explained:

> He then came to me and said, 'You need to get a solicitor, blah-blah-blah,' told me about the collaborative process and was pushing me, and I said, 'But [Husband], we can sit down together and sort most of it out.' He said, 'No, we can't, no we can't.' He wasn't having it. He would not listen to me at all. He would not bend in any way about that. He said, 'No, we have to do the collaborative process,' and that was that.
>
> *Okay. So you didn't have a chance to…?*
>
> I didn't have a choice.

In line with Pauline's experience, within our practitioner interviews some mediators and collaborative lawyers noted the phenomenon of dominant men choosing collaborative law as they hoped to secure a better outcome. This was identified as an important issue in screening into and out of the process, and also had ramifications for the fairness of the outcomes achieved, as discussed in Chapter 8.

*Mediation*

People's reasons for not taking up mediation when it was offered were more varied than for solicitor negotiation in the national Omnibus survey. Here, lack of finances was only cited by a very few (3 per cent) whilst a positive preference for a lawyer was also low, at 7 per cent. However, we found much evidence of constrained choice around mediation. There were two facets to this. First there were those who wanted to mediate but could not due to refusal by their former partner, usually resulting in a constrained choice to use a solicitor. Then there were those who did not want to choose mediation, but felt they had to do so in order to get legal aid for their case.

The most commonly given reasons for rejection of mediation in the Omnibus survey related to the behaviour of ex-partners. In addition to those rejecting for reasons of domestic violence, 20 per cent indicated that they did not (indeed could not) pursue mediation because of their ex-partner's refusal to participate. Although mediation has the advantage of being generally lower cost than lawyer-led FDRs, it is clearly not a realisable option for those whose partners will not agree to participate. This is true however suitable the case in other ways and notwithstanding how keen one party is to mediate. For example, Deanna had made the suggestion directly to her ex-partner, saying 'I did ask him to sort of go to mediation, but he wouldn't' (see also Maclean and Eekelaar 2016: 98–100).

The inability to talk to an ex-partner was another important reason why mediation was rejected. Nineteen per cent of our Omnibus survey sample felt that communication between themselves and the other party was so poor that they saw no point in even trying it. Whilst mediation aims to improve party communication, the baseline of existing communication is an important indicator of how open to this FDR people may be, with many feeling it would be futile or would make matters worse to try. Lack of ability to communicate operates as a constraint on choosing mediation (and sometimes collaborative law). Jason, who chose solicitor negotiation, described this: '[M]y problem was that me and my ex-wife really didn't get on at all so we couldn't be in the same room with each other. That was the scenario, so it was very awkward to, you know for people to mediate between us because there was a lot of bitterness there'. Wendy had tried to persuade her ex-partner to mediate, and had gone to the intake meeting alone. However, her ex-partner could not be moved:

> When I first went to the mediators he was saying to me, 'I'm not going to mediation with you. I f-ing hate you. I'm not sitting in the same room as you. I this, that and the other. I just want to go to court because then there will be no doubt about anything.' And I said, 'Well, you can't just go to court. You have to go to mediation first, and this is the quickest way to do it because there's a six-month waiting list to have a case like ours heard in court, plus you don't have to be in the same room as me.' I wanted us both to go because I thought it would have been really good, but you can only do mediation properly if both parties want to do it.

In fact, we found this kind of intransigence was quite common where mediation was suggested by one partner. David described this as follows:

> Before attending, erm, I was...well, being completely blunt and honest, erm, because the recommendation of the mediator had come from my ex-wife's solicitor, I did have a lot of suspicion that I was being railroaded into a position that I didn't want. And I did do fairly extensive research into the mediator in question to try to see if I could find any connections with the firm, which I was unable to do so. But I did have my reservations, erm, but in the absence of any recommendations, erm, I thought well, let's give it a go.

The suggestion of mediation by one party seemed to have the effect of making their ex immediately suspicious of the process in some higher conflict cases. In contrast, in other cases the suggestion by a neutral third party

such as a family friend or by both solicitors to try mediation could work better and led to an informed choice to try it, as Kathy found: 'It was neither of us that chose it. It were a method that solicitors tried first, so we both kind of went open-minded as to what might happen'.

Some parties reported feeling pressured into mediation by their ex-partner. A choice to mediate under pressure from a partner more often made mediation feel unevenly balanced, and perhaps affected how neutral the mediator was perceived to be, as Laura found: 'My ex-partner opted for mediation. I felt I had no real choice but to go and then felt the (male) mediator was very pro-husband.' In Rebecca's case, her 'choice' of FDR was clearly constrained by both her partner and her poor emotional state: 'Mediation was presented as compulsory by my partner, but I went to see the mediator and a solicitor as well. I wasn't ready at the time. I was still in shock… In hindsight, mediation was a good thing, but it was forced on me too early.'

Lack of emotional readiness was, we concluded, a major reason emerging from our study for rejecting mediation, sometimes operating as a constraint on choice where it was recognised by a party. Some just felt too raw at this stage to cope. Tracey explained this: 'I said I didn't want to go for mediation at that point because I just didn't feel that I could do it.... I didn't really feel strong enough'. Iris, on the other hand, did try mediation, but she recognised retrospectively that she was not in the right emotional frame to cope with this difficult process. She identified a lack of support where one or both parties are not emotionally ready, which needs to be addressed if the process is to work for people in this not uncommon state. As she explains, 'At the initial part of the breakdown, you know, there was a lot of emotions going. There was a lot of things that are going on at that time. I don't feel there's enough support, enough of the right…or enough of an alternative support'. The issue of emotional readiness is not something commonly taken into account or indeed even recognised in the MIAM process as a potential barrier to successful mediation.

Overall, the fact that voluntary mediation by its very nature requires the active and co-ordinated cooperation of both parties in dispute exercising their FDR choice in the same direction does make it statistically much more prone to rejection than solicitor negotiation, where choice is unilateral rather than mutual. While the same might be said of collaborative law, there is more support to build trust and confidence in the process and to mitigate emotional frailties, which can act as impediments to choosing mediation.

Despite the fact that the parties we interviewed had been dealing with family disputes in the time period before LASPO, many felt and indeed were constrained to try mediation due to legal aid requirements. Although

technically legally aided clients were required only to attend a session with a mediator to receive information about mediation, the message a number of clients seemed to have received from their solicitors was that mediation itself was a requirement. For example Lynn, who divorced in 2007 and who was legally aided, felt pressure from her solicitor to mediate rather than just attend an intake session. As she recalled, 'My solicitor said, "You have to go for mediation before you can go to court".' Sonia was frustrated by the need to 'choose' mediation in 2012 as part of the requirements for receiving legal aid:

> Basically, my solicitor said she couldn't really do much for me because of legal aid. I couldn't really put forward arguments or anything and the best bet was to go to mediation…. We were being pushed into it, regardless…. I didn't feel I had a choice, it was either mediation or…I felt it was my only real choice to kind of get things sorted, especially to do with my child. Because I kind of basically got told in terms of solicitor's time, it was too expensive; there wasn't enough legal aid to do it.

The advent of the Pre-Application Protocol in April 2011 also put pressure on parties to mediate prior to commencing court proceedings, although Gloria reported feeling such pressure as a result of local court policies as early as 2010:

> I was told I couldn't go to court until I'd been to mediation so I said, 'Well, what's the point? I know he's not going to agree to anything'. And they said, 'Well, unfortunately in [this city] they won't take a case to court until you've been to mediation'. So you're not given a choice, really.

Stan felt forced into mediation after the advent of the Pre-Application Protocol and felt frustrated as a previous attempt at mediation some time before had failed:

> At the time it was not really a choice, because in order for us to proceed to court we had to go through mediation, otherwise we would have just got to court and been told to go to mediation, as we're wasting the judge's time or something without having mediation beforehand. So it was never a choice; it was always part of the process put in to get to court.

Simon separated just after the Pre-Application Protocol came into force, and understood he was required to mediate rather than just attend a MIAM. On his account, 'It was…is apparently a legal requirement that before a matter progresses to court one needs to indicate willingness to go through a

process of mediation.' Porter received the same message from his Internet searching:

> I researched [online] the whole process of getting regular unsupervised access to my children and part of the process if you go through the legal route or the judicial route is mediation…
>
> *… And why did you choose mediation rather than, say, go to a solicitor?*
>
> Because it had to be done anyway from what I…from my research.

In a handful of cases, parties reported that they had been ordered to go to mediation by the court. For example Iris, whose ex-husband had been abusive in the past, was in 2010 nonetheless ordered by the court to attend mediation. Dominic similarly felt compelled to try mediation:

> *So who suggested the mediation?*
>
> Well the court did. When we went back to court the judge said 'Well, I am not interested in tit for tat. What are we going to do with the children? Dad said a week about, Mum said no as Mum wants to reduce contact. So what are we going to do?' and that's how mediation came about.

### Mitigating constraint – the importance of informed choice

To some extent, better information given to parties about their options may mitigate some (although by no means all) aspects of constraints on choice. We therefore explored practitioner practices around offering FDR choice alongside party accounts. Overall, as discussed in Chapter 4, we found that while some, and in particular the 'hybrid' practitioners, made sure 'an options conversation is at the heart of that first meeting' (Richard Benson), the full range of options were not equally offered to many participants and certainly not to those on legal aid. Different approaches were taken by practitioners to explaining FDR choices, with written information on options, sometimes in advance, being offered but not necessarily followed up in equal measure. Some practitioners stressed the importance of choosing the appropriate DR process, taking the view articulated by David Leighton that 'the answer comes from being in the right process', which might involve tailoring a bespoke process for the particular needs of the (usually well-resourced) client. By contrast, some mediators admitted to in effect screening in or out of mediation at MIAMs, rather than discussing the full range of options. Sally Fenton described it as:

> It's up to the client to decide and usually they decide on mediation, because the huge thing is that they are there with you, and that personal contact is the thing. So in a sense, the fact that you are raising the fact that other forms of ADR exist, they are there with you, you are a mediator, they are in mediation. It's like you have to fail for them to go somewhere else, you know? You have got them. And yeah, I am being quite honest about this, it is not an equal amount of information. It's not being presented in a neutral fashion in that they are already within your building, your mediation, they have had your background information and they have made personal contact with you. So if they go off and say, 'No I am going to try collaborative', well actually, you have kind of failed to, you know, get them into mediation. But it may be that that's what they want. It is the client's decision.

Clear explanations by practitioners to clients could, we found, mitigate the feelings of frustration around constrained choice in some situations. Where people felt informed, it improved their agency even if not their ability to freely choose and could lead to greater feelings of appropriateness and satisfaction. The information provided could also be key to how well prepared people felt they were for the process, again reconciling them more effectively to an FDR 'choice'. For example in 2002, Charlotte had not heard of mediation but took her solicitor's advice that their case was appropriate as it was not high conflict and found the experience positive. She remembers, 'I think she...she was very pro-mediation. Um. So she kind of, um, described it in favourable terms.... So it was...it was very clearly explained at the time, even though I hadn't heard of it.' Norah also felt that she had been given enough information to make an informed choice:

> Yes, definitely. They were very good – they checked sort of every step of the way that we were happy with it, you know, and what the limitations were, just to make sure that we had no false expectations, and very much emphasised that it was to help us sort things out.

However, some parties reported that the processes were not clearly explained with the full range of options and implications. Yvette, who went through solicitor negotiation, said that 'I feel like it was taken out of my hands', which is not what she was expecting. Nareen was not convinced her solicitor explained all the options fully:

> I mean my solicitor did say that there was mediation, but mediation was quickly ruled out because of the violence and then

> there was going to court. And I don't actually think my solicitor really mentioned much of the other options to be honest because I think he wanted my case and I think it was...he said things that would probably encourage me to do the dealings the way I did the dealings, and he didn't really tell me much else about other options I did have.

Thus, even though the advice given to Nareen may have been perfectly appropriate, she did not feel this was her choice, nor did she feel convinced she was being steered towards an appropriate FDR.

Nevertheless, as noted in Chapter 4, practitioner efforts to provide informed choice might not be recognised or could not be absorbed due to lack of emotional readiness. Glenys and Rebecca both recognised their emotional state affected how well informed they were able to become, however well the choices were explained. Several people talked about how they felt confused by the information and choices available at this emotional time, for example Pauline: 'And then, you know…I didn't know who to go to, what to do really, and then he started talking about the collaborative thing. Yeah, at the time I felt like I was being completely bamboozled…'

Overall, while some people in our interviews felt able to exercise an autonomous choice to use (or reject) a particular FDR, most experienced constraints on their autonomy due to limited finances and the requirements associated with legal aid, the attitude of the other party, or their own or the other party's lack of emotional readiness to negotiate. Clear explanations of the available options and what they involved could create a sense of agency, and conversely, lack of such explanations and a feeling of being pushed into an FDR created frustrations and dissatisfaction with the process. Even so, the emotional stresses of separation meant that some people were unable to absorb the information given to them and needed time before they could even begin to think about dispute resolution. Following the LASPO Act, not only are people's options more constrained if they are reliant on legal aid, their access to sources of information is also more limited since an initial consultation with a solicitor is no longer available. Attempting to piece together information from the Internet and/or attending a MIAM are unlikely to engender feelings of agency or address problems of emotional unreadiness.

## Screening for domestic violence

Mediation (and to a lesser extent collaborative law) are premised on both parties being capable of negotiating with each other face to face. In relationships characterised by domestic violence or abuse, this premise does

not hold. Contemporary understandings of domestic violence extend beyond physical and sexual violence to encompass a range of abusive behaviours – including emotional abuse, financial abuse, coercion, intimidation and threats, property damage, isolation, surveillance and stalking – designed to exercise power and control over the target (Morris 2009; Pence and Paymar 1993; Stark 2009).[1] When one party is fearful of, intimidated by or controlled by the other, their ability to advocate for their own needs and interests in negotiations with the violent, dominating or controlling party is negated. This not the kind of power imbalance which can be compensated or evened out by the mediator. Adopting strategies such as staggered arrival and departure times and shuttle mediation may keep the victim of violence physically safe, but they do not mitigate the underlying fear, intimidation or control. Mediation in this context functions as simply another avenue of control, and agreements reached are likely to reflect the abusive party's wishes rather than the interests of both parties (Astor 1994a, 1994b; Roberts 2014: 174). Such agreements may leave victims financially vulnerable, and may expose the victim and their children to child arrangements which are unsatisfactory, unsafe and damaging. Part of the purpose of initial intake meetings prior to mediation, therefore, is to screen for domestic abuse. This is not a simple matter. There are many reasons why victims may be reluctant to disclose histories of abuse, including intimidation, previous experiences of poor responses to disclosure or their own denial or minimisation of the abuse as a coping mechanism, and there is a need to build up a significant level of trust and confidence before some victims are willing to talk about their abuse (see e.g. Astor 1995; Piper and Kaganas 1997). In addition to domestic abuse, screening should also cover other contra-indications to mediation such as a party's active mental illness or where the subject-matter of the dispute (such as alleged child abuse or one party's alleged substance abuse) is not capable of negotiation. This section focuses on the issue of domestic abuse, although we have written about screening more generally elsewhere (Hunter et al. 2014).

Despite the attention that had been focused on the need to screen out domestic abuse cases from mediation identified in research in the late 1990s (Hester et al. 1997; Piper and Kaganas 1997) and the subsequent embodiment of this requirement in the Legal Aid Funding Code in 2000 and in the

1 This is reflected, for example, in the decision of the Supreme Court in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, and in the Home Office's 2013 policy definition of domestic violence (available at https://www.gov.uk/guidance/domestic-violence-and-abuse). The Home Office definition of violence as 'any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse' is in turn reflected in the Family Procedure Rules, Practice Direction 12J, and in the recently enacted criminal offence of coercive control: Serious Crime Act 2015, ss.76–7.

Codes of Practice for all mediation organisations, our study found worrying evidence of cases where screening appeared not to have occurred, or not to have been responded to appropriately. Among our 56 parties interviewed who had undertaken mediation, 10 clearly reported not having been asked about domestic violence at all in their intake or MIAM even though these all took place between 2005 and 2012. And for those who proceeded to mediate against a background of violence, the experience was often deeply traumatic and the outcomes singularly unfair. The following discussion attempts to explain the reported failures of screening despite formal commitments to its use. It highlights flaws in screening guidance and processes and contrasts practitioners' views of the ultimate benefits of mediation with parties' actual experiences of mediation in a context of violence and abuse.

## The screening process

The practice of screening for domestic violence prior to mediation and the responses to screening were and remain informed by legal aid requirements and the Codes of Practice of the different accredited mediation providers. The now common Family Mediation Council (FMC) Code of Practice (2016) clearly states that:

> In all cases, the Mediator must seek to ensure that the Participants take part in the mediation willingly and without fear of violence or harm. The Mediator must seek to discover through a screening procedure whether or not there is fear of abuse or any other harm and whether or not it is alleged that any Participant has been or is likely to be abusive towards another (5.8.2).

This raises the question of *how* screening should be conducted. Our own and other research suggests three issues of concern in the process of screening for domestic violence and abuse: firstly, whether screening is conducted jointly or separately, secondly, the kinds of questions asked in screening, and thirdly, the time available for screening.

### *Joint or separate MIAMs*

Best practice for screening for domestic violence was identified in earlier research to require each party to be seen separately, rather than jointly (Hester et al. 1997). Clearly, if one party is fearful of or controlled or intimidated by the other, conducting screening jointly is unlikely to result in the disclosure of abuse. Hester et al., however, found a reluctance in mediation ideology to let go of the cooperative couple ideal in order to do this (1997: 1). At the time of their research, only a small proportion of services were offering separate intakes. Morris found in her study of legally aided (NFM) intake sessions undertaken in 2010 that although screening was conducted

separately, it typically took place after both parties had initially been seen jointly, with the parties coming back together again after screening (2013, 2015). This is in line with the FMC Code of Practice which states that:

> All assessments for suitability for Mediation should be conducted by a Mediator at meetings and, where possible, on a face-to-face basis.… Assessment meetings can be conducted jointly or separately, but must include an individual element with each Participant to allow the Mediator to undertake domestic abuse screening (2016: 6.1).

The advantage for mediation services of joint MIAMs is that they take less time than separate MIAMs,[2] they engage both parties in the process simultaneously and promote cooperation from the outset, and they make it possible for the parties to proceed directly to mediation or make an appointment for the first mediation session if they both agree to do so. By comparison, if parties undertake separate MIAMs, it is more difficult to engage both of them and more difficult to convert from MIAMs to mediation. There is thus considerable incentive for mediation services to prefer joint MIAMs. Although the FMC Code of Practice and the Codes of other mediation bodies suggest that the question of whether separate or joint MIAMs are held is a matter for the parties to decide, Bloch et al. found in their research on MIAMs in 2013 that separate MIAMs were not always offered, because the mediator had not considered this necessary for the client or because it was not the mediation service's usual practice (2014: 27).

But even if the FMC Code is followed, joint MIAMs remain problematic as a method of screening for domestic violence and abuse. In an abusive relationship, the notion of 'client preference' is likely to mean, in effect, the preference of the abuser. There appears to be no recognition that violence and abuse may prevent or inhibit a victim from expressing a preference for a separate MIAM. And even if the mediator meets separately with each of the parties within a joint MIAM in order to conduct the screening component, the general context and the limited time available are unlikely to be conducive to effective exploration of potential issues of abuse or to encourage disclosure. Several of the parties interviewed by Bloch et al. felt they were not given the space to tell their story in a joint MIAM, 'which could compromise the mediator's ability to assess

2 The Legal Aid Agency pays for 1 hour and 20 minutes for a single MIAM and 2 hours for a joint MIAM, but this time includes the completion of mandatory paperwork at the end of each session (Morris 2013: 455). The actual time given to the parties can vary – Bloch et al. found variation from 30 to 90 minutes, with 45 minutes as standard for a single MIAM (2014: 3, 26). However, it seems clear that joint MIAMs are generally given less time than two single MIAMs.

their suitability for mediation. Conversely, individually attended MIAMs allowed intimidated clients to gain confidence and establish trust with the mediator, and could then discuss personal feelings and ask questions' (2014: 27). Likewise, Morris found that when seeing parties separately as part of a joint MIAM, mediators tended to take the same approach to both parties, whereas in separate MIAMs, 'the screening questions tended to vary, responding to the individual dynamic of the meeting' (2013: 453). She concluded that the fact that there was less time to devote to individual discussions in joint MIAMs, and the fact that the meeting began and ended with the parties together 'reduce[d] the opportunity for a spouse to disclose abuse' (Morris 2013: 455).

*The questions asked in screening*

Morris was critical of the typically blunt questions used in screening which asked either very indirectly about arguments and disagreements, or too directly if abuse had occurred or whether their partner would say they were frightened of them (2013: 450), neither of which would allow any narrative of abuse to emerge. While the screening questions asked met the NFM guidelines, according to Morris they 'reflect[ed] a simplistic exploration of abuse in a relationship and [left] the question of effective screening unanswered' (2013: 453). Similarly, questions concerning the client's ability to negotiate did 'not take into consideration the broader dynamics of the relationship, including any power and control' (Morris 2013: 454).

A further problematic aspect of screening questions is the policy of some mediation organisations, including NFM, that screening should focus on the individual client's *perception* of violence rather than the mediator making a priori judgements about levels of severity or types of violence (Roberts 2014: 274–5). This fails to acknowledge the situation of those for whom abuse is so normalised that they do not perceive it as such, or do not apprehend its severity (see Piper and Kaganas 1997: 272). For example Wendy, one of our party interviewees, explained:

> I don't think I was really…I was really aware of the emotional abuse.… [U]ntil I went to the solicitor and starting talking with Women's Aid, I don't think I had realised the level of emotional abuse that had been going on in my relationship, and it was all around that time when I…went to the solicitor, started talking through things, went to Women's Aid, started doing…the Freedom Programme.… The Freedom Programme is now available online for women that have been in abusive relationships, and I started doing that and I hadn't realised quite how abused I had been until I started doing that.

Relying solely on the client's perception of violence also fails to acknowledge the way in which the mediation context with its norms of cooperative behaviour tends to encourage minimisation of violence, as observed by Dingwall and Greatbatch, and renders the mediator complicit in that minimisation (Greatbatch and Dingwall 1999). Finally, it fails to acknowledge or take responsibility for potential dangers that the mediation process or its outcomes may pose to the victim and to their children. Many other family justice and related contexts have instituted careful and objective risk assessments for domestic abuse, using screening tools developed by experts such as Cafcass, Safe Lives or the National Association of Child Contact Centres (NACCC). Such assessments include the risks to children as well as to the adults involved. Best practice would suggest that such an approach should also be adopted in mediation.

*The time available for screening*

Both Morris's and Bloch et al.'s research also identified clear structural barriers to effective screening. Bloch et al. found that where the client needed longer than usual to tell their story or needed more time to absorb information, or where the assessment for legal aid took longer than expected, screening was sacrificed and the mediator's ability to assess appropriateness for mediation was compromised (2014: 26). They concluded that more needed to be done to ensure that clients were adequately assessed in all cases (Bloch et al. 2014: 40). Morris found that legal aid assessment requirements drove practitioner behaviour within the MIAM and reduced the time available for screening. Shockingly, she found screening for domestic violence took an average of just three minutes, a quarter of the average time taken to assess legal aid eligibility (2013: 453). Unsurprisingly she concluded, 'the amount of time spent on screening does not give the clients enough opportunity to disclose the abusive behaviour' (Morris 2015: 25) and that 'more work needs to be done to make the screening process more robust and fit for purpose' (Morris 2013: 456).

**Responding to disclosures of violence**

The FMC Code of Practice states that 'Where abuse is alleged or suspected the Mediator must discuss with the Participant believed to be adversely affected whether that Participant wishes to take part (or to continue to take part) in the Mediation, and information about available support services should be provided' (2016: 5.8.2). In other words, there is no notion that mediation should not occur in some instances. Rather, in line with the commitment to party autonomy, victims of abuse are still given the option to take part in mediation. Again, this fails to recognise the way in which a violent or abusive relationship negates the victim's autonomy. It

fails to take into account the immediate context in which the discussion takes place (as part of a joint MIAM?), or the wider context in which the victim's wishes are controlled by the abusive partner. The FMC Code goes on to say that if mediation does take place, 'the Mediator must uphold throughout the principles of voluntary participation, fairness and safety.... In addition, steps must be taken to ensure the safety of the Participants on arrival at and departure from the Mediation' (2016: 5.8.3). Arguably, however, if mediation takes place against a background of violence and abuse, the principles of voluntary participation, fairness and safety are already compromised. Ensuring the safety of all participants on arrival and departure is certainly important, but by no means guarantees that the process itself or its outcomes are voluntary, fair or safe.

In our practitioner interviews, we found common themes as well as differing responses as to how the 31 mediators interviewed would react to a disclosure of domestic violence when assessing suitability for mediation. Jennifer Eccles described it as 'a large grey area', but overwhelmingly in our sample the consensus was that mediation should not be ruled out in domestic violence cases, rejecting what Christopher Edwards described as a 'blanket-ban'.

Variation then arose as to where mediators would draw the line. Jane Davison explained that most cases of domestic abuse would probably not be suitable and that there was a threshold beyond which shuttle mediation was not appropriate. Kirsty Oliver acknowledged that parties who are extremely vulnerable and fearful and have problems making decisions are better suited to solicitor negotiation, or even the court process. Some, like Peter Young, were clear that mediation was not appropriate where there had been domestic violence injunctions. But many felt they could deal with coercive relationships falling short of physical violence in mediation. For example Martin Appleby saw it as part of the role of the mediator to correct power imbalances, to empower parties to deal with each other with mutual respect going forward and so would not discount these from mediation. David Leighton described it as 'naïve' to assume coercive relationships are unsuited to mediation, but argued that it is a question of degree. Some felt their professional backgrounds and long experience as mediators enabled them to mediate most domestic violence cases safely. Molly Turner, who fell into this group, admitted that she 'strain[s] the boundaries…on that particular code of practice' in terms of the cases that she is prepared to mediate.

These variations correspond to Bloch et al.'s identification of three categories of mediator whom they labelled 'purists', 'realists' and 'optimists' (2014: 16–17). 'Purists' had the highest threshold for accepting clients into mediation. 'Realists', who were the most prevalent among the mediators

they interviewed, were more willing to take on more challenging cases, while 'optimists' believed that almost all clients who were willing to try mediation were appropriate for it, and that they had the ability to mediate effectively in most cases. A number of 'optimists' among our interviewees were happy to be guided by the parties themselves, taking into account whether the abuse was 'historic', whether a party expressed fear or they classified it as 'separation violence'. These classifications of abuse, however, are classic instances of minimisation. The fact that violence happened some time in the past may not at all diminish its ongoing effects on the victim in terms of fear, intimidation or control (she knows what he is capable of if she steps out of line). And 'separation violence', far from being dismissed as merely situational, can be seen as the most dangerous form of violence, as the abuser struggles to reassert his control (Mahoney 1991). Many domestic homicides are instances of 'separation violence'.

The majority of the practitioners we interviewed did concede that particular skills were needed for domestic violence cases, but most felt mediation could be adapted to cope with domestic violence situations and therefore was often still appropriate. In line with the FMC Code of Practice, most recognised the need to put careful measures in place such as shuttle mediation or staggered arrival and departure times, judging things on a case-by-case basis. Molly Turner said she would usually insist on co-mediation. However, there has been no development in the UK as there has been in Australia of models such as Coordinated Family Dispute Resolution specifically tailored to family violence cases, incorporating multidisciplinary support for the participants (Field 2004; Kaspiew et al. 2012).

A key point in the thinking of many of our interviewees was what the alternatives were for a couple if they did not mediate. David Leighton explained it was a question of 'ascertaining which the least worst process is for the couple in question'. This is linked to the general faith demonstrated, as we have seen, by both practitioners and policy-makers, in the ability of mediation to provide a better process for the resolution of family disputes than any of the available alternatives, and an unquestionably better process than going to court. This faith in turn reflects back on the screening process. If it is generally believed that mediation is a better process than any available alternative, then there is no incentive to engage in rigorous screening for suitability for mediation, since screening out cases is considered to make the parties worse off. This attitude is likely to have intensified following the LASPO Act, as legally aided parties now do not have the fall-back option of solicitor negotiations if they are screened out of mediation, and the only alternative effectively available is self-representation in court (Hunter 2014: 661). Indeed, Bloch et al. found that following LASPO, 'realist' mediators took the view that clients had no

practical access to any alternatives to mediation to resolve their disputes, and so were more prepared to accommodate these clients' specific needs (2014: 16; see also Maclean and Eekelaar 2016: 62). Shockingly, Maclean and Eekelaar observed a mediator prepared to arrange mediation in breach of the husband's bail conditions to stay away from the wife after being charged with assaulting her, with only the proposed safeguard of different arrival and departure times (2016: 99–100). And it has recently been advocated that non-molestation orders and other protective injunctions should include exceptions to enable the parties to engage in mediation (Parkinson 2016: 116). Bloch et al. also found that the optimism of 'optimist' mediators about the suitability of mediation for everyone 'may have been influenced by business pressures due to the reduction in solicitor referrals post LASPO' (2014: 17; see also Hunter 2014: 661). This 'moral hazard' created by LASPO makes it even more likely that screening and responses to disclosures of violence and abuse will be inadequate.

Leaving this aside, however, the faith that mediation will always provide a better process, even in cases of violence or abuse, is tested by the experiences of our party interviewees who undertook mediation in such cases, and to which we now turn.

## Party perspectives on MIAMs and mediation after experiencing domestic violence

We found 10 cases in our party sample where, on the party's account, effective screening was sidestepped, and a further number of cases where, despite a history of violence, mediation was recommended by solicitors, parties were referred to mediation by a judge or cases were accepted by mediators. Two points may be made in relation to the latter category of cases. First, even if mediation services get it right, judges may still hold problematic views on the appropriateness of mediation. But secondly, in these cases, mediators still appear to be accepting the referrals and not insisting that mediation is inappropriate. These views and practices were not confined to older cases and our findings are consistent with other recent studies by Morris (2013) and Bloch et al. (2014).

### *Experiences of screening*

Sara went to a solicitor in 2010 for divorce and a domestic violence injunction but was told an injunction was not possible because the abuse was not physical. She was still living in the family home with her abusive ex-husband. Her solicitor sent her to mediation 'to save costs' but told her to ask for separate rooms. At the intake session her ex-husband arrived first and insisted they be seen together. Sara was asked, in front of

her ex-husband, if she agreed to be in the same room as him and agreed because she was afraid to say otherwise: 'I was so scared I just said yes'. Tilda, whose partner had been violent and recently threatened her with a car jack, was referred in 2012 to a solicitor by a domestic violence service. The solicitor then referred her to mediation, where she had a joint intake in which she felt unable to disclose the violence.

Harry, with an emotionally abusive ex-wife, was advised in 2012 by his solicitor to go to mediation 'because the court would look favourably on it'. Gloria, who described her ex-husband as both physically and emotionally abusive, was advised by her solicitor that an attempt at mediation prior to court proceedings was compulsory. She said that she was not asked about domestic violence at intake despite having asked for separate waiting rooms prior to mediation because of her concerns. Iris had refused mediation due to physical violence during the relationship but at a 2010 review hearing at court, the judge nonetheless ordered the couple to attend mediation to sort out their financial dispute. Whilst it is not possible to know, it may be that in this case because the physical violence had happened some years before, it was assumed that mediation should now be tried, misunderstanding the distortion of power that happens when a victim is in the same room as an abuser.

Some reported just having around five minutes alone with the mediator at the start of a joint MIAM before moving to a joint meeting. This was not enough time to establish the trust and rapport likely to be needed when disclosing abuse or violence. Raymond described his 2013 MIAM: 'Yes, that was like a sort of five minutes sit down before we sat in the same room'.

*Experiences of mediation*

Unsurprisingly, the failure of screening led to traumatic experiences of mediation and unfair agreements for a number of parties. Sara (above) capitulated to her husband's financial demands in the mediation session: 'I said yes to everything.… I was so scared because I'd got to go home and be with this man that I'm too scared to say anything else'. The history of abuse together with the fact that the parties were still living under one roof clearly should have ruled this case out of mediation as one in which voluntariness, fairness and safety were at major risk. Immediately following the mediation session, with the help of Women's Aid and a new solicitor, Sara was able to secure an injunction to protect herself.

After being unable to disclose at a joint intake session the violence to which she had been subjected by her 'controlling' ex-partner, Tilda was asked by the co-mediators in her case 'to say what she wanted'. But, she explained, 'I couldn't. I didn't know how to say what I wanted. I felt

intimidated in the room with him.' She described her experience of mediation as follows:

> I did feel very alone; I did feel quite alone in there. Do you know what I mean?… Because you have got [former husband] looking at you all the time when you speak. They sit there basically sort of intimidating you, you know, just glaring at you.

Because they agreed to a 50/50 split of their assets, Tilda's ex-husband insisted that she contribute half of his costs of mediation, even though she was legally aided.

While Tilda and Sara did reach 'agreements' in mediation, Gloria (above) described her mediation sessions as 'very unproductive'. Monica, who suffered from mental illness, explained to her solicitor and the mediator the degree of emotional bullying she was suffering from her husband but felt that as this fell short of physical abuse 'it just didn't count for anything. He's not seen as an abuser'. Monica's experience of one session with a mediator left her 'traumatised' and 'propelled [her] into a sort of breakdown'. She felt that the requirement of mediator impartiality had led to her husband's vitriol towards her in the mediation session going largely unchecked:

> I felt very much that, you know, the whole neutrality thing meant that…it was a very unsupported environment for me, obviously, because [the mediator] obviously had to be studiously neutral.… And I really feel for women who are really seriously being abused because I suspect that neutrality means that their claims of abuse will not be listened to.… What I felt was that it was not a balanced situation. I was mentally ill, I was poorer, you know. I was the one who had to give up my job, give up my house [when she left the relationship], and yet it was treated as if there were no power imbalances between us, as if we were both on equal footing and we weren't. You know, that's what really bothered me…it was one of the worst days of my life. I mean he basically sat there and insulted me.… He told me that I was an inadequate mother, that his nanny was a better mother than me. He told me that my children didn't love me, that they wouldn't miss me, you know, various incredibly brutal things…
>
> *And how did the mediator deal with this?*
>
> She didn't stop him; she didn't stop him saying things like that.… I felt very betrayed by that.… I really think the issues of, you know, emotional abuse, violence, insults, need to be dealt with. There needs to be a respectful environment maintained

> by the mediator, and my mediator wasn't maintaining that. She did not say, 'that is an unacceptable thing to say, that is even an unhelpful thing to say'. She just wasn't saying things like that, probably out of the desire to be neutral. But allowing these kind of emotional outbursts is entirely counter to the idea of, you know, of agreement.

Monica and her ex-husband agreed child arrangements in the car park immediately following the mediation session. Despite being the primary carer of their children, she offered him equally shared care:

> I was so broken at that point I said, 'Right, you and I stand here and you are going to agree that we have 50/50 but I want the money to live in [city]'.... And do you know what? He agreed to it. So basically the whole mediation was a failure and basically me saying something to him outside in the car park was what we ended up living by.

She reflected that the agreement was 'a product of my being basically traumatised by the mediation. I basically caved in. I caved in and basically begged him for an agreement'. But while her ex-husband agreed to pay maintenance to meet her housing needs, their division of assets remained unresolved two years later and at the time of interview was heading for court.

For Kim, mediation worked well despite initial misgivings due to her ex-partner's 'bullying' nature. Kim felt that the mediator was proactive and supportive in their interventions. But the majority in this situation felt as Lorna, that 'it was just another arena to be bullied in'. There was a clear correlation between failed mediations and cases where there were violence or coercive control issues. Overall then, despite one or two positive experiences, the majority of parties with a history of violence or abuse in the relationship found the mediation process difficult, traumatic and ultimately likely to be unproductive.

## Conclusion

While there are various ways in which choice of an appropriate FDR could be more fully realised and tested by giving parties better information and more open options, the reality is that resource and structural constraints and the attitude of the other party will always limit individual autonomy in this area, leaving many parties feeling pushed or defaulted into an FDR. Whilst some collaborative law parties felt their choice had been constrained by their partner and solicitor negotiation was the FDR of last

resort for others, the perceived legal aid and subsequent regulatory requirements to try mediation evoked the loudest criticism in our party sample. Overall, the notion of 'voluntary' mediation in a meaningful sense seemed already by 2012 to have been compromised for those contemplating court proceedings and for those on legal aid, even before the LASPO Act came into force. Since our study, the structural issues have become much more obvious for those reliant on legal aid.

The LASPO Act has not directly affected those who are able to pay for solicitor negotiation or collaborative law, which underlines the spectrum of choice between the haves and the have-nots. Those who had the option of collaborative law in our study were more likely to find their way to an appropriate FDR, linked to their access to financial resources and information. As we would expect, the collaborative law interviewees tended to be better educated, more affluent, and generally have more sense of choice and agency about their routes to the resolution of post-separation disputes. At the other end of the socio-economic scale, those who are dependent on legal aid have now had their choice reduced to two often inappropriate options – mediation or self-representation at court – unless they fall within the domestic violence exception. The current situation ironically acts as a brake on out-of-court FDR. It takes two to mediate, and not every case or party is suitable for mediation. It seems unsustainable to leave self-representation in court as the only option for those who cannot afford solicitor negotiation as the only realistic way to resolve a family dispute.

In relation to domestic violence and abuse, our study shows that excessive faith in the value of the mediation process, the virtues of cooperation and the mediator's own skills and experience, exacerbated post-LASPO by the perceived lack of alternatives for clients and a business imperative to retain clients can result in inadequate screening for domestic violence and inadequate responses when violence and abuse is disclosed. This faith is not justified, however, as the experiences of parties who mediated in the context of violent or abusive relationships demonstrate. Most found the mediation process traumatic and to function as a continuation of the abuse, and outcomes were either non-existent when mediation failed or involved the victim of abuse capitulating to the abusive partner's wishes.

It is also not necessarily the case that victims of violence and abuse have no other or no better options than mediation. For those who can afford to pay, lawyer-led processes are inherently more supportive in cases of domestic violence or coercive control because the lawyer can act as a buffer protecting the party from intimidation by their ex-partner, provide legal advice and advocate for the party's legal interests, and assist the party through the sometimes lengthy process of re-establishing their own autonomous decision-making capacities. As discussed in the following chapter,

we found lawyers could also offer better support where power dynamics are otherwise skewed. Solicitors were reported by our parties as routinely asking about violence within the relationship, and most parties in our study who used lawyer-led processes felt readily able to disclose incidents of violence, in contrast to some of those who found themselves in mediation. Thus screening out from mediation should occur for those who are able to pay for legal services and have this choice.

Secondly, for those who can show the necessary evidence to fall within the domestic violence exception, legal aid is still available for solicitor representation in private family law cases. Whilst the exception remains narrow, it has been widened following the Court of Appeal decision in the case of *R (Rights of Women) v The Secretary of State for Justice and the Lord Chancellor* [2016] EWCA Civ 91. The amended regulations have broadened the definition of violence to include financial abuse and risk of domestic violence, and evidence of domestic violence within the past five years rather than two years will now be accepted (Civil Legal Aid (Procedure) (Amendment) Regulations 2016, reg. 2(2)). There are also signs that the evidence gateway may be further widened in the future. Screening for domestic violence and abuse in mediation should therefore not only be alert to the availability of evidence that would render the client eligible for legally aided legal services, but should also advise clients who may be eligible as to how to obtain the necessary evidence, including how to obtain protective injunctions (which should not contain exceptions for mediation!). The ability to get legal aid for solicitor representation would expand the client's FDR options to include solicitor negotiations, as well as the possibility of having their interests protected in court if necessary.

There will remain a group of victims of violence and abuse who are unable to obtain the evidence to get legal aid for a solicitor (primarily those who have suffered non-physical forms of abuse) or who are financially over the legal aid threshold but unable to afford a lawyer (see Trinder et al. 2014; Hunter 2011, 2014). For these cases, the response of mediation could be far more sophisticated, involving much better understanding of the dynamics of controlling relationships and much more consistent and effective support for the abused party, which may include not just information about or referrals to appropriate support services but actively working with those services – including lawyers willing to assist in such cases (see e.g. Parkinson 2016: 110). Otherwise, as the experiences set out above attest, mediation may offer no benefits over leaving the parties to their own devices, and may make things worse.

For all of these reasons, effective screening for domestic violence and abuse prior to mediation is vital. At the very least there should be separate MIAMs in every case to facilitate disclosure of violence and abuse and more

rigorous and realistic assessment of the ability of mediation to offer a voluntary, fair and safe process. Closer examination of the duration and content of screening and better training in screening for and responding to violence are also needed, incorporating contemporary understandings of coercive control and detailed and objective risk assessments. Where violence or abuse are disclosed, an excessive focus on individual autonomy – and too simplistic a notion of what constitutes autonomy – should not be allowed to operate at the expense of justice for the most vulnerable. Practitioners could do more actively to address the support needs of victims of domestic violence and abuse, including needs for legal protection and legal aid.

Another function of screening should be to identify and address the position of parties who are emotionally unready to enter FDR. Our research suggested that emotional readiness to engage in FDR is a largely unaddressed issue which can leave parties feeling confused, overwhelmed and unable to make decisions, and in turn can result in unsuccessful attempts to reach agreements. In some cases it is simply a matter of time, and we found good lawyers slowing down the process when either their own client or the other party appeared emotionally unready to negotiate. But better access to and availability of counselling or other therapeutic interventions may also assist and should be a referral option considered by mediators to enable parties to get to a point of emotional readiness from which they are able to engage in mediation successfully.

# 6
# Experiences of FDRs

## Introduction

This chapter sets out our findings in relation to parties' experiences of each FDR process, as well as the comparative assessments of FDRs made by parties who had experienced more than one process. Thirty-two of the parties interviewed had experienced only mediation, 27 had experienced only solicitor negotiation, and 25 had experienced both of these. Of the nine people who had experience of collaborative law, one also had experience of mediation and one party had experienced all three FDRs.

In Chapter 2 we described the outlines of each process and previous research relating to each of the three FDRs. In this chapter we pick up many of the issues raised there, including parties' levels of satisfaction with each process, what parties liked and disliked about the process, the role of the practitioner within the process, and how emotions and conflict were dealt with in the process. The chapter also discusses experiences of victims of domestic violence and abuse in solicitor negotiations, complementing the discussion of experiences in mediation in the previous chapter.

As described in Chapter 1, experiences of partnering, parenting and separating are shaped by societal expectations and the legal and socio-economic context. In particular, experiences of parenting and the labour market are typically highly gendered; it is still the norm in the UK for women to do the majority of the domestic work and childcare and fathers to be the main breadwinner. Although this is changing slowly, the proportion of couples with an equal division of paid and family work, or with the mother as the main wage-earner, remains low, and certainly for our sample of separating parents was not the norm. For this reason, mothers and fathers often started in different positions at the outset of the FDR process – with mothers normally the resident parent and fathers usually the one with the higher earning capacity and financial assets. This is reflected in how people experienced the negotiation and dispute resolution process, and each section below also discusses particular gender issues raised within the relevant FDR.

As noted in Chapter 2, Dingwall and Greatbatch (1991), reporting on a study of mediation in England and Wales in the 1980s, argued that mediation was a parent-centred process with parents and conciliators making few references to child welfare. Since then, efforts have been made to ensure that children's welfare is central to all forms of dispute resolution. As Ewing et al. (2015) noted, however, while FDR processes all explicitly focus on the best interests of the child, in practice children are rarely directly involved and it is far more common for parents to represent their children's interests and views indirectly. This chapter therefore further discusses the extent to which each process was felt to focus on children's welfare.

The chapter focuses on satisfaction with each of the FDR *processes*. In practice, however, although we distinguished in both the Omnibus survey and in our interview questions between satisfaction with process and satisfaction with outcomes, parties themselves did not always make such a clear distinction. In the Omnibus survey, we obtained very similar results when we asked about satisfaction with the outcome of each FDR, as we did when we asked about satisfaction with the process. Clearly for participants there is much overlap so a process is much more likely to be retrospectively viewed as satisfactory if it led to a satisfactory outcome. As Walker et al. (2004) found in their earlier study, we also found that people in the Omnibus survey who experienced mediation were less satisfied with the process than those who experienced a lawyer-led FDR. The interviews gave us the opportunity to delve further into differences between satisfaction with process (discussed in this chapter) and satisfaction with outcomes (discussed in the following chapter), and also gave us the opportunity to seek direct comparisons from parties with experience of more than one process.

Overall, we found that each process has particular strengths and weaknesses, making each process more or less suited to some kinds of parties and situations. None of the FDRs emerged as clearly superior to any of the others, although it does appear that mediation in combination with legal advice is generally preferable to mediation without that option. While some of the weaknesses of each process could clearly be addressed, the processes would still tend to complement each other rather than any of them offering an approach appropriate to every case.

## The experience of solicitor negotiation

In the Omnibus survey, 65 per cent of the 70 respondents who had experienced solicitor negotiations were satisfied with the process. Similarly, within the party interview sample, over two thirds of the 53 parties who had experienced solicitor negotiation were satisfied with it as a process.

**What parties liked about the solicitor negotiation process**

There were many things that people said they liked about the process of solicitor negotiation. People mentioned advantages such as the removal of a need to communicate directly with their ex-partner. Many who had used this process felt that a face-to-face process might ideally have been preferable but was not possible for them; hence, not having to see their ex-partner or talk to them directly was a strength, or necessity, for some such as Simon: 'What I liked initially…due to the emotional sort of stress around the whole situation, I liked the fact that it was remote. It allowed you to start a course of action without being directly involved with face-to-face discussions'.

People often liked the structure of this process; specifically, they appreciated the formality of letters. As Gary said: 'It was straightforward. She [ex-wife] could understand the form and letter and she just signed it and sent it back'. Efficiency, good advice and the professionalism of the solicitor were mentioned as positives. Eve said her solicitor was 'prompt, quick, efficient, local', and Harry said 'I was very satisfied, actually. I have got to say I think my advice was excellent'. People also liked the way that a solicitor negotiated outcome is clear, written down and enforceable.

Perhaps the strongest advantage, according to solicitor negotiation participants, was the benefit of having someone specifically on their side. Leo told us: 'At the time, I felt he was my only ally. He knew the system, and he was the only one that was on my side.' People regularly described their confidence in their solicitor's skill, including the development of a good relationship, and the clarity of the explanations they provided. Stella said: 'You lose it there for a while. Which is where my solicitor was good, because she would sit me down and say, "Right, this is what happens next. This is what your options are".' Richard said of his solicitor that 'He knew I had mental health problems and he made sure I understood everything crystal clear'. Several parties spoke of the reassurance that partisan advice offered, as typified by Kim:

> I felt fully supported [by my solicitor] and I was unaware how...kind of...how much the law protected me, so.... Just seeking the advice from a solicitor made a huge difference, because I thought I was in a situation.... Well, I received a letter saying to me that if I wasn't prepared to go to mediation, [if] I wasn't prepared to discuss this, you know, it would proceed to court, which obviously at that stage really alarmed me. I didn't know anything about the process. So just talking to the solicitor, finding out my rights, just massively put my mind at rest.

### What parties did not like about the solicitor negotiation process

While some people liked the solicitor negotiation process for the benefits described above – not having to communicate directly with an ex-partner, having a structured process with a formal outcome and having an expert specifically on their side – there were other aspects of the process which people found problematic. Many people mentioned solicitor negotiations leading to high levels of stress. According to Zoe, 'It was one of the most stressful things I have ever had to go through'. It was fairly common to experience an increase in hostility which often resulted from the initiation or progression of solicitor negotiations; Joe described it as: 'I suppose it's really just the very formal way that the solicitors correspond with each other, and once my former wife saw the letter that came to her solicitor, as far as she was concerned that was akin to war being declared'. Some, like Ernest, felt that the process fuelled conflict:

> The only way to describe the process was they were pouring petrol on the fire. I mean there were no issues to be discussed apart from contact and finance, and there were all sorts of spurious things thrown in. It was almost to intimidate me. It was horrible. It was absolutely horrible.

The length of time taken was also a major negative for many. Simon felt that 'It was ridiculous, ridiculously protracted'. Seth commented that:

> We felt that [ex-wife's solicitors] were just biding for time, anything to not give an answer. There would be 8 to 10 weeks between letters. I would get a letter asking me questions and we would reply to that in a couple of weeks and nothing for about 8 to 10 weeks.

As described in Chapter 5, people often did not feel emotionally ready to deal with the issues and this sometimes led to them stalling the process (deliberately or otherwise), as explained by Jason: 'Emotions are running high and certain people are not ready to negotiate, especially my ex who was very bitter and very sore'. Some people admitted to using stalling tactics themselves. More generally, however, people felt that the other party or the other party's solicitor was deliberately delaying the process by dragging out response time to letters, or by responding minimally to requests. In Jason's words again, 'It was always something stalling or there was always, you know, something or another and again, so negotiations weren't great.' The general tendency to blame the other side, and particularly the other party's solicitor, for the protraction of the process was striking, as illustrated by Kevin who said of his ex-wife's lawyer:

> She wanted to build aggression and she wanted to build distrust.… Anything I said she turned negative against me and blew it out of all proportion. She twisted and she would play on [ex-wife]'s insecurities…[whereas my solicitor] wanted a solution rather than a problem.

Related to the issue of time, cost was another stated negative of solicitor negotiations. Some people felt that the cost was either excessive, or too difficult to anticipate when starting the process. Sandra said:

> Looking at it now, I think it was all an absolute shambles. It was all crazy, really. I would say my solicitor probably…it's cost me a lot of money. There are things that actually could have been advised probably a little bit better. I think, looking at it in total I think it came to about £13,000 for me.

Self-funding parties reported particular concerns about cost when the other party was legally aided (or self-representing) and were perceived to be able to keep sending letters for free. Conversely, some expressed frustration with the apparently poorer quality service provided to the other party on legal aid. As Paul described it:

> My solicitors were chasing up paperwork, it would always have to result in extra letters being sent to chase up things and they were missing deadlines. I just found that, whether or not it was a tactic or whether it was down to her being legally aided, that it was just really, really sloppy. And it was really time consuming and just made the process more painful for me and her as well and the children.

Many practitioners acknowledged and shared the parties' frustrations with traditional negotiations – the cost, the delay and the exacerbation of conflict – although they argued that they worked hard to minimise these factors. For example, John Astwood spoke of encouraging parties to negotiate directly as much as possible to minimise costs. Judy O'Leary sought to minimise cost and delay by giving her clients early advice on the court's likely approach to certain issues to reduce what remained in contention between the parties. And David Leighton regularly referred clients to parenting coaches to achieve a less acrimonious post-separation parenting relationship.

### Emotion and conflict in the solicitor negotiation process

One clear advantage of solicitors as gatekeepers of process choice is that they are able to assess clients' emotional readiness to engage in any form

of FDR. Jayne instructed her solicitor because a friend had had an initial appointment with that solicitor and had been extremely tearful. As Jayne explained, the solicitor had told her friend: '"No, have a tissue, go away and come back as you are not ready to do this", which is really good'. On the other hand, trying to slow down the process due to emotional unreadiness to negotiate could be costly, as Freda found to her detriment:

> I think a lot of the problem was that I couldn't make my mind up. I didn't really want a divorce and I think it sort of dragged on, you know, trying to delay matters a little bit. And after paying a lot of money out I couldn't see any way round the situation at all.… I don't think I was ready [initially], but unfortunately you pay for that, which is the real downside. You know it's going to cost…well, you realise at the end how much money it's cost you and you feel well what a bloomin' waste, nothing wasn't going to turn out any different. I mean, if somebody doesn't love you any more, they don't. I think she [the solicitor] tried to jolly me along with it, but you make your own mind up, don't you, whether it's the right thing to do or the wrong? Unfortunately, financially it was the wrong thing.

Most of the practitioners we spoke to saw assisting clients in the 'emotional divorce' rather than simply concentrating on practical issues as central to their role in solicitor negotiations (see also Eekelaar et al. 2000). As Martin Appleby put it: 'Personally, I could not just concentrate on practical issues. I think that would give the client about a tenth of the service they really need.' Katrina Walters described supporting clients through the emotional divorce as an intrinsic part of a solicitor's role, one that is often not recognised by policy-makers. Others, like Lorna Denton or Ed Jamieson, acknowledged the need for family lawyers to be empathetic towards their clients but preferred to refer clients to counselling where necessary on the basis that they were not trained counsellors and it was not cost-effective for clients to use them as a counsellor.

Many parties who undertook solicitor negotiations reported high levels of conflict at the start of the process, and quite a few had ruled out mediation because of this conflict. For others, conflict was exacerbated upon instructing a solicitor, not because of anything the solicitor did but because of the signal sent to the other party that the relationship was at best in jeopardy. This was Jenny's experience:

> I think [former husband] thought that it would all blow over. The real level of conflict escalated when you know, solicitors… came on board or when, you know, that really.… Certainly he

> was not keen on the idea, putting it mildly. And so then it was really, and the fact that actually that might mean something serious, but then it became very tense, so to say.

Similarly, Yvette reported that solicitor negotiations 'probably antagonised' conflict at the outset, but she ultimately attributed this to the inherent conflict of relationship breakdown rather than the solicitor negotiation process per se:

> It's like waving a red flag at a bull.... But then I think, as the time went on, it reached a point where, um, he knew we had to come to, you know, some agreement.... When the negotiation was going on, I think it was probably facing up to it all that was hard for both of us, really. I think it was the realisation rather than the exacerbation.

A particular aspect of the solicitor negotiation process that tended to exacerbate conflict was the disclosure of finances. As Stella noted: 'So we had to get his businesses valued, which he resisted.... This is really why it got acrimonious.' Since parties resisting financial disclosure are likely to end up in solicitor negotiations by default, it is this process which is likely to see the greatest acrimony around the disclosure issue.

A few people thought the solicitor negotiation process had directly reduced conflict, but this was relatively rare in our study. For example, Miranda stated: 'I think it put a fence in between us in a way, but we didn't have to speak to each other, we didn't have to communicate, it could go through the solicitors.' Jim had a similar experience:

> *And did you feel that using the solicitor, did that help to reduce the conflict at all do you think?*
>
> It did. After about a couple of letters everything changed. The arguing stopped and everything.
>
> *So do you think getting them to correspond meant that it took the heat out of it, is that what you are saying?*
>
> It did, yes.

### Experiences of solicitor negotiation in domestic abuse cases

As outlined above, parties who engaged in solicitor negotiations appreciated having someone 'on their side', and this was particularly evident in solicitor negotiation cases involving violence, coercive control or extreme power imbalances. Jason spoke of his 'relief' following his disclosure to his solicitor of the violence he had endured during the marriage,

which he had chosen to keep from his family and friends. He described his solicitor's response to the disclosure as 'professional', 'comforting' and 'considerate'. He said that he was 'touched' by the way his solicitor handled the case. The solicitor's empathy ensured a predominantly positive experience of the process for him. After her negative experience of mediation (see Chapter 5), Sara instructed a solicitor who specialised in domestic abuse cases who treated her as 'an individual' and was 'really, really supportive'. 'I mean, for me to get hold of [a solicitor specialising in] domestic abuse was brilliant because they.... You know, they knew exactly that, you know…I needed someone that really dealt with these issues.'

Stella's husband was not physically abusive but there were significant power imbalances between them. He initiated the separation after a long marriage, causing Stella's GP to prescribe anti-depressants for her 'reactive depression' and provoking a strong physical and emotional reaction in her such that she 'physically shook' if she had to be in the same room as him. He was self-employed and was evasive in his financial disclosure. Stella felt at a significant disadvantage to him 'because of his experience as a businessman, also I felt at a loss, 'cos he knew how the law worked and I didn't'. She described feeling as if she was 'flat out' in a 'boxing ring' at the outset of the process. She was 'very satisfied' with and 'empowered' by her experience of solicitor negotiations. Her solicitor listened to her, explained the process well and addressed the disclosure issues effectively. As a result, and continuing the boxing analogy, by the end of the process Stella felt that she had 'got up again'.

Solicitors were reported as routinely asking about violence within the relationship, and most parties felt readily able to disclose experiences of violence. Some, like Ernest, chose not to disclose that they were a victim of domestic violence as he did not wish to 'inflame the situation'. Others, like Monica, felt that her solicitor (like the mediator) did not take sufficient account of the emotional abuse she had suffered. However, most of the parties who undertook solicitor negotiations following the breakdown of a physically or emotionally abusive relationship felt that their lawyer had responded appropriately to the allegations and most were grateful for the protection that arm's length negotiations afforded.

### Gendered experiences of the solicitor negotiation process

There was no gender difference in satisfaction with the solicitor negotiation process in the Omnibus survey. In the interviews some parties highlighted gendered experiences and views of the process. However, overall fewer parties talked about gender and bias in relation to solicitor negotiation than

did those who had experienced mediation. There were some discussions in the interviews about whose interests tended to be most served by the solicitor negotiation process, but this was more related to perceptions of the law as relayed by solicitors as opposed to the process itself. Zoe, for example, thought that the system and the legal rules were geared towards the father's rights rather than child welfare:

> I found that the whole system, the way it worked, was very much geared towards the father now and what the father wants and how much time he wants with the child and all that sort of thing. I'm not quite sure whether it was because of the whole Fathers 4 Justice thing or anything like that.…
>
> *Did they argue that as being something in your daughter's interest, or it was his interests that were being [over-speaking]?*
>
> Yeah. They did say that they felt it was very important that…and don't get me wrong, so did I. I felt it was very important that she spent time with her father as well, but it seemed to go even further than that. It was sort of 'yes, it doesn't matter if you are this, that and the other, if you are a good father or not, we are going to do all this for you and make sure you can…' if you know what I mean? There wasn't really any looking at sort of how he communicated with her as a dad, what kind of father he was, whether he supports her in any other capacity, it was just 'how can we make things comfortable for you, for you to see your child?'

### The role of the practitioner in solicitor negotiation

As discussed above, a positive feature of solicitor negotiation was often the partiality of having one's own solicitor on one's side, fighting one's case. Many parties, as typified by Annette, found this reassuring:

> *And what would you say worked for you about that process?*
>
> Erm, well obviously having somebody on my side and, you know, somebody that actually knew what they were talking about so that I had…not ammunition, that's the wrong word… but I had backup…it was just having somebody on my side, really, to fight my corner.… That's where [solicitor negotiations] benefitted me, I'd say.

Miranda echoed this view: 'Oh I felt [the solicitor was] on my side which is what I wanted; you do want to feel that someone is going to be fighting your corner'.

This did not always mean that the solicitor acted as a 'hired gun' zealously pursuing the party's instructions. Deanna, echoing views expressed by others, appreciated objective advice from her lawyer:

> *And did you feel your lawyer was on your side, generally?*
>
> She was very practical and very…erm, yes. But I think, you know, she was sort of telling me how it was I think, and not what I wanted to hear. So I think that's what…I trusted her.

On the other hand, some parties felt (as Wright (2007) found in her earlier study) that their solicitor was too objective, not involved enough, or perhaps even sympathetic to the other side. Norah found the solicitors in her round-table negotiation process 'icily professional':

> They were both in our various corners but I could feel that they were being professional. They weren't antagonistic to each other. Mine wasn't antagonistic to him or his to me. I mean, I had been told to sit there and not say a lot [*laughter*], to let her do the talking, so she did. They were icily professional, shall we say.

In the recorded solicitor-client first meetings, we saw solicitors giving clients the space to tell their stories and finding out what they wanted to achieve, while also ensuring that all necessary legal matters were covered. The lawyers provided information (sometimes in written form to take away), advice, options and reassurance, managing the client's emotions, and discouraging an adversarial approach. The process tended to be more constrained and directive when the client was legally aided, while privately paying clients were offered greater choices and the various pros and cons of different options were discussed. Clients left the first meeting with knowledge of where they stood legally, information about processes, and a clear plan for what would happen next, while also understanding that much would depend on the other party's response to the proposed course of action. In the best examples it was evident that clients felt emotionally supported and had a clear sense that their lawyer would be looking after their interests.

### Focus on children's welfare in solicitor negotiation

A minority of solicitors cited tension in the solicitor negotiation process between the lawyer's obligation to represent their own client and to attend to the best interests of the child or children involved. A recently qualified solicitor, Rebecca Carmichael, said that if a privately paying client wished to advance an application for shared care motivated by financial rather than child-centred concerns she would give appropriate advice but would ultimately follow the client's instructions. Overwhelmingly, however, the solicitors we interviewed strove to minimise any such conflict by focusing on child

welfare and the fostering of a positive post-parenting relationship. Lorna Denton epitomised this child-centred approach to solicitor negotiations:

> I often say to my clients, you know, 'I can divorce you, that's not that complicated, but you are going to have to parent these children for the rest of your lives. You are going to have to pitch up to birthday parties, christenings and weddings, and how we start and sort things out now can affect things that happen at a later date. So, you know, we are really at a crossroads and need to choose our road quite carefully'.

John Astwood, whilst describing his role in solicitor negotiations as that of 'a hired gun' where there were no children, indicated that if the parties had children this called for a 'more rounded approach' and the pursuit of outcomes that considered what was best for both parties and the children. Martin Appleby expressed his frustration at the minority of 'dinosaurs' in the legal profession, most of whom were senior solicitors who had been trained in the adversarial model, who saw their role as 'wholly to promote their client's own interests'. Many practitioners emphasised that they had trained within an interests-based ethos in which the focus on child welfare rather than client self-interest is fundamental. In the recorded solicitor-client interviews where there were children involved, discussions almost inevitably focused predominantly on the adult issues in dispute, although the lawyers were generally concerned to ensure that any proposed arrangements would be in the children's interests.

Some parties experienced a tension between attending to their own needs and focusing on their children's best interests. Some felt that their solicitor handled the sometimes competing needs of parents and children well. Gail said:

> I did feel that [solicitor] was even-handed, and I wouldn't say that she was on my side but I would say that she was on my children's side. And that was actually what was more important for me, was to have somebody who would look at what I was doing with the children in mind.

As indicated above in relation to gendered experiences of solicitor negotiations, however, some mothers felt pressured in the solicitor negotiation process to accept solutions in favour of fathers that they felt were not in the child's best interests. Zoe (quoted above in this regard) said further that her solicitor:

> made me feel in some ways like it was a big bickering contest and I had forgotten about my own daughter. Because she would

> say to me often, you know, 'This is about the child, not about you,' and all this kind of thing. Because I was expressing that I was very uncomfortable with trying to arrange things with him and then not knowing when she was coming home and her safety and things like that, to which they responded with, 'Well, you know, she's getting contact with her father, it's not about you and blah-blah-blah.' So there was a bit of hostility there, I think, between myself and my solicitor.

Gwen had a similar account:

> *And you felt pressurised by your solicitor to give the parental responsibility because he felt it would make you look good?*
>
> Yeah. I did only under peer pressure, but I don't feel it was in the genuine interest of my daughter. He's on so much medication that it can make him not aware of his actions and what he's really think…you know, choices.

The extent to which adults' or children's interests prevailed in the outcomes of solicitor negotiation is discussed further in Chapter 8.

## Experience of the process of mediation

Only 41 per cent of the 46 respondents to the Omnibus survey who experienced mediation expressed satisfaction with the process. In contrast, almost three quarters of our interview sample of 59 mediation parties were satisfied with the process of mediation. The majority of these parties had experienced sole mediation, with only seven interviewees indicating they had had co-mediation.

### What parties liked about the mediation process

There were several aspects of mediation which were viewed positively by participants. The structure of mediation as a managed discussion was appreciated by some, both in terms of an agenda outlined at the start, and in terms of the mediator keeping the parties on track in working towards solutions. For example Charlie, who experienced all-issues mediation, said: 'They showed us sort of a menu of how they were going to run it and what each section was about. An agenda. And it was good to have. That's what I liked. You had a fixed process that you went through.' Similarly, in the recorded financial mediation case we observed, the process was highly structured by the mediator, although the children's mediation cases were more free-form. Some people appreciated the fact that agreements made in the session were written down so they could not be forgotten. Jayne thought that direct negotiation

with her husband would have been fruitless because of his 'selective memory' but found the mediation process helpful as it followed an agenda and moved on once agreement had been confirmed by both parties. One specific structural tool of financial mediation that a few parties commented on favourably was the use of flip charts to show both parties information and outline strategies. Flip charts appeared to be a useful way of demonstrating impartiality while also giving information. Charlotte described this: 'She behaved very impartially and we both had a chance to say what we wanted to say and she put everything up on a flip chart so that we could see.'

Whilst, as outlined below, the lack of enforceability of mediated agreements was a major downside for many interviewees, for those couples who had had a reasonably amicable break-up but who needed more than a 'kitchen table' agreement, such as Alison, mediation was a good fit:

> *And what did you like about the [mediation] process?*
>
> It was informal, it didn't feel invasive.… We could both put our point of view across. Because we don't shout at each other or argue anyway and we never have. You know, it was just like being at home discussing it but it was just written down and legalised, really.

Mediation was viewed as quick and cheap compared to the alternatives. For Jayne:

> Within the shortest period of time possible we got a workable agreement. If we had gone through solicitors, we would still be struggling now and my bill would be horrendous. We wouldn't have got anywhere if we had done it on our own because [ex-husband] would have refused to discuss it. But now we have got something which I am hoping will be approved. It's fair, it's workable and we have both come out of it with what we need and the kids are dealt with which is what I said at the beginning the priority is, that the kids are looked after and they are. And she said, 'At the end of the day they are going to have two homes', which they are.

Some found mediation an amicable way of resolving a dispute, though as discussed further below, this was not universal. Some people appreciated the opening up of communication; Esther, for example, appreciated that mediation had 'provided a sort of safe haven…a better place to express views'. Some, like Eleanor, welcomed mediation as a safe emotional space:

> It was brilliant, actually. I found it really positive. Because, before when I'd tried to discuss it with my ex-partner – face to

> face, it always, always ended up in a really emotional argument and really aggressive, if you like. So, yeah, mediation was brilliant, because I just felt completely safe.

Others were grateful for the suggestion of new angles which allowed them to overcome emotional stalemates. Stan told us: 'I wouldn't say they gave us anything new. I would say maybe a different angle or a different way of looking at things because we were unable to because of our emotional involvement in that particular topic'. Jasper appreciated the mediator's ability to generate options that he and his former partner had been unable to see given their emotional turmoil:

> Because you get blocked I think, as often people do for lots of reasons, because there are so many emotions involved in the breakdown of a relationship that for someone to be able to sit there and just, not in a sort of Relate way, but just practically and say, 'Have you considered this or have you considered that?'

Some commented on their confidence in the practitioner's skill. Andy said: 'She allowed the process to go ahead and she gave me time to get myself together. I wouldn't say pushed but she led the discussion well.' Some were satisfied with the process even without achieving a significant outcome. Norah thought that 'It helped us step along the way.'

**What parties did not like about the mediation process**

There were a number of aspects of mediation that people did not like, or found hard or uncomfortable to do. Some people found having to sit in the same room as their ex-partner very difficult. For many, the process itself of having to discuss sensitive issues with their ex-partner in this context was very hard, and sometimes unbearable. Seth, for example, said it was 'a horrible, horrible thing to have to do and given the choice I wouldn't do it.' The negative experiences of those who mediated against a background of violence or abuse have been discussed in Chapter 5.

People often struggled with power dynamics and power imbalances between the two parties and the mediator. Some people felt that the mediator gave more attention to one party than the other. Karl said that 'He was totally on her side.' One detail which upset some people was if the mediator seemed to know one of the parties before the start – especially if the mediator had conducted the MIAM for one party and not the other. Kathy was aggrieved that the mediator 'was the one that [ex-partner had] seen when he first went, so I felt like she knew his background, but she'd only really, like, read my background so she didn't know anything really about me. She'd heard his side of the story; she'd not given me a chance to hear

mine'. Some people felt that the mediator did not adequately support them during the process.

Some parties found the lack of legal context difficult, either in having a mediator from a non-legal background who was not aware of all the legal implications, or in having a mediator strictly maintaining impartiality when the party felt the need for legal advice. For example Alan's ex-wife had obtained legal advice prior to mediation but he had not. After several sessions of his wife quoting legal issues at him, he felt the need to put himself on the same footing:

> *So you went to them to get some legal advice on what your likely entitlement was?*
>
> Yes, to see what the parameters were legally as my wife had done that and I didn't like that being quoted at me. So I thought I better get some myself so at least I can quote it back.

A number of people complained bitterly that the main problem for them had been the unenforceability of agreements reached during the mediation sessions. Karl reached agreement on contact issues in mediation which his former partner immediately reneged upon:

> It felt like it had no meaning to it. It wasn't even worth the paper it was written on. She looked at it and she just chucked it away and said, 'No, you can't see your child',… It doesn't mean anything in the eyes of the law. It felt like a pointless exercise in the end, that's what it felt like to me, as I might as well have just gone straight to court back months, months and months ago instead of going through all the rigmarole of solicitors' letters, mediation, only to end up in court in the first place.… [Ex-partner] used it as a tool to try and delay me seeing my child I think, you know.

Some parties found the cost of mediation prohibitive, especially if several sessions were required, and this was particularly difficult if only one party was legally aided. Stuart had six sessions of mediation with his former wife before the process broke down. He explained that his initial reservations about mediating centred on the cost and potential delay since he was privately paying while his former wife was legally aided:

> My initial reservation [was] how long [could former wife] drag it out for because I wasn't on legal aid so I had to pay for each session. I was paying my costs and I was thinking, God, if she drags this out for 8, 10 or 13 sessions, I am going to be having to get a bank loan to cover the costs.

### Gendered experiences of mediation

In the Omnibus survey, men reported greater dissatisfaction than women with the process of mediation. Forty-eight per cent of men said they were dissatisfied or very dissatisfied, compared to only 14 per cent of women, although women were almost as likely to be neutral about the process as satisfied. These different gendered satisfaction levels were the same as in Walker's earlier (1996) study.

In our party interviews there was a regularly stated perception, particularly by men, of gender bias in mediation. Some went into mediation with this view. For example Ryan 'thought they might be more on the ex's side, because she was a woman', and David, who was feeling 'bruised and… mistrustful of women generally' put it directly to the mediator at his intake session that 'the main reservation I have is…that you are a woman and I am not quite sure how I feel about that'. In this case, he conceded that his reservations turned out to be unfounded and 'she acquitted herself admirably'. Others came away feeling that the system, or particular mediators, were biased against them. For example Charlie said: 'And the mediators sort of work it like that. They seem to stand together with the wife, or with the girl. 'Cos the mediators were all ladies. There weren't any men'. And he continued: 'I just got the impression that, you know, men weren't supposed to have emotions and women were. That was perhaps just the state I was in. There was just a gender thing, I suppose'. In the reverse situation, as noted in the previous chapter, Laura felt pressured into mediation by her ex-partner and then 'felt the (male) mediator was very pro-husband'.

### Emotions and conflict in the mediation process

As noted in Chapter 5, we concluded that lack of emotional readiness to negotiate was a major reason emerging from our study for rejecting mediation. It was also a reason why some mediations broke down without agreement or with agreements that were unfair since they had been driven by feelings of guilt (see Chapters 7 and 8). Unsurprisingly, the experience for parties of mediating before they were emotionally ready to engage in the process was not only unproductive but also, on many occasions, deeply distressing for the emotionally unready party. One practitioner, Christopher Edwards, said of a client he had referred to mediation before she was emotionally ready to engage in the process:

> It taught me a lesson, taught me a very early lesson to be honest, that you can't just refer everybody. Again, if you feel that a client is just emotionally going to go to pieces when in the same room as the other party, you can't subject them to it and it's not the time to do it. So that's the circumstances where I have

> certainly in advance protected the client when I have felt very strongly.

Rebecca mediated shortly after separation at her ex-partner's insistence. The co-mediators were, Rebecca said, sensitive to the difficulties and some of the sessions involved shuttle mediation. Nevertheless, she thought she had mediated 'way too soon' as she was still 'a complete mess at that point' and 'an emotional wreck', unable to make good decisions. The mediation had clearly been a traumatic experience for her.

Conversely, when mediation was delayed until both parties were emotionally ready to participate then the experience of mediation could be positive. Malcolm described the intake session as an opportunity to get 'a feeling and a judgement of whether we were ready to go through mediation and what the main issues were, but we were quite happy.' Malcolm was emotionally ready to mediate and his experience of the process was positive, describing it as 'amicable', 'friendly', '[un]rushed', 'therapeutic' and 'beneficial for the children'. Robert, who credited mediation with improving the parties' communication skills leading to reconciliation, put it this way:

> [It] basically boils down to if both parties are willing to play ball. If one of them is so angry that they just don't want to be in the same room as that person or whatever, then it's not going to work. But in my case it was perfect because we both sort of had our space and time to calm down and we just wanted what was right for our daughter.

Some parties commented on the emotional difficulty of the mediation process itself. For example Chelsea found the prospect of seeing her ex-partner for the first time since separation emotionally daunting. David described the mediation process as 'harrowing' and said that whilst he and his ex-wife had driven together to the first session, they travelled separately to subsequent sessions 'because of the levels of disappointment, hurt and all the rest of it that were generated throughout the sessions'. Just because some are relatively amicable, the turmoil they may experience during the process should not be underestimated.

Some people viewed the mediation process as a way of starting to deal with emotions. Malcolm appreciated that mediation:

> had a therapeutic component, because I felt that you could talk more about what was going on. It helped to get those emotions partially out of the way so you could concentrate on moving forward, and it was less formal than sort of sitting at a solicitor's office.

Generally, however, perhaps because of the requirement of mediator neutrality and the future focus of the process, more interviewees reported a focus on the practical aspects of the divorce rather than on parties' emotions. Mediators interviewed also reflected this view. Laura Gurney, for example, said that a mediator needed to acknowledge emotions but had to keep a business-like balance and remind the parties, where necessary, that mediation is not counselling. Hannah Phillips reported that 'The emotions are dealt with usually at intake and we say to them that mediation is very practical. It focuses on getting them separated permanently and emotions don't come into it.' Henry Sanderson said that a mediator needed to deal with emotions 'proportionately' while remaining 'outcomes focused'. This was also observed in the recorded mediations, where mediators took a practical rather than therapeutic approach, encouraging parties to reach agreement on future arrangements rather than to dwell on the past and the emotions arising from the breakdown of the relationship.

Several party interviewees appreciated this approach. Eleanor, for example, reported that her mediator encouraged them to approach their negotiation over child arrangements as follows: 'When you're thinking about these arrangements, try and think of it as in like a business sort of mindset rather than an emotional one.' Alan, who was privately paying, thought it a waste of time and money to discuss emotional issues in the mediation sessions:

> If I came along and poured out my heart and my feelings like my wife was, you know, we would never get anything done. And it was about getting the task done; it wasn't any more about counselling or trying to get us to get on.… I am not going to spend that amount of money and waste my time, and I didn't think we were wasting time other than trying to delve into what my true feelings were. And I think that was a waste of time and that wouldn't have helped anybody.

Whilst it tended to be men who shared this view, some women also felt it was not one of the functions of mediation to deal with emotions. Tilda said: 'The mediator said to me, "It feels like you are the one that is holding all the guilt for this," and so I…and I wasn't sure what to say to that because that seemed to be touching on emotions and I thought, you know, we are not really here to discuss that.'

Dealing with conflict is an inevitable part of mediation, whether conflict is embedded in the parties' relationship or emerges out of the stress of the negotiation process. George, for example, described mediation as 'a nerve-wracking experience. I felt that it was a battle between me and my wife and it was definitely anxious making stuff.' Sometimes the tension appears to

have been well managed by the mediator. Eleanor had this experience: 'It worked really well because if either one of us started getting into an argument or too aggressive in our manner or anything like that, the mediator was really good at calming it down'. Stuart described his mediator's strategy for containing conflict as follows: 'So she recognised that when the emotions were running high, she would try and calm things and suggest maybe if somebody did take a bit of time or need to leave the room, then they could do.' Stuart said at the time the mediator's refusal to 'get sucked into' the emotion seemed somewhat uncaring but in retrospect he felt that this had been the right stance.

In recorded session 209 the mother was angry and aggressive at the outset and vented her feelings towards the father at some length, despite the efforts of the co-mediators to get her to focus on her child's interests and future arrangements. The opportunity to 'let off steam' seemed to help, however, and the parties were able to reach an agreement (albeit possibly a fragile one) over contact. On the other hand, some women complained about the mediator's failure to check the other party's aggression. Lorna indicated that her former husband was 'over-powering', 'very antagonistic' and 'very aggressive' during the mediation process. She described her mediator as 'a closed book' who 'didn't really commit herself to saying anything' and who ultimately 'wasn't strong enough' to deal with her ex-husband. As discussed in the previous chapter, Monica felt that the mediator's failure to intervene to stem the tide of vitriol that her ex-husband levelled at her during the mediation session had made the mediation 'a very unsupported environment'. These experiences were the minority, but this was nonetheless a troubling finding.

### Experiences of co-mediation

As noted in Chapter 2, while co-mediation had been the predominant model of mediation at the beginning, by the time of our research it had become a minority practice, often used primarily for training purposes. Many of the practitioners we interviewed had trained under the co-mediation model but now seldom used it for reasons of cost. Only three mediators had substantial co-mediation practices. Gordon Russell's practice was 45 per cent co-mediation, and he attributed his 90 per cent success rate to the significant numbers of cases he co-mediated. Donald Green had recently set up his own private practice with a commitment to offering the co-mediation model, and he co-mediated all cases at this practice unless the parties asked for sole mediation. Angela Brown co-mediated a number of cases as she believed that the mediation process was more effective with interdisciplinary co-mediation in high conflict and/or complex cases. Her practice provided co-mediation in privately funded cases at no extra cost

to the clients, and she lamented that other practices were not able to do likewise. On the other hand, Hannah Phillips' practice had recently taken the decision to offer sole mediation only as co-mediation was deemed to be commercially unviable, despite her belief that as a model of mediation it was 'infinitely preferable'. Emily Jacobs and Yvonne Newbury were reluctant to co-mediate publicly funded matters in case the LSC (now LAA) later rejected their claims.

Practitioners thought that co-mediation offered the most supportive experience for clients, particularly if one mediator had a legal background and one a therapeutic background. This was the case for Kevin, who had counselling prior to mediation coupled with co-mediation with a lawyer-mediator and a mediator from a therapeutic background. But such a supportive experience is one which is likely to be beyond the financial reach of the majority. Some practitioners also pointed to the advantage of co-mediating to provide a gender balance in the room. By contrast, as noted above, Charlie's experience of co-mediating with two women mediators was problematic. Similarly, George was unhappy with what he described as the 'slightly less than ideal balance of genders in the room' when he co-mediated:

> I was definitely aware of the fact that there were three women in the room and me. The two mediators were female. Erm…
>
> *What sort of feeling did that sort of dynamic give you?*
>
> Er, it just...it kind of raised a slight suspicion in my mind or a slight sort of wariness that you know, would these people be... would they be impartial as they no doubt stated that they were?

Where co-mediation is used, achieving gender balance wherever possible appears to be the optimal model.

Several practitioners thought that co-mediation was beneficial particularly in redressing power imbalances. The parties we interviewed, however, predominantly did not feel that the co-mediators had been able to redress power imbalances. At Tilda's joint intake session (discussed in the previous chapter), the mediator suggested co-mediation, in Tilda's view, because it was clear that her ex-husband was going to be difficult. Whilst she thought that 'the mediators had more control when there were two of them', ultimately they were not successful in mitigating the intimidation Tilda felt being in the room with her ex-husband. Similarly, the presence of two mediators did not redress Rebecca's emotional unreadiness to mediate. In the recorded co-mediation process we observed, both mediators were women and both were from a legal background. It was not clear that they brought any difference of approach to the process but rather,

echoing Tilda's comment, operated to back each other up and provide strength in numbers in attempting to contain the very angry and aggressive mother.

### Experiences of shuttle mediation

Like co-mediation, shuttle mediation is a strategy which may be deployed to deal with 'high conflict' cases or domestic violence cases where there is a risk to physical safety. Most of the mediators in our study said they undertook shuttle mediation if needed, although a number were ambivalent about it. Hannah Phillips' view was that shuttle mediation is 'not a family mediation tradition'. She thought that offering shuttle mediation simply because the parties did not like being in the same room often exacerbates problems, but would offer it if one party genuinely felt unable to be in the same room as their former partner. Henry Sanderson typified the view of several mediators that shuttle mediation is generally unrewarding for the parties, that it is unable to help improve communication, but that it can be used if this is the only way that matters may be progressed. Only two were opposed to shuttle mediation on principle. Gordon Russell said:

> I never shuttle. I don't shuttle and I won't shuttle. I take the view that shuttle is not mediation, its pure negotiation, you are being a negotiator on behalf of the couple and at no point do they get the 'ah ha' moments that you get in mediation where somebody actually sees the emotional reaction when they make a statement or when they ask a question.

We argued in the previous chapter that there is a tendency for mediators to resort to techniques such as shuttle mediation in cases which ought to be screened out as unsuitable for mediation altogether, and this concern has been echoed recently by Glynne Davies (2013), who argues that many shuttle mediations that break down do so because the matter was not suitable for mediation in the first place.

Only three of our party interviewees who mediated had shuttle mediation, and none reached agreement. As discussed above, Rebecca was emotionally unready to mediate, and neither co-mediation nor shuttle mediation could put her in a position to be able to participate effectively in the process. Similarly, Jason's ex-wife appears to have been emotionally unready to mediate and their three or four sessions of shuttle mediation over finances were unproductive. Dominic had two court-referred sessions of shuttle mediation, attending on separate days to his former wife who had alleged domestic abuse. The parties were unable to reach agreement on children matters and mediation ended as the mediator felt that they were unable to assist further. These experiences suggest that screening out

of mediation would have been more appropriate for these parties than attempts at shuttle mediation.

### The role of the practitioner in mediation

As outlined in Chapter 2, two central tenets of mediation practice are impartiality as between the parties and neutrality as to the outcome arrived at (FMC 2016: 5.1.1, 5.3). In order to maintain neutrality, the mediator may provide clients with information but not advice. Researchers have questioned whether impartiality and neutrality are either achievable or desirable (Greatbatch and Dingwall 1989; Mulcahy 2001; Piper 1993), and in practice, mediators have been observed giving clear steers to the parties that not only moved beyond information-giving but which were 'almost moving beyond advice to something that looks as close to direction as a mediator could come' (Maclean and Eekelaar 2016: 107). Previous research also indicates, however, that when parties separate they want specific legal advice tailored to their own situation (Maclean 2010: 105; Pereira et al. 2015; Walker et al. 2004: 124). Here we discuss how parties experienced these aspects of the mediation process. Further discussion of mediator practices can be found in Chapter 8.

One issue is whether impartiality requires the mediator to treat the parties strictly equally, or to weigh in on the side of the more vulnerable or more reasonable party in order to try to achieve some kind of balance. Raymond encapsulated this issue nicely:

> [The mediator] definitely maintained her impartiality and her professionalism. I think an onlooker, a fly on the wall, would have seen that she needed to work a lot harder on my wife because my perception of that is that the mediator is trying to bring you both to a middle ground, and because the middle ground is all I was seeking and am seeking and my wife would prefer the, you know, an extreme on that scale.

Norah also thought: 'I would say he remained impartial, but I think my ex felt that he was siding with me'. But on the other side of the balancing equation, Laura felt that her mediator had not been impartial: 'He was all for my husband. I felt like a little naughty schoolkid sat in a corner'. Or when an equal treatment approach is adopted, parties may feel this is inappropriate. Stan said:

> I find the idea of mediation quite frustrating in that you have an individual permanently sat on the fence. Sometimes people just need a little bit of a poke in a certain direction or a little bit of, 'No, look, that's just wrong, this is what you should be doing.'

In relation to the information/advice distinction, some parties felt aggrieved at what they viewed as advice from the mediator, as illustrated by Sonia:

> *Do you feel [the mediator] was giving you specific advice or information?*
>
> Oh yes, she told me, she told me I was getting a good deal financially, which I thought was completely not her place to say that.

Conversely, some parties would have appreciated more advice. Malcolm said that the 'only downside' to mediation had been the absence of advice:

> *And what either didn't seem to work or did you not like about the process?*
>
> I think fundamentally it was the bit about [the mediator] not having the freedom to come up with what would be ideal and work for both of you, even when you were both in consensual agreement. That was the only downside I think. But they did say, to be fair, at the beginning, that they weren't allowed to give advice. But I don't think that would conflict if they actually said at the beginning, 'this is what you need to work towards', because the parameters are quite large when you start looking at it, sort of what the judges can do, because that would have been very helpful.

These accounts illustrate the inherent tensions in mediation and help to explain why some parties will find the process frustrating and unsatisfactory, whatever approach is taken by the mediator.

When discussing the role of the practitioner in mediation, it is necessary to think not only about the role of the mediator but also the role of the supporting lawyer. Several of our parties consulted a lawyer before or alongside mediation. Esther, for example, was thankful that her lawyer was able to advise her on a reasonable financial settlement to inform the mediation process: 'I think that's what I'd been waiting for all along.' This view that legal advice in tandem with mediation was the optimum process was echoed by a number of interviewees. Rebecca, for example, said:

> I guess what you should feel is that you know you're getting the legal advice that you need, and the support, so you know what your rights are and what you should be aiming for. And then you've got the mediation to do things sensibly, [to try to] reduce the conflict.… I think one can complement the other.

Indeed some, like Tracy, did not feel able to mediate until they had secured robust legal advice and support:

> *So the decision to go to mediation, from your perspective, having said that you didn't want to go originally, what made you decide to try it?*
>
> … A friend recommended a different lawyer to me.… So I went and had a chat to my new lawyer, and she is a great believer in mediation and said that what she would do.… I think the first lawyer…probably didn't give me enough information on my rights, so I had lots of information on how the processes worked.… So my new lawyer just said, 'I am going to try and make you feel empowered'. She said, 'If you need me, I'm here, but to try and keep the costs down as well and to try and see if you can work through this yourselves, we'll go through mediation.'

Similarly, Andy, who had a very positive experience of mediation, felt the need for legal advice before committing to the mediation process:

> *And so did either of you have a solicitor at any point?*
>
> I went to a solicitor because I wasn't sure about the whole mediation process so I wanted to know my rights in the whole situation, so I went to see a solicitor before I had my individual mediation appointment.
>
> *So that was after your wife had suggested but before you actually went to mediation?*
>
> Yeah, my wife suggested it and she went for her individual one just with the mediator and I wasn't sure what the process was because at that stage I wasn't sure on what information she was giving me and how accurate that was, so I just wanted to double check, so I got some advice from a solicitor before I went and yeah, that was fine.

Following the LASPO Act, people reliant on legal aid are now expected to mediate without legal advice, despite the evidence that this is felt to be important by many parties, both in enabling mediation in the first place (when they might otherwise choose not to do so) and in assisting parties to reach agreement. A number of practitioners in interviews expressed concerns about the forthcoming legal aid cuts for this reason. Henry Sanderson summed up their apprehensions well: 'I think that to expect mediators to operate effectively in a legal advice vacuum is very dangerous.'

**Focus on children's welfare in the mediation process**

Although one of the aims of the research had been to investigate the experience of child-inclusive mediation, instances of this were very rare in our sample. A few people had considered and rejected it, with concerns about the possible emotional impact on the children. As Ryan put it: 'It might have felt more awkward with the kids around, to be honest with you, because we would just be fighting over them. That wouldn't be a very good situation for kids'. Lynn noted that 'I think [mediator] said, "Perhaps I could invite [daughter] along to get her involved." But she didn't want to go. I was trying to make it the least stressful for her as possible. So yeah, that wasn't really good'. Ernest had experienced child-inclusive mediation, and still had reservations:

> I just felt, you know, the parties involved, certainly me, and perhaps the child as well, their expectations weren't best managed.
>
> *And your daughter was involved in the first mediation.… Do you think this was helpful for your daughter?*
>
> I think it put her in a difficult position.
>
> *Okay. And do you think it would be a good idea to involve children in the mediation process more directly?*
>
> I think mediation has to be child focused rather than child inclusive. I think there are better ways of bringing the child 'into the room'. I think there's better ways of focusing on the child than actually bringing them to mediation. I think it puts them in a very difficult position.

Given widespread reluctance on the part of parents and mediators to include children in mediation (see Ewing et al. 2015), we focused on how parents and mediators considered the child's best interests in the mediation sessions.

Mediators were clear that child welfare would trump parental autonomy if parents proposed an agreement the mediator did not think was in the children's best interests. For example, Gordon Russell described himself as 'impartial but…not neutral as to the outcome.… Mediators seek always to try to secure outcomes that are good, workable outcomes for children and deliver on what children need rather than purely taking things from a parent point of view', while Molly Turner tells her clients that her role as a mediator 'is to be an advocate for their children'. Mediators variously said they would terminate mediation if they felt the parties were failing to put the children's welfare first or would not consider an outcome that was not in the child's interests to be an agreement. Only one mediator (from a legal

background) stated explicitly that it was ultimately up to the parents to decide and it was not for her to introduce her own value judgement.

There were a number of positive examples from those who had experienced mediation where parties felt the children's needs were set firmly at the centre of the discussions. Tilda observed: 'They were very clear with me that it was about the children and not about either of us, really. It was all about them and responsibility of care, yeah.' Chelsea also felt that the process was very child-focused:

> She was lovely actually. She said that, you know, 'I think [child] is really lucky to have parents like you two.' And I think because we were quiet, she probably picked up on the fact that we both just.... [My son] desperately wanted to see [his father] and I wanted the same really. So it was all quite amicable.

Malcolm also experienced a child-centred mediation process which aided the post-separation parenting relationship:

> It was beneficial for the children because [the mediator] had experience with the sort of psychological effects with the children and were able to sort of point me in the right direction of literature that you could read, literature that the children could read, and sort of very much.... A certain percentage of the mediation sessions were about how well the children were coping and sort of how you were explaining things to the children. So it was very much trying to keep...well it sounds a stupid thing to say, but trying to keep you together as a family unit and supporting each other as a family unit until you go your separate ways, so that was very good.

Tracy described how the mediator reframed the discussion from parents' interests to the child's interests: 'One of my husband's objectives was to spend, I think he said spend as much time with the children as possible and so the mediator said, "Well, why don't we phrase it as to be able to build meaningful relationships with the children?"'

Some men thought there was a conflation of what was best for the child and what was best for the resident parent. As Leo put it: 'I expected us to be talking about what was best for my son but it turned out to be, in my opinion, what was best for his mum'. Rebecca's experience was that the mediator seemed focused on reaching a workable compromise rather than on what best met the children's interests: 'It was more "this is what [ex-partner] wants to do, this is what Rebecca wants to do, can you come to an arrangement of what you want?" rather than "this is what is best for the children".' As these experiences demonstrate, it can be difficult to remain

focused on the absent children in the mediation process. Stan observed that in his case the parents themselves were not able to focus on the child's need: 'It was not child-focused because, you know, maybe we were both unable to see what actually the best outcome was for the child.'

Some people who experienced all-issues mediation felt that finances were prioritised by mediators over child issues. Sonia wanted to talk about the details of everyday parenting such as homework and bedtimes:

> *How far you think the mediator emphasised the need to focus on the child's welfare? It sounds like you don't think she did?*
>
> Well, she said it but she didn't actually do it.… It's like she knows what to say. It's not like she's not aware of it; she just didn't do it. So there's no point in saying it. So, in a way, she did prioritise finances.

However, Geraldine found that sorting out the finances first helped to resolve the issues in relation to the children:

> They didn't come into it in the end as much as I thought they would. I thought we would talk about them more or that they would naturally come into it but in the end, because of the finances, I had to do a lot of work and our child-care costs…sort of dictated how our child-care arrangement actually would have to be in the end.

In the recorded mediations we observed various techniques used by mediators to maintain focus on the child, including 'bringing children into the room' and discussing their personalities and interests, reframing to try to break an impasse and refocus on children's needs, and using a focus on the child's welfare as a tool to bring parents together and encourage cooperative parenting by stressing their common interest in their children's welfare. However, where parties were entrenched in their adult dispute, mediators' efforts to get the parties to focus on the children were often in vain, resulting in children's interests receding into the background (see further Ewing et al. 2015).

Monica felt that her ex-husband used the concept of the child's best interests as an argumentative tool (see further Smithson et al. 2015):

> The thing is he [ex-husband] kept banging on about that. You see, this is his big thing that, you know, he wanted what's best for the children and I didn't.… So in fact, he kept banging on about it. He knew the correct buzzwords. He knew what sort of things to hang his argument on, so he kept banging on about it.

As will be discussed further in Chapter 8, it is clear that parents may have very different views of their role in their children's lives, and in particular, gendered expectations of parenting before and after separation often influence parental views of what is best for the child. In recorded mediation session 207, for example, the father considered that he and the mother had shared the care of the children, having had 'different inputs and different types of input over the years that we have been together', and he therefore wanted a 50/50 shared care arrangement post-separation. The mother, on the other hand, was adamant that she had been the primary carer and that it was in the children's best interests to remain in such an arrangement.

In general, the understanding of what it actually means to focus on the child's welfare in practice, and at a time of changing parenting gender role expectations, appeared to be inconsistent and not well considered among parents or practitioners. This could then give rise to intractable norm conflicts, as discussed in Chapter 8.

## Experiences of the process of collaborative law

As discussed in Chapters 3 and 4, it was not clear whether the 16 Omnibus survey respondents who said they had experienced collaborative law had in fact done so in its specialist sense as a distinct FDR process, so their relatively high satisfaction rate with the process (63 per cent) may simply have reflected the level of satisfaction with a lawyer-led process in general. As discussed in Chapter 2, however, other research on collaborative law has found high satisfaction rates (Lande 2011; Lloyd et al. 2010; Macfarlane 2005; Schwab 2004; Sefton 2009), and similarly, of the nine parties in our Phase 2 interviews who had experienced collaborative law, most were highly satisfied with the process. As already noted, these parties tended to be better educated and informed, and more affluent with a wider set of options available to them.

### What parties liked about the collaborative law process

Parties who had engaged in the collaborative process particularly liked the opportunity to resolve problems amicably and cooperatively. For example Jane, who entered the collaborative process with a strong sense that she wished to be fair to her ex-husband in relation to finances and shared parenting, reported that the interest-based approach was a positive feature of the collaborative process:

> So [my collaborative lawyer] was sort of complimentary about [ex-husband] and his nature which, for me, worked because it

> made me feel like we were kind of on the same side, we are just trying to sort this mess out.

William thought the lack of letter writing also meant that potential problems could be intercepted and addressed:

> I think the ability to sit around the table, I think that was the biggest difference I noticed with my first divorce.… The letter writing, I used to get letters from my solicitor, and how you felt, you could interpret the tone of the letter.… I suppose that was the big difficulty – [whereas in the collaborative process] if my lawyer said something that I could see was getting on my wife's, you know, issues, I could step in and say, 'Well, what if we did this?' So it was a very quick way of intercepting potential problems before they blew out of all proportions.

In cases where there was no dispute over child arrangements, parties also reported that using the collaborative process had helped shield the children from the adult dispute leading to better outcomes for the children. Jane said:

> I think we have done a really, really good job with the children because they haven't seen anything…and I'm sure that would be a bit harder.… I'm sure that would be harder to do if you were doing it in a process where there's letters flying around the place.

Parties also commented positively on the role of the lawyers working collaboratively for the good of the family. For example, William:

> I knew my lawyer reasonably well and I also knew my wife's lawyer – they got on well together and that was quite key to it.… And I actually ended up with a lady that [wife's solicitor] gets on well with and that was good because they weren't scoring points off each other.

Joshua also noted that 'There was no "My solicitor, your solicitor" sort of thing and it was all comfortable and jolly in places'. Interviewees spoke of good relationships with their solicitor, and how this helped with negotiating with their ex-partner. Marcus said: 'I was really appreciative of [solicitor's] approach and he made a very difficult situation as simple as it could possibly be.'

Another feature of the collaborative process viewed positively was the ability to incorporate other professionals and bring in interdisciplinary skills to assist the parties. In some cases, one or both parties received counselling

prior to or within the collaborative sessions, enabling them to cope more effectively with the emotional consequences of the separation. For Marcus, having a counsellor present during a collaborative session had helped to 'iron out some of the emotional language…helping us maybe to rephrase things…so [that] we didn't push each other's buttons, basically.' Sebastian reported that the presence of a trusted accountant acting as 'the honest broker' in the collaborative sessions gave his wife confidence in the disclosure process, enabling them to reach an amicable settlement. In the recorded sessions, some parties had advice from an independent financial adviser and a pension actuary either between or within the collaborative sessions. The ability to 'buy in' these additional services when needed generally led to parties using collaborative law reporting that it had been a supportive process.

In two of the recorded collaborative processes, the parties reached agreements and signed consent orders in two sessions (in one case, matters were concluded on the same day, with a break to allow the practitioners to draft the divorce papers and proposed consent order). In the party interviews, parties appreciated the speed of the process which aided emotional recovery. As Marcus put it: 'The fact that we resolved it as quickly as we did has just allowed me to focus on getting over the emotional side of the separation'. The speed of the process made the experience less stressful than it might otherwise have been. Joshua said:

> I couldn't fault it. It was just so, without having to wait for letters or worrying. Because the uncertainty can make people worry more needlessly and there was no uncertainty. And as it was all quick and it was all sorted out together and explained together then, I really couldn't fault it.

**What parties did not like about the collaborate law process**

As in previous studies (Davy 2009; Lande 2011), the cost of the collaborative process was mentioned by several parties as a negative and as a potential disincentive to using the process for couples of lesser means. Some of the high net worth men interviewed thought that the process was expensive but potentially cheaper than contested proceedings.

Previous findings that costs may escalate due to the lack of an enforceable time limit (Family Law Council 2006; Macfarlane 2004) were borne out in our study. Sebastian, for example, lamented the lack of a rigid timescale in the collaborative process. According to him, this had resulted in additional costs of £10,000, a dissipation of goodwill and an additional three months to conclude matters whilst his former wife 'pondered' the proposals made in the collaborative process. Similarly, the inability to enforce financial disclosure in a timely manner was problematic for Jenny:

> [The process] didn't seem to have a definite framework.… It did seem that any deadlines that came up were ones which both parties had to agree to so it wasn't like they could.... I mean I would have found it fantastic if they could have said, you know, basically 'you have to give us this information by this time otherwise there will be a penalty'.

Some parties' experiences of the process were also marred by a lack of adequate information on the mechanics of the process. For example, Jane said:

> I found the process a bit confusing.… I'm the type of person that needed to understand exactly what the process was going to be. So I think I spent a lot of my time and paying a lot of money...asking questions about the process rather than about my situation.

A lack of understanding of the process was particularly challenging when, like Sheila, the interviewee felt that the other party was better informed:

> My solicitor had not told me how he was going to behave in that four-way meeting and it had all come as a surprise to me and [I] felt that that was wrong and that my husband seemed to have a better idea of what was going on than I did.… [My solicitor had] told me virtually nothing, and I think he had taken a kind of…you know, almost a paternalistic role – he knew what he was doing, so I didn't need to know, which I didn't realise but I felt uncomfortable with him. I felt he wasn't telling me things.

**Experiences of the disqualification clause**

Since the disqualification clause is a hallmark of collaborative law that distinguishes it from other processes, we were interested in whether it affected the parties' experience of the collaborative process. In fact, although some of our practitioner interviewees expressed concerns that parties might find the disqualification clause off-putting, our party interviewees made remarkably little comment on this aspect of the collaborative law process. As noted in the previous chapter, Sebastian shared Tesler's (2004) view that the disqualification clause acts as a strong incentive for the lawyers to remain at the negotiation table. Jenny thought that the disqualification clause might help to keep the *parties* at the negotiating table. Marcus viewed it as a fallback if the parties got stuck. For the others, the disqualification clause was inconsequential. Even in the two cases (Tracy and Sheila) in which the collaborative process broke down and the parties had to instruct new lawyers,

they did so uncomplainingly. Indeed Tracy felt she had a better relationship with her new lawyer and had no regrets about being forced to change.

### Gendered experiences of the collaborative law process

The parties' reports of their experiences of the collaborative process raised fewer concerns about gender bias than the accounts of those who mediated. The presence of lawyers in the process giving legal advice and emotional support was welcomed by the parties and appeared to counteract some of the power imbalances involved, although in a small number of cases, such as Sheila's, power imbalances for women were exacerbated by their (male) lawyer's paternalistic approach.

Nevertheless, the accounts of several women in the collaborative process were highly gendered. Jenny's case illustrates this well. She described her husband as emotionally, but not physically 'cruel' and had spent much of the marriage and the period following separation placating him. As she was the homemaker and her husband was the breadwinner and she was choosing to end the marriage, she expected to leave the marriage with little financially. Her priority, having been the primary carer of the children, was not to lose them:

> Obviously the most important thing was that I didn't want to lose my children, you know? I had no idea that I had any rights because it was me who was wanting to go.... I mean I didn't think I would get half the home, you know, I was choosing to leave.

From such modest, gendered expectations Jenny described the collaborative process as having been a 'lifesaver' and a 'lifeline'. She spoke positively of the role of her lawyer in adjusting her expectations in discussions prior to commencement of the collaborative process, and of both collaborative lawyers for helping to counter the power imbalances between her and her ex-husband in the process:

> I was coming to the divorce from quite an unconfident point of view, you know, as a person having not worked for several years and having, you know, not feeling very erm socially adept or you know, sort of a bit imbalanced, you know, basically because he was the one with the money and I never considered, even though we were in a long marriage that, you know, the money was in any way mine or I had access to it, you see, and he comes from a different class.... So yeah, I felt very positive. I felt that [the collaborative lawyers] dealt with that well, you know, with the dynamics.

Pauline, like Jenny, felt vulnerable coming into the process and expressed 'relief' at having 'somebody doing it for me' in the collaborative process. As we observed, however, the presence of her lawyer was insufficient to prevent the gendered power relationship between the parties driving both the process and (as we discuss in Chapters 7 and 8) the outcome. In Jane's case the normative gender roles were reversed; she was the breadwinner and her husband was a 'stay at home' father to their three children. Jane expressed concern that insufficient weight was placed on her husband's earning capacity, but acknowledged that this was an issue with 'legal guidelines' rather than the process.

### Emotions and conflict in collaborative law

The flexibility of the collaborative process enables it to be paused until both parties are emotionally ready to engage in the process, with interim arrangements agreed where necessary. As David Leighton put it, in the collaborative process: 'you avoid doing the long-term decisions until you have the information and have the capacity to do it. And that's the beauty of collab [sic] that litigation can't deliver, because litigation just says, "Don't care about your readiness to do this stuff, this process is marching on".' Pausing the process and undertaking counselling in the interim enabled Marcus to get to 'a stronger place and willing to kind of move forward with things', and he was grateful for this. Counsellors and coaches can also be brought into the process if one or both parties are struggling emotionally. Marcus appreciated that in the collaborative process 'there was a recognition of the emotional impact of the divorce'. In his view, the presence of lawyers helped ensure that the parties did not allow emotions to take over or make emotionally driven decisions. Jane felt that her collaborative lawyer had got the balance right in her approach to the emotional divorce, making Jane 'tough it out' at times whilst also being attentive to her well-being when needed.

By definition, the level of conflict in the parties' relationships at the point that the collaborative process commenced was relatively low in most cases. For some parties therefore the sessions could be, in Pauline's words, 'relaxed' and 'friendly'. Recorded collaborative case 213 involved a couple who, according to the wife, were 'hoping just to still be friends yeah, I mean we are best of friends and now we have decided to divorce', while the parties in recorded collaborative case 214 had separated several years before the collaborative process. In both these recorded cases exchanges between the parties were largely unemotional, good humoured and transactional.

While parties found the process in general relatively amicable, this did not make it stress-free or comfortable for a number of parties. Sheila said: 'I think it stressed me out a lot. I became very stressed with that phase, those few

months [of the collaborative process]. I found that unbearable'. A lack of direct conflict did not mean that the parties' experiences of the collaborative sessions were not emotionally charged. For Jane, the process of 'dissecting' one's life in front of 'two strangers' was incredibly stressful and awkward, but she recognised that traditional solicitor negotiations 'would have been absolutely heart-wrenching and a lot more emotionally tough'. Jane described the suggestion made by the collaborative lawyers that the parties go for a coffee together whilst the final consent order was drafted as 'ridiculous', explaining that the day had been one of the most emotional of her life and that the practitioners were wrong to assume that the parties had got beyond their feelings of sadness just because they behaved civilly towards each other.

Overall, the parties who had experienced the collaborative process tended to agree that whilst the collaborative process is emotionally challenging, it is preferable to solicitor negotiations or court proceedings, or to mediation in cases where parties feel too emotionally vulnerable to negotiate with their former partner without a solicitor present.

### Experiences of collaborative law in domestic abuse cases

Denny (2011) cautions that the collaborative process may not be appropriate where there are trust issues (including threats of violence or oppression) or where one party is vengeful. The practitioners we interviewed exercised caution when domestic violence was disclosed. Some, like Kirsty Oliver, believed that such cases are not suited to the collaborative process. Others, like Richard Benson, were hesitant to recommend the collaborative process when domestic violence was disclosed, but might not screen the case out if the violence was acknowledged and the perpetrator had shown contrition. Matthew King's view was that if 'historic' abuse was disclosed then the question of suitability for the collaborative process turned on the parties' ability to engage in the process. John Astwood would screen out of collaborative law when there were 'massive inequalities' that required the collaborative lawyer to assume the role of protector of their client.

The fact that those who used the collaborative process were predominantly low conflict couples did not preclude the presence of either gendered power imbalances or, in some cases, histories of emotional and financial abuse, as discussed above. 'Low conflict' could be a product of one partner being controlling and the other being habituated to control and to appeasing that partner's wishes. None of the parties interviewed who undertook collaborative law had a history of physical violence, however, it was clear from our interviews and observations that the kind of cases identified in the previous chapter, in which dominant men chose collaborative law in the hope of securing a better outcome, were not screened out of the process. None of the women involved reported feeling scared, intimidated

or overborne in the way that mediation parties described (see Chapter 5), but power imbalances were reflected in the outcomes, as discussed in subsequent chapters.

**The role of the practitioner in the collaborative law process**

Denny describes a paradigm shift in collaborative law away from the traditional predominantly lawyer-led process to a client-led approach (2011: 57). Practitioners acknowledged this shift but nevertheless saw their role in the collaborative process as one of 'steering' the parties. As Matthew King said:

> Well as a collaborative lawyer, my role is to steer and guide clients through a difficult process and help them deal with practical issues which inevitably arise from divorce and separation... in a manner which is civilised, fair and child centred.... My approach...tends to be fairly hands-on but one cannot lose sight of the fact that, you know, the collaborative approach also has to be client driven as opposed to lawyer driven.

Almost all of the parties interviewed felt sufficiently involved in the process and in control. Jenny spoke of the collaborative lawyers putting the issue of what would be on the agenda as the first agenda item to ensure that her ex-husband was involved and felt 'a bit more in control'. Sheila, however, reported feeling 'very disempowered' by her solicitor's 'paternalistic' attitude, which ultimately led to her instructing a different collaborative solicitor. In the recorded collaborative law cases we noted the lawyers making considerable efforts to allow parties to set the agenda, although there were also certain matters directed by the lawyers which were required to be addressed, such as the facts to be alleged on the divorce petition and the various necessary steps such as disclosure, valuation of assets and the basis for division in separating the parties' financial affairs.

Richard Benson described his role as a collaborative lawyer as 'trying to avoid entrenching your client by talking about entitlement; [instead] you are trying to encourage them to see life from the perspective of their partner and talk about interests and aspirations'. This interests-based approach was summarised well by the wife's collaborative lawyer in recorded session 214:

> It's actually the four of us working out the answer together for the benefit of the family.... This is about the two of you and your [children] and making it best for you. So we all work together in this and we are not oppositional and it's very much about working together.

This role, however, appeared to necessitate a delicate balance for the practitioner between being partial to their client and concerned with fairness to

everyone. The ambivalence of this goal was reflected in the ambivalence of some of the party interviewees, such as Sheila, about whether their solicitor was impartial, and how appropriate that felt:

> The thing that bothered me slightly was that I had the impression that [my solicitor] and my husband's solicitor, you see, [my solicitor had] worked with [husband's solicitor], obviously, quite regularly – were almost deciding for themselves how this was going to work, and I think [husband's solicitor] was influenced by my husband who was quite forceful about what he thought.… There was the odd thing that [my solicitor] said that made me feel that he'd sort of decided what was best in this situation without actually saying to me, 'What do you think is best?'

On the other hand, Pauline and Jenny felt that both their own solicitor and the other party's solicitor were sympathetic to their position. However, whilst this was comforting for Jenny she had reservations about how her husband might respond to the dynamic: 'I felt that if my ex felt that his lawyer was being sympathetic to me that would really not work.… The sympathy, in other words, was a double-edged sword.' In the recorded cases we observed a spectrum of approaches, from the lawyers fudging a difficult issue and failing to confront a bullying husband for the sake of maintaining harmony, to the lawyers becoming highly positional over a particular issue and having to be reminded by their clients that the aim was to achieve an outcome that was fair to both of them.

**The collaborative process and children's welfare**

The collaboratively trained practitioners unanimously agreed that a child-focused approach is 'fundamental' to the collaborative process. The parties' children are, as David Leighton put it, 'the lens through which issues are resolved'. Two of the three recorded collaborative law cases involved minor children but in both cases the parties had agreed arrangements for the children prior to commencing the collaborative sessions. Nevertheless, the lawyers stressed the need to focus on the children's interests. As Richard Benson put it in a meeting with his client prior to commencing the collaborative process, 'The reality is as you have said, you have got kids and they are at the heart of the solution'. In the other case the wife's lawyers explained that the children were included on the agenda 'not because we think there was anything major to think about from what I gather, as everything seems to be going reasonably well there, but just as a kind of reminder that, you know, they are three very important people who aren't sitting in this room'. Nevertheless, as the discussions proceeded into the details of the parties' financial affairs and division of property,

adult concerns tended to take over and the children receded into the background.

There was also no evidence from the party interviews of children being given the opportunity to speak to a child consultant in the collaborative process and none of the practitioners suggested hearing the voice of the child in this way. Indeed, Sheila's attempts to have a third party elicit the children's views were resisted by the collaborative lawyers:

> And what I felt uncomfortable about was not being able to ask [the children] what they thought.
>
> *Did anybody suggest bringing the children into the process?*
>
> No. They were very reluctant, only me. And even my new solicitor, who I thought was wonderful, seemed quite reluctant about that. I asked about, you know, if we weren't to bring them in to a meeting like this, what about having a guardian ad litem, someone to talk to them, and they were very anti that. So I accepted, you know, they are the people who know how these things work. Because they said, 'Children really don't usually like that sort of thing. If we did anything, it would be that we, the solicitors, would speak to them.' But they really, really were reluctant about bringing the children in.

## Participants' comparisons of FDR processes

Twenty-seven parties in our interview sample had experienced more than one FDR in attempts to resolve post-separation disputes with their former partner. This was typically because one form of FDR broke down and parties then moved to an alternative process. As discussed in the following chapter, attempts at different FDRs were often an indication that the dispute was intractable and a number of these parties ended up in court. Sometimes parties settled, at least partially, and returned to the same or a different FDR many months or several years later as new issues emerged. In addition, some parties had experienced more than one relationship breakdown and used different processes at different times. Twenty-five of the parties interviewed had experience of both mediation and solicitor negotiation processes. Two of the nine interviewees who had experienced collaborative law had also tried mediation, and three further collaborative law interviewees had used solicitor negotiations for a previous divorce. Sheila had experienced all three FDRs. Those who had experienced more than one process expressed different preferences – about half those who had experienced solicitor negotiation and mediation preferred the former while half

preferred the latter. Some liked the combination of processes which offered different strengths. Sebastian, Joshua and William who had gone through two divorces preferred collaborative law to their previous solicitor negotiation experiences and Tracy also preferred collaborative law to mediation, while Sheila was more ambivalent about collaborative law compared to other processes.

While preferences varied, the reasons for preference clearly relate back to the strengths and weaknesses of each process identified earlier in this chapter. Stan appreciated solicitor negotiation as a more definite process: 'It was absolutely hands-down better than mediation because there were logical steps to it, there were contracts in place at the end of it and there should be consequences when these contracts are.... So, yes, the solicitor approach is much better.' Leo felt that solicitor negotiation was more enforceable if one partner was not cooperative: 'The solicitor negotiation worked better, in that my ex-partner responded better to more formal intervention.'

Kevin, on the other hand, found mediation to be 'cheaper and it was less aggressive, far less aggressive' than solicitor negotiations. For Greg, mediation 'wasn't so stressful. Like when you sit with a solicitor it's a more serious sort of thing, but in there it was quite a comfortable sort of thing to talk about it all, I felt.' Malcolm preferred mediation for being able to think more creatively: 'It enables you to think outside of the box and enables you to come up with solutions that you wouldn't have necessarily have sort of come up with if you had sort of gone to a solicitor'. Lorna found mediation more contained than solicitor negotiation, about which she said: 'You open a letter and you read it and you just think "Oh, my God!", you know? Your stomach turns, you know? You're crying over the soup! In the mediation it's more contained.'

Both Sandra and Kim preferred mediation for children's issues and solicitor negotiation for financial issues, for similar reasons. Sandra explained: 'Mediation was definitely our way forward in terms of the children because I think the mediation, what mediation added, what the solicitors didn't, was the emotional side'. However, she also realised that mediation would not work for her in relation to the financial side of their separation:

> At the beginning, I was up for mediation across the board and it was only when we went into mediation with the children that I realised there was a level of him getting a bit of leeway and I just thought, I'm not going to lose the house, I can't afford to lose the financial backing for these children, for me to sit in mediation and me have to back down. Because I was quite weak, I felt that mediation, because it was me probably not being able to make the decisions, that I felt I needed a solicitor's

> strength to say, 'right, this is what we want and we are going for it', kind of thing. I felt that if I was going to go into mediation over finances I was going to come out totally at the bottom of the pile. So the solicitor, for me, was a very strong thing for me financially; I felt I needed that.

After her collaborative law process broke down, Tracy instructed a new solicitor who encouraged mediation, with the solicitor's support. However, Tracy felt the difference between having her solicitor alongside her and being in the room alone with her controlling ex-husband:

> One thing I feel about mediation, actually, is that there's.… I think it is great and I think it can really work but I suppose there are times when I do feel.… I am not quite as vocal in those situations because I do get nervous and I think sometimes things can be missed off. I think there is a danger…and this is why I went for collaborative first because I think there's a danger that one person isn't always heard.

Finally, Monica noted that neither mediation nor solicitor negotiation could provide an appropriate process when one party was not open to compromise:

> Well, my major criticism of [FDR] is…it depends on both parties being reasonable and you cannot mandate that.… I mean, my ex-husband came into it with all guns blazing, determined to destroy me. Now that is not what mediation is about but you were never going to stop him feeling like that.… I wanted a collaborative solution but I realised it just wasn't possible because he saw it as a venue to try to destroy me.

## Conclusions

It is clear that each FDR process has different strengths and weaknesses and is therefore likely to appeal to different parties in different situations. Collaborative law provided an amicable and cooperative process, in which the lawyers worked collaboratively with each other and with the parties in the interests of the family as a whole, in which other professionals could be incorporated as necessary to assist the parties and which was relatively quick compared to the exchange of letters in solicitor negotiations. On the other hand, it was more costly than the other FDRs, could be confusing if not fully explained and could run into trouble with the lack of enforceable time limits. The disqualification clause in collaborative law was generally viewed either neutrally or as a positive aspect. Mediation was quicker and

cheaper than the other FDRs, assisted parties to communicate with each other, provided an informal but still structured process with an agenda and written outcomes, and provided helpful options or angles to assist resolution which parties may not have been able to generate themselves. Conversely, many parties found the process very emotionally difficult and stressful, there were complaints about perceived mediator bias and the lack of legal context, and the greatest problem was the unenforceability of mediated agreements. Finally, solicitor negotiation offered a structured and relatively formal process which avoided the need for parties to meet face to face, and parties greatly valued the partisan support of a professional legal expert. The drawbacks of this process, however, were its tendency to exacerbate stress and conflict and the length of time it could take to resolve matters, with costs inevitably increasing the longer the process went on.

In terms of emotions and conflict in each process, the lawyer-led processes appeared better at identifying and addressing emotional unreadiness to engage in dispute resolution and could slow down the process accordingly. By contrast, several parties interviewed had attempted to mediate before they were emotionally ready to do so and the process had broken down, whereas those who were emotionally ready had a better experience in mediation. Lawyers in solicitor negotiations were often prepared to deal with their client's emotional divorce, while in collaborative law, there was an awareness of emotions and clients might be referred for counselling, but emotions were generally kept out of the collaborative process. Mediation also tended to focus on problem-solving and the containment of emotions to allow this to occur. Conflict appeared to be an inherent part of both solicitor negotiations and mediation, arising from the stresses of relationship breakdown and the difficulty of embarking on new, post-separation lives. In mediation, there was variation in the extent to which mediators were successful in defusing conflict and preventing anger and bitterness from spilling over into vilification of the other party. Parties who engaged in the collaborative process tended to be low conflict by definition, but this did not always prevent the process feeling stressful and emotionally charged.

Gender issues in the lawyer-led processes tended to relate to the way legal principles had a gendered effect, for example primary carer/homemaker mothers and wives feeling the law was pro-fathers on contact issues or feeling empowered by the law on financial issues. Gender issues in mediation also attached to the process, with men in particular perceiving women mediators to be biased against them. This was intensified in cases of co-mediation with two women mediators. Solicitor negotiation provided much greater support, protection and empowerment for victims of domestic violence or abuse, and in cases of significant power imbalance, than did

mediation. Neither co-mediation nor shuttle mediation were particularly effective as strategies in these cases, with mediation tending to break down, indicating the inappropriateness of the matter for mediation to begin with. Cases of physical violence tended to be appropriately screened out of collaborative law, although cases of non-physical abuse and significant power imbalances did enter the process. In these cases, victims were much better supported in the process than occurred in mediation, however (as discussed in the following chapters), the outcomes could still be problematic.

Parties' comments and our observations from the recorded sessions on the role of the practitioner in each FDR process largely confirmed the findings of previous studies, including the tensions identified in earlier research. Much depended on the quality and skill of the practitioner in whichever process was chosen. In solicitor negotiations, parties highly valued the fact that their lawyer was on their side, but this did not necessarily mean that the lawyer acted as a hired gun, and in some instances, parties felt their lawyer was too objective and insufficiently partisan. In collaborative law, collaboration between lawyers and parties in the interests of the family as a whole was the dominant theme, although this again could leave some parties feeling insufficiently supported. There was also a tension for the lawyers between steering and rowing – putting the parties in control of the agenda or being more directive – though parties tended not to see this issue as problematic. In mediation, tensions clearly exist for mediators between being completely impartial and attempting to balance power between the parties, and between providing information bordering on advice and refraining from doing so. Whichever approach was adopted by the mediator, it was likely that one or other party would be dissatisfied. Finally, the role played by solicitors in mediation was an important theme, with the provision of legal advice both equipping parties with the confidence to engage in mediation and empowering them in the mediation process. The removal of this option for legally aided parties post-LASPO is a matter of great regret.

The extent to which each process focused on children's welfare varied both within and between processes. None of the processes systematically included consultation with children themselves, so parents were relied upon to represent their children's best interests. Despite the lip service paid to the importance of being child-focused in all three processes, it could be difficult in practice to retain that focus – a point recognised most frankly by parties and practitioners engaged in solicitor negotiations. Some parties commended mediators' focus on the interests of their children, while others felt the mediator was more focused on achieving agreement between the parties. We also observed focus shifting away from children's welfare in both mediation and collaborative law recorded sessions, as well as parties

in mediation using the concept of children's best interests as another battleground for their own conflict.

The parties who had experienced more than one process (most commonly mediation and solicitor negotiation) echoed the advantages and disadvantages of each process as identified above in expressing their preferences between processes. In some cases, a combination of processes was preferred. And in some cases, the unwillingness of either or both parties to cooperate meant that none of the FDRs would be appropriate.

In Chapter 1, we described procedural justice as requiring the availability of dispute resolution processes which are readily accessible and effective; which provide reasonable access to legal advice and representation and to appropriate form(s) of dispute resolution without undue delay or cost and not dependent on personal resources; which allow for equal participation, for the voices of the parties – and of children who are old enough to express a view – to be heard with equal respect; and which seek to overcome rather than perpetuate or magnify power imbalances. On these measures, our findings suggest that the system of FDR prior to the LASPO Act fell short of procedural justice in some respects. The collaborative law process, which would have been appropriate for many cases, was not available regardless of personal resources, and there were also limits to the availability of solicitor negotiations for legally aided parties and parties with incomes just above the legal aid threshold. Across all processes, children's participation was not guaranteed. There was also the risk that cases of domestic violence and abuse would be inappropriately mediated, which would not allow for equal participation and would tend to perpetuate or magnify power imbalances. Following the LASPO Act, however, the system of FDR falls a long way short of procedural justice, having shut down reasonable access to legal advice and representation and appropriate forms of dispute resolution – including court proceedings – for the great majority of those reliant on legal aid.

Our findings about the value and drawbacks of all the FDR processes, both alone and in combination, do not support an exclusive policy focus on mediation. It cannot be claimed that mediation will always provide the best process – for many it is not appropriate and does not work at all, and for many more it only works on the basis of prior legal advice. In fact, the different processes complement each other and offer a necessary range of options for parties depending on their particular circumstances. As suggested in the previous chapter, better information on the identified strengths and weaknesses of each process would assist parties in making appropriate dispute resolution choices. But as also noted in that chapter, the practical unavailability of some options to many parties operates as a real constraint on people's ability to resolve their disputes effectively.

# 7
# Outcomes of FDRs

## Introduction

As outlined in Chapter 1, neoliberal policy developments concerning family dispute resolution have emphasised the importance of parties resolving their dispute out of court, ideally by mediation, but have demonstrated little concern with the content or quality of resolutions, beyond asserting that agreements reached between the parties themselves are likely to be more durable than those imposed by a court. It seems to be assumed that whatever parties can agree on will by definition be a 'good' outcome. This chapter sets out our findings on the resolution rates from each process, and proceeds to discuss the quality of resolutions in terms of parties' satisfaction with the outcomes they achieved and their reasons for settlement. It also considers longer-term outcomes of FDR, going beyond the resolution of the immediate dispute. Finally, it discusses what happened in cases that were not resolved by FDR. In the following chapter, we discuss a further aspect of the content and quality of outcomes, that is, the extent to which agreements reached in FDR can be described as 'just', not only from the perspective of the parties and practitioners but also more objectively in terms of the conception of justice outlined in the Introduction.

This chapter draws upon two sources of data. In the Phase 1 survey we asked people who had experienced an FDR whether they had achieved a successful outcome on some or all issues, and how satisfied they were with the outcome. In the Phase 2 interviews we asked people the same questions, but in addition asked their reasons for reaching agreement, whether the agreement reached had lasted and whether there had been any longer-term outcomes such as improved communication arising from their experience of FDR. As noted in Chapter 2, when comparing outcomes between FDRs it is important to recognise that participants in each FDR are not always comparable, and we highlight this point where relevant during the chapter.

## Resolution rates

Previous UK studies of outcomes of FDRs have found very different levels of resolution. For example, in McCarthy and Walker's (1996) study of all-issues mediation, 80 per cent of parties reached agreement, while the Davis et al. study of publicly funded mediation (2000) found that fewer than 40 per cent of couples reached full agreement. More recent figures for publicly funded mediation indicate that full or partial settlement is achieved in around 63 per cent of cases (Legal Aid Agency 2016b: 26). However, these are outcomes recorded by mediation agencies at the conclusion of mediation. They do not involve follow-up with the parties to determine whether the agreement has held after leaving the premises (a problem encountered by some of our interviewees, as discussed below). Research on collaborative law has found settlement rates to be high, in the range of 80 to 90 per cent (Healy 2013; Lande 2011; Lloyd et al. 2010; Schwab 2004; Sefton 2009). It is notable, however, that no previous research has attempted to measure settlement rates for solicitor negotiations, presumably because, as explained earlier, the point at which solicitor negotiations end and the court process begins is somewhat fluid. In the Omnibus survey whether or not any of the FDRs resulted in settlement on all issues, some issues or no settlement was self-defined by respondents. In the party interviews, on the other hand, we were able to identify from parties' narratives whether the matter had resolved by a primarily solicitor-led process (even if proceedings may have been issued) or had moved definitively into a court-focused process. In calculating resolution rates for the parties we interviewed, we also separated out financial disputes from disputes over children and counted them separately. Thus, where parties were in dispute about both finances and children, they have been counted twice for the purposes of this discussion.

In the Omnibus survey, 74 per cent of those who used solicitor negotiation settled on some or all issues, compared to only 48 per cent of those who used mediation. Within the FDR experiences in the Omnibus sample, we did not find a difference in rates of settlement by relationship type for solicitor negotiation. But we found a significant difference in outcomes for mediation, with the ex-cohabitants having a lower rate of settlement in mediation than the divorcing couples. Sixty-one per cent of divorcing couples settled on some or all issues, while only 23 per cent of separating cohabiting couples did so. As explained below, we found in our interview sample a notable difference between resolution rates for financial matters and children's matters. This may explain the different settlement rates for divorcing and cohabiting couples in the Omnibus survey, in that cohabiting couples were likely to have been mediating only on children's

matters, while divorcing couples were likely to have mediated on financial issues as well.

As shown in Table 7.1 below, parties who used any of the FDRs were more likely to settle financial matters than children's matters. To the extent that mediation is considered to be particularly appropriate for resolving disputes over children and promoting ongoing parental cooperation, this finding appears to undermine such claims. However, both financial and children's matters were more likely to be resolved in mediation than in solicitor negotiations. Those who chose the collaborative process to negotiate financial disputes were more likely to reach agreement than those who chose either mediation or solicitor negotiations for financial matters although, as the numbers using the collaborative process were small, it is difficult to compare collaborative law with the other two processes.

The finding that a greater percentage of those who chose mediation over solicitor negotiations settled both their financial and children issues is likely to be explained more by the nature of the parties who attempted mediation than by the process *per se*. First, couples with most conflict were likely to be steered towards solicitor negotiation rather than mediation. Secondly, if one person refused to mediate, solicitor negotiations became the only FDR option by default. Thirdly, parties who had unsuccessfully attempted mediation might then proceed to solicitor negotiations. Thus on average, the parties who went to mediation were generally more willing and able to reach an agreement than those who chose or found themselves in solicitor negotiations.

The number of parties in our interview sample who attempted collaborative law was too small for statistical comparison, however, the difference between children's matters and financial matters appeared to hold. Three parties used collaborative law for children's matters, of whom only one resolved in collaborative law. By contrast, eight parties used collaborative law for financial matters, of whom seven resolved in collaborative law. Again, this high settlement rate is likely to be referable to the kind of parties who chose the process rather than the nature of the process *per se*.

**Table 7.1** Percentage of cases using a FDR process that settled in that process

| *Type of dispute* | *Mediation*<br>*Fin: n=35*<br>*Ch: n=38* | *Solicitor negotiations*<br>*Fin: n=33*<br>*Ch: n=20* | *Collaborative law*<br>*Fin: n=8*<br>*Ch: n=3* | *All processes*<br>*Fin: n=76*<br>*Ch: n=61* |
|---|---|---|---|---|
| **Finances** | 71% | 58% | 88% | 67% |
| **Children** | 55% | 20% | 33% | 43% |

This discussion of settlement rates makes it clear that although FDR in general and mediation in particular is capable of assisting parties to resolve a substantial proportion – even a majority – of family disputes, it is not capable of resolving all disputes, and there will still be a significant proportion of cases which will either require court intervention or remain unresolved. This appears particularly likely to occur in children's cases. The outcomes of cases which were not resolved by FDR in our interview sample are discussed further below.

## Satisfaction with outcomes

In the Omnibus survey, satisfaction rates with outcomes of FDR mirrored very closely the satisfaction rates with the process of FDR. Those who had experienced mediation were less satisfied with the outcome achieved than those who experienced solicitor negotiations. Sixty-six per cent were satisfied with the outcome of solicitor negotiation, but only 42 per cent with the outcome of mediation. The higher rates of non-resolution in mediation may partly explain the lower rate of satisfaction with the outcomes of mediation. There was no gender difference in satisfaction with the outcome of solicitor negotiations, but there was a significant gender difference in satisfaction with the outcome of mediation. Fifty-six per cent of men were dissatisfied with the outcome of mediation, compared to only 22 per cent of women in the sample. Women, however, were not more likely to be satisfied with the outcome of mediation, but instead were more likely to be neutral about the outcome. As discussed below and in the next chapter, this higher rate of dissatisfaction for men may be related to higher, and perhaps unrealistic, expectations of mediation in the first place.

In the party interviews in Phase 2, by contrast, people were able to separate out their satisfaction with process as compared to outcomes, with satisfaction with processes generally rating more highly than satisfaction with outcomes. For mediation, where almost three quarters liked the process, just over half were satisfied with the outcome, with over a third stating they were dissatisfied. For solicitor negotiation, under half of parties indicated they were satisfied with the outcome compared with over two thirds who were satisfied with the process. Less than a third however, considered they were dissatisfied with solicitor negotiation, with almost a quarter being neutral. Satisfaction with the outcomes of collaborative law, like satisfaction with the process, was predominantly high. For some women such as Jenny who settled in collaborative law, high satisfaction reflected their initially low expectations: 'I didn't know that…he would have to sell our marital home and I would get half of that money.… So the outcomes… were far bigger than I thought.'

### Partial outcomes

Some practitioners stressed the positive benefits of partial outcomes in mediation, such as narrowing the issues or reducing conflict levels, making agreement more likely in whatever process the parties pursued post-mediation. In the words of Henry Sanderson:

> Some progress…some better communication, some better understanding of each other's positions, some interim arrangements, some better understanding of children's needs. So short of...what you might call a successful outcome, I think there are lots of little victories that can be won.

Experiences within our party sample did reflect this. Of those who attempted mediation on children's issues but failed to resolve, a number reported such fringe benefits of the process, or a partial outcome with some contact being agreed or an interim arrangement put in place. Fringe benefits in addition to improved communication included, in Stuart's case, managing the other party's expectations leading to settlement in subsequent solicitor negotiations; in Norah's case, dealing with disclosure which was 'a step along the way'; in Glenys's case, gaining a better understanding of the other party's standpoint; and in Jason's and Gerald's cases, narrowing the issues. Similarly, a number of those who attempted solicitor negotiation but failed to resolve reported fringe benefits (mostly a reduction of conflict and improvement of communication) or partial outcomes. In addition, as noted in the previous chapter, several women reported feeling empowered by their legal adviser. In collaborative law, a partial outcome alleviating some concerns was achieved in one of the two unresolved children disputes, with other positive benefits being reported in the other unresolved case. As with solicitor negotiations, fringe benefits of the collaborative process included reduced conflict, improved communication and empowerment. As discussed below, improved communication, an explicit aim of mediation, was achieved more often in mediation than the other two FDR processes. However, the lawyer-led processes appear to have had the added advantage of empowering a number of users.

On the other hand, partial outcomes were a frequent source of dissatisfaction for parties. Simon had not settled financial matters following separation but had paid the mortgage on the former matrimonial home for 14 years to ensure that his children would not be disrupted and because he hoped that this would lead to a softening of his daughter's refusal to have contact with him. However, that hope had not been realised and Simon remained estranged from his daughter. Karl, as discussed below, thought that the interim agreement he reached in mediation 'had no meaning to it' as his former partner immediately reneged on it.

Partial outcomes were encountered in all the processes, with unfinalised matters either being resolved at court or in some cases through direct negotiation between the parties. Ernest, whose wife left the former matrimonial home without warning taking the two young children with her, was able to agree some interim contact in solicitor negotiations but the matter proceeded to an acrimonious adjudicated outcome which left Ernest feeling 'bloodied and bruised'. Rebecca was able to reach an interim child-care agreement in mediation but her ex-partner then forced the issue by retaining one of the children following a contact visit. The parties agreed shared care through direct discussions although Rebecca felt 'pushed into' the agreement because of the circumstances that her partner had engineered. Matters were also sometimes left unresolved, with the party with the least incentive to settle often gaining the upper hand through delay and inaction. As outlined below, this led some parties such as Seth to regret having made only an interim financial agreement, or to parties such as Ruth and Monica feeling 'frozen in time' or 'trapped' by the other party's inertia.

**The non-binding nature of mediated agreements**

As discussed in the previous chapter, whilst some such as Andy saw the non-binding nature of the mediated agreement as a positive, providing flexibility, a larger number of participants were frustrated by the fact that a mediated agreement, unless approved by the court as a consent order, was not enforceable. In some cases, an apparent agreement was 'torn up' soon after the parties left the mediation session. For example, Karl and his ex-partner agreed interim contact between Karl and their two-year-old in mediation on the basis that they would review this in a further mediation session after six weeks. However, Karl's ex-partner immediately withdrew all contact and Karl felt forced to initiate court proceedings. Agreements might also break down at a later date. For example, Seth had reached an agreement in mediation nine years earlier but his wife refused to be bound by it when they finally divorced:

> At the time, I felt it was a good thing as we came up with something which we could work to. Since then...everything we agreed to at the time has been dismissed.... It makes me wonder whether I should have gone to a solicitor and got it confirmed in court but I didn't do that, it was my mistake.

Raymond, when interviewed, was on tenterhooks as to whether his ex-wife would agree to a consent order reflecting the mediated agreement: 'If it doesn't get agreed, it would have been a waste of time and money. That was my initial reluctance for the process...it may be worthless. So we will have to see.'

These findings cast doubt on the claim that agreements reached in mediation are likely to be more durable. It appears to be more the case that agreements reached in mediation are more *vulnerable*, since there is no external oversight of an agreement by a solicitor or a court (or by the mediator), meaning that a party who has negotiated in bad faith is not held to account if they renege on it. Obtaining a consent order is one way to make an agreement legally binding, but this is not part of the service provided in mediation. It is necessary for at least one of the parties to engage a solicitor to draw up a consent order to be submitted to the court. Legal aid does remain available after the LASPO Act for this step of the process, but the payment offered to solicitors is minimal and in practice, it is rarely availed of. The Family Mediation Task Force reported in 2014 that fewer than 30 claims under the Help with Family Mediation scheme had been made in the first year of LASPO, amounting to £6,000 of legal aid expenditure (2014: 19). The remuneration offered is likely to be a strong disincentive for solicitors to offer this service (£150 for advice and an additional £200 in finance cases only to assist the client to obtain a consent order once agreement has been reached in mediation). Further, as the structure of legal aid funding indicates, consent orders tend only to be made in financial cases. They are not generally employed in children's cases, and the no-order principle in s. 1(5) of the Children Act 1989 discourages their use. Thus in children's cases, parties are left to their own devices without the backup of the courts if either party breaches the mediated agreement.

## Reasons for settlement

Neoliberalism assumes that people make decisions based on 'rational choice and cost-benefit calculations grounded on market based principles' (Hamann 2009: 37). Barlow has argued elsewhere, however, that people do not make decisions in relation to the ordering of their private lives based on the model of 'rational economic man'. Rather, people make decisions with reference to moral and socially negotiated views about acceptable behaviour which may vary in particular social contexts (Barlow and Duncan 2000). In Emma Hitchings and Joanna Miles' study of financial cases, reasons for settlement were found to be rarely simple; it required a number of non-legal and legal factors to coalesce to enable the parties to reach agreement at a particular moment in time (Hitchings et al. 2014: 312). Non-legal components of the 'jigsaw puzzle' required for settlement included parties' emotional readiness to settle, engagement with each other or the process, concerns over the effect of the dispute on the children and having third-party emotional or practical support. For financial settlements reached in FDR, the puzzle is also more likely to be completed if there has

been disclosure, sensible legal advice and the parties' expectations are realistic (Hitchings et al. 2014: 313–14).

Our party interviews provided the opportunity to explore reasons for settlement as well as levels of satisfaction with outcomes, although the two are obviously connected. Reasons for settlement cited by the parties in our interview sample ranged across the full spectrum from 'reached a mutually satisfactory settlement' to 'had no choice' or 'just gave up'. Those at the 'mutually satisfactory' end of the spectrum were more likely to be satisfied with the outcome of FDR than those at the other end. Mirroring Batagol and Brown's (2011) findings noted in Chapter 2, we also found strongly gendered reasons for settlement.

### Mediation

In mediation, cases which settled divided between those who settled because they thought they had agreed a fair settlement or good settlement from their own perspective; those who just wanted the matter over and done with either to protect their children or so that they could themselves achieve closure and so were prepared to compromise or capitulate; and those who wished to avoid court at any cost. Some, like Ryan, settled all issues, felt the outcomes were fair and were full of praise. Eleanor settled because she 'managed to get exactly what [she] wanted'. Charlie thought he should share the care of the children equally with his ex-partner, but agreed a 45:55 time split as well as an equal share of the financial assets, which was 'better than expected'.

As the outcome statistics indicate, parties generally found financial cases were easier to settle, with the reality of what was possible becoming apparent within the process. Rebecca, who could not agree arrangements for sharing care of the children with her ex-partner, found the financial matters far more straightforward to settle on. Children's matters were often a case of taking what was offered as it was better than nothing, or being persuaded that the proposal was the best for the children. Kathy agreed a contact arrangement for her children because it was all that was possible given her ex's shift-work. Porter agreed contact of only six hours per fortnight as his ex-partner refused to agree any more than this in mediation and he could not afford a solicitor to take it to court:

> I just wanted to do anything to see my children and I had to accept it. It was either that or we get [out of] mediation and take it to court. And the reason why I didn't want to go to court was because I can't afford it. She doesn't work and gets legal aid. So I am facing, you know, the deepest pockets of the government versus me, so what do you do?

In the third category, Tilda agreed to share care of the children, more than she would have wished, and to split the family assets equally, as she knew she could not face going to court and was certain her ex-husband would have issued proceedings if she had tried to push for a different settlement: 'I feel I got the...absolute minimum.... I didn't really have a lot of choice in that unless I wanted to go to court...which would cost me more.'

As discussed in the following chapter, there was a tendency across the three processes, but particularly in mediation, for practitioners to overstate judicial discretion to ensure that parties chose not to litigate. This portrayal of the family courts as unreliable, inefficient and capricious left a number of the parties we interviewed making decisions in the belief that there was no 'best alternative to a negotiated agreement'. For example Simon, who had had protracted solicitor negotiations over financial matters prior to reaching settlement in mediation for significantly less than his barrister advised, told us that he did so because:

> I knew that if I took it to court…I could be faced with… somebody taking a very different view. It seemed to me that I had no idea what to expect.... I didn't really want it to go to court because a) it would be hugely expensive, b) because it would be extremely stressful for everybody concerned, and I was completely in the dark as to what the likely outcome would be.

Simon thought that there needed to be 'more clarity' over likely outcomes to avoid others reaching decisions in mediation because they felt 'in the dark' over the likely adjudicated outcome.

**Solicitor negotiations**

Within solicitor negotiations, the primary reason for settlement was a perceived 'good' outcome or a lower offer taken on the advice of the lawyer. Harry accepted limited contact with his baby son on his solicitor's advice that greater contact was unlikely if the matter went to court, given his son was so young and he lived a long way from his ex-partner. Jim, who became the primary carer of his 14-year-old step-daughter (whom he had raised as his own child) following separation, agreed to pay his ex-wife half of their joint assets. This included half of a substantial personal injury payment that he received following a serious road traffic accident. Jim did not object to paying his former wife half of the equity in the former matrimonial home but felt that it was 'unfair' that she should receive half of his damages award since he was the one who had gone through the pain and suffering. Nevertheless, he capitulated in part because he 'wasn't up to fighting' following the accident and in part

because his solicitor advised him that his ex-wife was 'entitled' to this amount: 'that's how it works'.

Where matters were settled contrary to legal advice, this was often due to reasons of cost or the desire to have closure and move on, especially after lengthy negotiations where court was the only other alternative. Settling in order to 'get out' of the relationship or the ongoing acrimonious negotiations was highly gendered, as discussed below.

### Collaborative law

The majority of parties who used collaborative law indicated that they settled because they reached an agreement they viewed as fair. For example, Sebastian indicated that he was intent on treating his wife in a 'fair and honourable way' in order to preserve his excellent relationship with his adult children. For several women, their notions of what was fair were tinged by feelings of guilt at ending the relationship and a desire to placate their husbands. For example in Pauline's case, '[Husband] has always behaved as the wounded party.... I did feel, "well, you know, he didn't want this, I've got to be fair and make sure that he's happy".'

This guilt led Pauline to agree a financial package in the collaborative process that fell far short of substantive equality, which she later regretted. Her husband, William, whom we also interviewed, had expected to have to pay spousal maintenance following their long marriage so felt fortunate to achieve a clean break on capital with only nominal maintenance. His satisfaction with the outcome was at Pauline's financial expense. One party's willingness to concede to the other party's preferred outcome because of feelings of guilt is a feature of a number of studies (Batagol and Brown 2011: 212–13; Hitchings et al. 2013: 44; Wright 2011: 385) and is discussed further in the following chapter.

### Gendered reasons for settlement

It was evident that a number of women sacrificed their financial entitlement in order to gain closure. Miranda, for example, earned more than her husband, but as primary carer of the young child of the marriage there seemed no reason why she should not have at least half of the available capital. However, she settled for less than half of the matrimonial pot as she 'just wanted out'. Patty signed over her share of the house and business to her husband to enable her to take her son abroad, and at the time of the interview she was living in straitened circumstances. She explained, 'I was so tired and stressed by the whole thing, I think I allowed it to happen if I am being honest.' Stella eventually capitulated as she did not have the energy to continue: 'I knew there was more money there than he...declared,

but I…I couldn't…. It takes so much energy and I couldn't expend more energy on that. I didn't have it. I just wanted to know that I had enough… to be able to carry on.' Perhaps the most concerning example was that of Annette, whose controlling husband made it clear that if she left him she would leave with nothing financially. She was the primary carer of children aged five and seven. She gave up her interest in the former matrimonial home (albeit that this was in negative equity at the time of the separation) and in her husband's pension as well as settling for child maintenance at less than the CSA assessment because 'I didn't really care what he paid me, I just wanted it all to stop.' For these women, all of whom settled in solicitor negotiations, partisan advice and arm's length negotiations may have provided a more satisfactory process but were insufficient to prevent unjust outcomes in the face of their inability to sustain a drawn-out battle (including potential court proceedings) with an ex-partner determined not to budge from a position of strength. Similarly, in recorded collaborative law process 204, the primary carer mother settled for less than half of the liquid capital and no share of her husband's pension because she knew that he would not agree to anything more and she 'just wanted to get out'. As discussed in Chapter 5, in some mediation cases safety concerns (rather than attrition) appeared to drive women's decisions to settle for inadequate financial arrangements.

At the same time, women were strongly motivated, across the FDR processes, to ensure that they facilitated staying contact between their former spouse and their children by ensuring that the former husband's housing needs were met. For example Jane, who settled in collaborative law, noted: 'We have got three children and I want [husband] to be in a nice house where our children are going to be half the week'. Similarly, Gail, the mother of two children aged under six who settled in solicitor negotiations, was advised by her solicitor that she was being 'over-reasonable' in agreeing to equal division of the matrimonial assets, but she was prepared to do so as she was concerned that her husband needed adequate accommodation to provide the children with somewhere suitable to stay during contact. She also hoped that her stance would promote a more amicable post-separation parenting relationship and expressed regret over agreeing the financial arrangement that she did, given that the hoped-for relationship had not transpired and her former husband continued to be difficult and would only communicate via their now 10-year-old daughter. Barbara's solicitor advised her that she had an entitlement to her husband's pension as she had been a stay-at-home mother for many years. She gave up that entitlement on assurances by her husband that his pension would go to the children – assurances that he subsequently reneged upon. Alison and her former husband agreed in mediation to an

equal shared care arrangement with respect to their two children. Alison also agreed to sign over her interest in the former matrimonial home to her husband conceding that:

> I'd left [husband] with the family home for the sake of the children…and I know I'm not in a position to actually put anything down as a deposit and probably will never own my own home again, but the children are looked after and that's all that matters.

Gloria settled in court proceedings following solicitor negotiations and mediation. She recognised that after a marriage of 28 years there should have been an equal division of the equity in the former matrimonial home, but she settled for less on her husband's assurance that he would bequeath the house to the parties' granddaughter (who lived with Gloria).

As indicated by Gail's story above, women's preparedness to forego what they were advised might be their legal financial entitlement was often linked to their desire to forge a positive post-separation parenting relationship. Dora, who settled in mediation, told us:

> I could have gone for a lot, lot more, and one of the things [husband] didn't understand or his lawyer didn't understand was why I didn't. I mean, I had my reasons and the reasons are children and continuing relationships and family dynamics and I put a price on that.

Some men also valued ongoing family relationships more highly than securing the most advantageous financial settlement. Sebastian, who settled in the collaborative process, explained:

> I was married to [my wife] for 30 years plus and she was the mother of my four children and I want to be able to have a relationship with my kids afterwards. And I took on board very quickly that if, apart from the fact that it was the right thing to do, if my kids thought I was screwing their mother over for a few hundred grand that would terminally affect my relationship with my kids.

However, whilst some (like Sebastian) were clear that treating their former wife fairly was 'the right thing to do' we found no evidence of men sacrificing financial entitlements to the extent that some women did. These gendered dynamics bear out the concerns expressed by Grillo (1991), and echo Piper's (1993) observations, about disadvantages to some caretaking mothers in mediation, which clearly remain salient today.

## Longer-term outcomes – improving communication and reducing conflict

One of the claimed benefits and explicit goals of mediation is to improve communication in the longer term, that is, to enhance ex-couples' ability to negotiate and cooperate in the future, especially concerning parenting decisions. Several mediators cited helping parents to improve their communication with each other as a 'key' or 'central' aim of mediation: the mediator's 'mission statement', in Molly Turner's words, and while generally leaving the agenda for mediation to be determined by the parties, would often make future communication an agenda item. The 'transformative' potential of mediation is what distinguishes it from other processes in the view of several practitioners, captured well by Sarah Hamilton:

> I suppose, because I come from a legal background, to me a good outcome is where we resolve the issues that they came to resolve. And I know the sort of criticism of that from some mediators, that it's too outcome focused, but I think the reality of it for clients is that that's very much what they want. But the greatest, greatest moments, and I call them 'transforming moments', and they are a privilege to be sitting there when it happens, is when someone listens to someone and changes their behaviour. I do see that happen and that's quite, you know, quite wonderful really.

Whilst we sought to determine whether parties who had mediated felt the outcomes of improved communication and reduced conflict were actually achieved, we also asked about the effects on communication and conflict of the other FDR processes, by way of comparison.

### Improving communication

In the Omnibus survey, 27 per cent of people who had experienced mediation felt that it had led to a significant improvement in communication and/or cooperation on some or all issues. However, a higher proportion of those who had experienced solicitor negotiation – 35 per cent – felt that it had improved communication and/or cooperation. At the same time, 17 per cent of those who had experienced mediation felt that the process led to communication and/or cooperation getting worse, while only 9 per cent of those who had experienced solicitor negotiation felt this. These figures are consistent with the overall pattern of respondents to the Omnibus survey being more satisfied with solicitor negotiation than with mediation. As with resolution and satisfaction rates, the picture was reversed in our interview sample, with mediation seen as improving communication in

around 40 per cent of cases, whereas under a quarter of solicitor negotiation participants felt they benefitted in this way.

There was much variation in parties' views of whether mediation was successful at improving communication. Some experienced the process as a positive way of communicating with support. According to Robert: 'Yeah it did basically (improve communication) because it's a lot easier to sort problems out if you are calmer, and obviously they helped us to understand that'. A number who found the process traumatic, stressful or uncomfortable felt that it still helped with communication and negotiation in the longer run, for example Kathy:

> We still have the odd niggle...but...it's taught me to.... You can't go over the top having every little minor detail.... It's made it easier. We don't argue like we used to, and I think it just stems from mediation.

And Geraldine:

> I think because we went through mediation, I can sort of perhaps negotiate a bit better with him than I might have been able to before.... I suppose we are a bit more used to now putting a proposal forward which you know, you wouldn't do when you are married, but making a suggestion and seeing what he agrees and sort of having a bit more of a negotiation. So I think I am perhaps…better at doing that now.... So I think from that point of view, that will help going forward too.

A minority, however, were emphatic that (failed) mediation had caused a further breakdown in communication, exacerbating previous tensions. Leo, for example, thought that the mediation process had 'completely destroyed' communication.

The fact that there was less experience of the process of solicitor negotiation enabling communication is unsurprising. As some commented, this was not usually viewed (by parties or practitioners) as a goal of the process. Moreover, many solicitor negotiation participants were already in a worse place in terms of communication and tension than those attempting mediation. Some parties felt that the resolution of issues through the process had indirectly improved future communication, for example Yvette: 'I think when it was all done and dusted it did, yeah. Because then there was no argument really left then. I think it did reach a point where we could both move on'. Nevertheless, it does seem clear from our data that mediation gave a substantial group of participants some strategies and practice in longer-term negotiating which was not a feature of

solicitor negotiation for most. But at the same time, mediation was by no means unique as a process in improving communication, and neither did it do so uniformly.

According to Richard Benson, improving the parties' communication was the 'essential reason' for using the collaborative process. As with mediation, the collaborative process gives parties a structured environment in which to have difficult conversations and to normalise effective patterns of dealing with each other in future. Some practitioners suggested that the potential to improve the parties' communication is greater in the collaborative process than in mediation as there are two practitioners assisting the parties and it is easier to incorporate family consultants within the process. The parties who experienced collaborative law did not have much to say about longer-term communication outcomes, perhaps because their communication tended to be good in the first place. However, Jenny, whose husband had dominated her in the relationship, did feel that the collaborative process had improved communication by empowering her:

> It gave me a lot of confidence that actually I wasn't...that I was a reasonable person and an intelligent person and someone who could find things out and act on them and...I suppose for the lawyers to be able to...for your ex's lawyer to be able to almost give that kind of vibe too, obviously it was a very positive thing...an ongoing positive outcome.

Jenny felt that using the collaborative process rather than a more adversarial process had improved the parties' respect for each other. The fact that the children had seen 'from the wings' that their parents were trying to work things out sensibly had also had, in Jenny's view, a positive, ongoing impact on the children.

### Reducing conflict

By contrast with improving communication, and somewhat surprisingly, around one third of parties who engaged in solicitor negotiation felt that it had helped to reduce conflict, as compared with a quarter who felt mediation had had this effect. A number of parties reported that their solicitors had been at pains not to exacerbate conflict in relationships where tensions were already high. Deanna thought that her solicitor's practical, efficient approach helped to 'reduce conflict a lot'. Patty appreciated that solicitor negotiations were arm's length, as this 'reduced the arguments that we could have had if we were meeting in lawyers' offices and having discussions'. Karl on the other hand was scathing about his experience of

mediation to try to agree contact for his daughter that worked around his shift patterns. Karl reported that the male mediator had told him:

> 'No judge in the land will give you your child on your days off.' Well unfortunately for him I did go to court and I did get my daughter on my days off. So it shows you how out of contact he is with the judges of today, you know what I mean? And for a person like me, he fuelled my fire to be more, you know, to go forward and win my rights to see my child. So I don't think he done a very good mediation to be honest.

As discussed in the previous chapter, there was of course evidence in some instances that solicitor negotiations engendered conflict whilst mediation defused it. For example, Kevin described his mediator as follows:

> He tries to be quite empathetic, he is trying to play even-handed all the time. He is trying to build confidence. He wants to keep it all very calm as he is a calm sort of guy, you know. He wants to make sure that there is no conflict if he can avoid it and he wants to build trust on both sides and he is very careful not to take sides.

It may also have been that fewer people reported mediation lowering conflict than reported that solicitor negotiations had reduced conflict levels because there was generally less conflict in mediation to defuse. The key point again, however, is that a dichotomous view of solicitor negotiations and mediation is not helpful and is not an accurate portrayal of experiences of these processes.

With mediation, reported reduction of conflict and improvements in communication were strongly correlated with resolution of the issues in dispute, whereas with solicitor negotiations, longer-term benefits were reported just as often when the matter did not resolve – indeed more often in the case of reducing conflict. These findings suggest that solicitor negotiations can provide a viable alternative to mediation in terms of conflict reduction. Moreover, improvements in communication cannot be viewed as a compensating benefit if parties fail to resolve their dispute in mediation. Rather, those who do not resolve are less likely to attain this benefit, and in some cases failed mediation can result in a deterioration of communication.

## Cases that were not resolved by FDRs

In the Omnibus survey we asked respondents who had not resolved all issues in FDR how the remaining issues had been settled. The survey questions asked separately about the aftermath of mediation and solicitor

negotiations rather than about the dispute as a whole. As discussed in the previous chapter, parties sometimes attempted more than one form of FDR, and among survey respondents, 9 per cent of those who attempted mediation and 5 per cent of those who attempted solicitor negotiation ended up settling their dispute by some other form of FDR. Six per cent of those who attempted mediation and 25 per cent of those who attempted solicitor negotiation ultimately settled matters between themselves and their ex-partner. The largest group in each case – 30 per cent of those who attempted solicitor negotiation and 41 per cent of those who attempted mediation – said that the unresolved issues were settled either by negotiations at court or by the court making a decision. This clearly demonstrates both that solicitor negotiations do not inevitably result in court proceedings, and that mediation and court proceedings are far from being mutually exclusive. Finally, while only 10 per cent of those who attempted solicitor negotiations reported that issues that were not resolved in the negotiation process had remained unresolved, 39 per cent of those who had attempted mediation reported that issues that were not resolved in mediation had remained unresolved.

In the interview sample, as noted above, we looked separately at disputes over children's matters and financial matters, but within each of these categories we took account of the total dispute resolution experience from the party's perspective. The majority of unresolved children's matters ended up in court (19/27 = 70 per cent): seven were adjudicated, six resolved by negotiations and six were ongoing at the time of interview. For example, Stan, whose ex-partner had been resisting contact, was awarded a shared care arrangement at court and felt totally vindicated that he had not settled for less than substantial contact with his son. A smaller proportion of unresolved financial matters ended up in court (13/22 = 59 per cent): two were adjudicated, eight were resolved by negotiations and three were ongoing at the time of interview. Lorna, for example, settled her financial claim through negotiations between solicitors, finding the door of the court focused her ex-partner's mind on what sort of financial settlement might be fair, where mediation and solicitor correspondence had failed. This difference in modes of resolution again appears to illustrate the greater tractability of financial disputes to some form of negotiated resolution.

Among the cases which did not go to court, some matters were settled against the odds by direct negotiation between the parties. Sheila, for example, felt 'under a lot of pressure' in the collaborative process because her husband was seeking a substantial increase in overnight contact with their two teenaged children, as he was about to begin cohabiting with his new partner. Sheila felt that the children should be brought into the process and the proposals discussed with them, but the collaborative lawyers

and her husband felt this was inappropriate. Since Sheila was reluctant to accede to her former husband's demands he terminated the collaborative process. Agreement was subsequently reached when Sheila spoke to the children and they agreed to try the new arrangement.

A few cases remained unresolved, with the parties considering further action at the time of the interview and limping along with failed or no agreements or entrenched positions where they were waiting to see who took further action first. As discussed above, Seth mediated with his wife following separation nine years prior to the interview but reached an interim arrangement only on contact, child maintenance and division of savings as he did not feel emotionally capable of dealing with matters globally. Attempts to both mediate and broker an agreement in solicitor negotiations in the two years preceding the interview had been fruitless, with his estranged wife, in Seth's view, persistently delaying matters. Seth had tried throughout to avoid court proceedings but two weeks prior to the interview had instructed his solicitor to issue an application for a financial order to break the deadlock: 'I just bit the bullet and said I had had enough. I felt as if I had been played around with.' Two years after Monica separated from her ex-husband, he remained living in the former matrimonial home whilst Monica was in rented accommodation. She described his views on an appropriate division of the matrimonial assets as 'entrenched'. Attempts to reach agreement in both mediation and solicitor negotiations had proved fruitless as he refused to give adequate disclosure or engage meaningfully in the process. Monica believed this was because he feared having to sell the house. At the time of the interview, he had failed to respond to 'another 21-day deadline' set by Monica's solicitor to disclose or face court proceedings and she had agreed a 'final' extension of two weeks.

Ruth had been separated for three years at the time of the interview but, whilst a decree nisi had been pronounced on her divorce, her self-employed husband had not yet given disclosure of his financial position so no progress had been made to resolve the parties' financial ties. Ruth thought that this impasse had arisen partly because both parties were inert and eschewed conflict, but mostly because she still felt guilty that it was her affair that led to the breakdown of the marriage. Even though Ruth expressed frustration at being 'frozen in time' until finances were agreed, her feelings of guilt, and her desire to avoid court proceedings, prevented her from taking a firmer stance. Similarly, in recorded mediation 206, which ended without agreement, the father wanted to make arrangements for contact at this new home, but the 'emotionally stuck' mother was unable to accept the father's remarriage and refused to allow the children to have contact with the father's new wife.

Analysis of the cases which did not resolve in FDR shows that where parties are emotionally unready to negotiate, have taken entrenched positions or have everything to lose and nothing to gain by negotiating, there can be no FDR resolution. Terry provides one of the clearest examples of a party with an entrenched ideological position on child welfare. His solicitor negotiations failed as he would not compromise on anything less than his ultimate goal of equal time shared residence of his children. He then actively pursued the matter in court and was awaiting a final hearing at the time of the interview. He had a clear plan, regardless of whether this approach was right for any individual child, and was now acting as a McKenzie friend for other fathers. He advocated the use of cameras to record all interactions with children and (ex-) partners to guard against false allegations, regardless of how this might affect the children. And he did not recommend mediation because of the unenforceability of mediated agreements:

> I'd like to give clean advice like go to mediation…but it doesn't work. The mediation is not legally binding. You can have an agreement in mediation, it's immediately broken and in the courts anyway. Judges don't make any allowance for the fact that one side or the other has not abided by mediation.

The issues of entrenchment and clashing ideological 'principles' are discussed further in Chapter 8.

## Conclusion

From our interview findings, it appears that financial disputes are easier to settle out of court through any FDR process than children issues. The more cooperative, interactive processes of collaborative law and mediation had higher resolution and satisfaction rates than solicitor negotiations, with satisfaction clearly correlated with resolution rates, and resolution rates in turn related to the kinds of parties who chose (or defaulted to) each process. A variety of partial or subsidiary outcomes ('fringe benefits') were identified even where FDR failed, in around half of the cases in each process, although partial outcomes were often a source of dissatisfaction. Parties were more likely to report improved communication resulting from mediation than from solicitor negotiation, although the reverse was true for reports of reduced conflict. Failed mediation and solicitor negotiations could both produce a deterioration of communication and heighten conflict, but there was some evidence that failed solicitor negotiation could succeed in providing 'fringe benefits' in some cases. Satisfaction with outcomes was lower than satisfaction

with process for both mediation and solicitor negotiation. In particular, as found in the previous chapter, there was dissatisfaction with the non-binding nature of mediated agreements, which tended to render them vulnerable to early breakdown.

Reasons for settlement were not always rational or self-interested. While many settled because they received what they considered to be a good offer or a fair result, some simply wanted to achieve closure or avoid the risk of court proceedings, or accepted their lawyer's advice that the proposed outcome was the best they could expect. It was notable that a number of women sacrificed their financial interests because they wanted closure, were fearful or intimidated, or were concerned to promote their children's interests or to preserve a good co-parental relationship. Here, the gender division of labour in the family, gendered patterns of relationality and gendered power imbalances were compounded to the detriment of mothers and wives.

Cases which were not resolved in FDR either went to court, were ultimately resolved by direct negotiation between the parties or remained unresolved. Children's matters were more likely to go to court and more likely to be adjudicated than financial matters. The major reasons for the failure of FDR were emotional unreadiness to reach a resolution or the entrenched position of one or both parties. Sometimes a party had no interest in 'moving on' from a position of advantage, either in possession of the property or the children.

The findings of this chapter, as with the findings of the previous chapter, do not support an exclusive policy preference for mediation. It is not clear that the same resolution rate for mediation would be maintained if more conflicted parties with more challenging cases enter mediation because the alternative of solicitor negotiations is no longer available. The resolution rates for publicly funded mediation reported by mediation services do not take account of the situations revealed by our data whereby parties refused to implement agreements reached in mediation. The need for court proceedings, especially where one party refuses to make financial disclosure or decisions or is entrenched in a strategic position, is clearly demonstrated by our data. Otherwise, some parties – and their children – would find themselves unable to resolve matters at all. This helps to explain why people persist in going to court, even as litigants in person, since this is a better option than either no resolution or one imposed by one party on the other. At the time of our research, litigation with lawyers could often mean a negotiated settlement at the door of the court, whereas in the post-LASPO world of litigation without lawyers, this is less likely to occur.

Finally, the neoliberal ideology of private resolution and party autonomy masks the gender dynamics which result in women agreeing to poor financial outcomes. To analyse these outcomes as simply women's individual 'choices' would be to ignore their systemic and structural nature and material effects. Since these cases would have resulted in fairer adjudicated outcomes, they raise concerns about the discouragement and inaccessibility of court proceedings and the material and gendered effects of being unable to go to court, or to make a credible threat to do so. These gender dynamics are explored further in the discussion of the norms driving settlements in the following chapter.

# 8
# 'Just' Settlements?

> Are mediators concerned about substantive justice? Absolutely not. That is the wrong question to ask. Mediation is about searching for a solution to a problem.… The mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgment about the quality of the settlement. Success in mediation is a settlement that the parties can live with. The outcome of mediation is not about *just* settlement, it is *just about settlement*. (Genn 2010: 117, emphasis in original)

## Introduction

This chapter considers the outcomes of FDR in normative terms – the question of whether settlements are *just*. There are a number of different ways of approaching this question. First, are settlements just from the perspective of the parties? This requires consideration of the norms or conceptions of a 'fair' outcome brought into the process by the parties, and then comparing these to the outcomes achieved. Secondly, are settlements just from the perspective of practitioners? This raises several subsidiary questions. Do mediators operate within a normative vacuum as Genn suggests above and as mediation theory claims, or do they, as previous research outlined in Chapter 2 suggests, bring their own normative commitments to bear on the mediation process? And if so, what are those normative commitments? Is there a difference between mediators and lawyers in these respects? Or between lawyer-mediators and non-lawyer mediators? To what extent does the 'shadow of the law' fall on each FDR process? And to what extent does each process operate within the shadow of child welfare knowledge, the 'social work ideology' identified by Piper (1993) and Neale and Smart (1997)? Finally, are settlements *just* in accordance with our own conception of justice articulated in Chapter 1? As in previous chapters, we draw comparisons between the three FDRs, as well as noting gender differences in parties' conceptions of fairness, and differences in approaches to children's matters and financial matters.

## Parties' norms

In the Phase 2 interviews we asked parties what they had thought would be a fair outcome for their dispute, and whether they thought the outcome achieved was fair. Not all parties answered these questions or answered them directly. For those who did answer, we identified themes in the responses and categorised responses according to those themes. In some cases, the answers also enabled us to categorise the position held by the party's ex-partner, as they described what they had both wanted or sources of disagreement between them. Similarly, we read over the transcripts of the recorded sessions, identified statements made by parties which indicated their conceptions of a fair outcome, and categorised those statements within the same themes. In some cases, parties' statements or accounts fell within more than one theme. In these cases we did not attempt to identify a single or dominant norm held by each party but coded for each of the themes they expressed.

The range of norms expressed differed somewhat between children's matters and financial matters, although there was also considerable overlap between them. The overlapping norms (described in more detail below) were formal equality, rights, primary carer, punishment, legal rules, child welfare, reasonableness, guilt, pragmatism and self-preservation. These were all invoked in both children's matters and financial matters. Additional norms invoked only in financial matters were needs, contributions, compensation and sacrifice. A number of these norms were discussed in the previous chapter as reasons given by parties for settling their dispute. To elaborate on each of them:

> *Formal equality* meant that the party believed that a fair outcome would be either 50/50 shared residence of children or a 50/50 split of the property and financial assets. A variation on this was where parties wanted a 50/50 split of the value of their house, but otherwise wanted to keep assets they felt were 'theirs', particularly pensions (see also Mair et al. 2015: 195). We categorised these cases as falling within the norms of both 'formal equality' and 'contributions'.
>
> *Rights* meant that the party referred to what he or she perceived to be their moral rights, for example to have a particular kind of relationship with their children.
>
> *Primary carer* meant slightly different things in the context of children's and financial cases. In children's cases, it meant a view that children should maintain a stable base with their primary carer, essentially maintaining the pre-separation status quo. In financial cases, it meant that finances should be divided so as to make adequate provision for

the party who would be the primary carer – in practice, for all of those who espoused this norm, the primary carer was the mother.

*Punishment* meant that the party felt aggrieved by actions of the other party which had resulted in the end of the relationship (e.g. they had walked out, had an affair or behaved intolerably) and wanted the outcome to reflect an element of punishment for that fault.

*Legal rules* meant that the party felt that a fair outcome would be one that was in accordance with the law.

*Child welfare* meant that the party was concerned to ensure that the outcome was in the best interests of their children.

*Reasonableness* meant that the party wanted to reach an outcome that was fair to the other party.

*Guilt* meant that the party felt guilty about their own role in ending the relationship (e.g. they had been the one to walk out or have an affair) and wanted to make it up to the other party by giving them more than they might expect or be entitled to in their post-separation arrangements.

*Pragmatism* meant that the party took a pragmatic approach to negotiations and was prepared to settle for what they could get, regardless of whether it reflected their needs or legal entitlements.

*Self-preservation* meant that the party felt intimidated or highly stressed by the negotiation process and was prepared to agree to anything to get it over with.

*Needs* meant that the party was concerned to achieve an outcome which met their own future financial needs.

*Contributions* meant that the party felt that the division of assets should reflect the direct financial contributions each party had made to those assets.

*Sacrifice* meant that the party was prepared consciously to settle for less than their legal entitlements in order to maintain good relations with the other party or achieve some other objective they considered more important.

*Compensation* meant that the party felt they should be compensated in the property settlement for something they had given up in the interests of the relationship or the family (e.g. giving up a full-time job or a career or an occupational pension in order to be the primary carer).

The predominant norms expressed by the parties and their former partners differed between children's matters and financial matters, and in each case, as indicated in the previous chapter, were clearly gendered. In children's matters, mothers were most likely to express norms of child welfare and primary carer/status quo. For example Kathy described how when she and her partner first separated, they agreed contact amicably 'for the sake of our daughter'. But following a 'fairly serious family dispute' she stopped contact. Both parties were legally aided and their solicitors directed them to mediation. While Kathy found the first mediation session very unhelpful, she did not consider terminating mediation because her aim was 'to sort something for our daughter, so I'd have always gone back'. She wanted to reinstate contact provided her ex-partner would be more reasonable. A strong expression of the 'primary carer' norm occurred in recorded mediation 207, in which the wife, Roberta, was categorically opposed to the shared residence arrangement suggested by her husband, Peter:

> Well, listen, when the children fall over, when they cry, when they wake up in the night, it is me that they ask for. And children need to be with their mum the majority of the time. There's no doubt about that, Peter, they need to be with their mum.

The predominant norms expressed by fathers in children's matters were rights, child welfare and formal equality. For example Karl's daughter was aged two at the time of separation. He sought overnight contact for 4/10 nights around his shift pattern, and felt thwarted in mediation: 'I felt like I needed somebody to say, "Look, he is the father of the child, he is entitled to his child as much as you are…" but I felt that [the mediator] pandered to [the mother's] needs.' He referred to 'my rights to see my child' and felt strongly that the rights of the father should be given equal weight with the rights of the mother. Charlie explained that even after mediation:

> I'm still…trying to get 50/50 access for my children. I get 45/55.… And my solicitor says, 'Well…you do well to get that much, so…so don't rock the boat. It's just going to cost you money for nothing'.… So I still think the access side…is still put towards the women for the kids and not for the men.… In this equal rights world…it is difficult.… I did do really well but, you know, it'd be nice to have an equal share.

While child welfare was the second most frequently expressed norm for men after rights, men still only expressed this norm half as often as women.

A handful of parties in children's matters, both men and women, were also concerned with issues of blame and punishment. For example in

recorded mediation 206, the mother, Martha, was refusing to allow the children to have contact with their father, Jacob, at his house, where he now lived with his new wife:

> Any person who has come out of a relationship…and that's the thing, you expect me to just accept it and get on with it and be strong. Jacob, if you have been heartbroken you wouldn't just accept it and get on with it. You have to understand that you broke somebody's heart, do you see? I am not forcing you to understand it but at least have some kind of an idea that I broke someone's heart here, it's going to take time for this person to build herself, it's going to take time. You can't just break somebody's heart and say, 'Ok I am now demanding the kids to come', it's not like that.

In interview, Kevin expressed his hurt in anger rather than sorrow:

> I am a much better father than she is a mother. I didn't shag anyone else.… If she commits adultery, she should start on the opposite end of the situation in my view, as she has made the conscious choice to go and do what she did, because I didn't sleep with anybody else.

The predominant norm expressed by wives in financial matters was the desire to meet their future needs, usually due to their status as the children's primary carer. For example Brenda had two children aged three and five at the time of separation who remained with her. She and her ex-husband mediated over finances and reached agreement that she would stay in the house until the children turned 18. Ruth had two children aged 8 and 13 living with her. She felt she should retain a larger share of the assets because her needs were greater as the primary carer, and she was receiving meagre child support payments. At the time of the interview, solicitor negotiations with her ex-husband were ongoing.

After needs, the next largest group of wives expressed the norm of formal equality. However, as discussed in previous chapters, women were also more likely than men to have mixed feelings and to bring a range of normative considerations into their financial disputes, including feelings of guilt, pragmatism, sacrifice or self-preservation, concerns about compensation or a desire for reasonableness, which were rarely put forward by men. For example, Kay agreed to the transfer of the former matrimonial home to her ex-husband on payment of a small lump sum. Both the mediator and the District Judge expressed reservations about the settlement, but Kay said she 'felt so guilty that [she] had left', and agreed to her ex-husband's suggestion because 'I always felt guilty and I still do, actually, all these

years on.... I am still making excuses for everything'. Patty's house was sold and the equity divided, but all of her share was swallowed up in paying off jointly acquired credit card bills which were in her sole name. She explained that her decision to 'give up the house' was made because her ex-husband refused to hand over their child's passport to allow her to leave the country. She said, 'I just wanted to be done and dusted and I caved in.... At the time it was expedient.... I just did what I needed to do and got out of it'. Sonia was aggrieved that she did not receive greater compensation for the fact that she gave up her career to look after their son while her former husband had continued to progress in his. She described their financial settlement as 'nothing like what I had hoped for or thought or felt was fair':

> I've always felt I've got the worst deal. I do all the hard stuff with my child and my ex has a job with a good pension and career, you know? He's got a great job now which he didn't have to start off with but he's progressed in his career and he's got the money, he's got the time, he's got his hobbies, he can go on holiday. I can't do any of those things.

Kim wanted to be reasonable about finances. She agreed to the return of a deposit paid by her ex-partner, despite her solicitor's advice that this was not necessary.

The predominant norms expressed by husbands in financial matters were formal equality and contributions. Although, as noted above, a group of wives also adhered to the norm of formal equality, men expressed this norm twice as often as women. As also noted above, the two norms of formal equality and contributions were often expressed together. For example Victor had brought more capital into the marriage than his ex-wife. He had no objection to his ex-wife retaining family heirlooms provided she did not pursue his pension and he could retain the capital he brought in. Liquid assets were then divided equally. In recorded collaborative law process 204, the husband was happy to split the proceeds of the sale of the family home 50/50 with his ex-wife, but was concerned that he be able to retain all of his pension rather than having to share that with her as well.

The number of collaborative law cases involving children's issues was too small to enable comparison, however the major norms brought into the process by the parties did not differ substantially as between solicitor negotiations and mediation. Parties were equally likely to bring norms of child welfare, formal equality and rights into each process. There was a bit more of a tendency for parties to bring primary carer norms into mediation than into solicitor negotiations, but the difference was not great. In relation to financial issues, there was a difference between solicitor negotiations and

mediation on the one hand, and collaborative law on the other. Parties were equally likely to bring the norm of primary carer's needs into solicitor negotiations and mediation, however this was hardly raised at all in collaborative law. Conversely, while parties were also equally likely to bring norms of formal equality and contributions into solicitor negotiations and mediation, they were substantially more likely to bring these norms into collaborative law. These differences may, however, have simply reflected demographic differences between the parties undertaking different processes, with those using collaborative law having fewer, older children and tending to be at the end of longer relationships on average. At a lower level, child welfare norms appeared roughly equally between the three FDRs. Norms of pragmatism and sacrifice were somewhat more likely to be brought into solicitor negotiations than into mediation, while the norm of reasonableness was somewhat more likely to be brought into mediation than into solicitor negotiations.

To summarise, the norms held by parties when they entered FDR fell into a relatively limited range which varied by the subject matter of the dispute (children or finances) and by the gender of the parties, with less variation between FDRs. These patterns are consistent with (although more detailed than) earlier research by Smart and Neale, Simon Duncan and Mair et al. Smart and Neale (1999) observed that in the process of reconstituting the post-separation family, women tend to think in terms of an ethic of care and responsibility while men think in terms of formal equality and rights. Duncan's work on gendered moral rationalities showed that mothers negotiate between motherhood and paid work according to varying gendered values derived from their own social relationships and networks, which are often ignored by policy-makers (e.g. Barlow and Duncan 2000; Duncan and Edwards 1999). And in Mair et al.'s study of post-separation financial agreements in Scotland, they observed that 'the point at which parties will compromise appears in many cases to be gendered', with men focusing on preservation of their pensions, while women focused on stability, children and the family home (2015: 195).

## Practitioners' norms

When parties enter an FDR process, they encounter a practitioner who may seek, either explicitly or more subtly, to align the norms brought in by the parties with legal and/or child welfare standards. While it is expected that lawyers will inform and advise parties about the relevant legal principles, the research outlined in Chapter 2 raised questions about the extent to which mediators take a 'norm-educating' role or 'steer' parties in a particular direction. This section discusses practitioners' accounts and practices

in this regard, as reported in the Phase 2 practitioner interviews and as observed in the recorded sessions.

One important difference to note at the outset between our research and the earlier research on mediation – particularly the research on what mediators do by Greatbatch and Dingwall (1989) and Piper (1993) – is that while those researchers observed exclusively non-lawyer mediators conducting children-only mediation primarily in not-for-profit family mediation services, the mediators who participated in our research presented a different profile. As noted in Chapter 3, the majority of the mediators we interviewed (and whom we observed in recorded sessions) were trained as solicitors and worked in the private sector. They had been trained as mediators by several of the different mediation organisations. At the same time, the majority of the lawyers interviewed and/or observed in recorded sessions were also trained in collaborative law and/or mediation. Consequently, we might expect to see more convergence than divergence between the approaches of lawyers and mediators in relation to both legal and child welfare norms.

### Child welfare norms

As noted in Chapter 6, where children were involved, practitioners universally expressed the importance of a child-focused approach, whatever the issues in dispute – whether child-care arrangements or finances – and whatever dispute resolution process was used. This might, indeed, be seen as part of the shadow of the law, since s. 1 of the Children Act 1989 specifies that in determining any matter relating to a child's upbringing, the child's welfare should be the court's paramount consideration, and s. 25(1) of the Matrimonial Causes Act 1973 states that in exercising its powers in the division of the parties' finances, the court must give first consideration to the welfare of any minor children of the family. As discussed in Chapter 6, practitioners described and we observed in the recorded sessions various techniques employed in all processes to encourage parents to focus on their children's needs, including making children the first item on the agenda, 'bringing children into the room' (asking parents to describe their children's individual personalities and interests or to bring in photos of them), refocusing on the children if the discussion strayed too far away from them, making concrete suggestions for arrangements that would benefit the children, and 'reality testing' proposals in terms of their potential effects on the children, including asking parents how they thought their proposals would work for the children and how they thought the children would feel about them.

Practitioners in all processes also espoused and transmitted a consistent set of values relating to parenting, including the importance of parents maintaining a cooperative and constructive post-separation relationship

for the benefit of their children and the need for good communication between parents. Solicitors tended to express the value of ongoing cooperative parenting in terms of ensuring that parties would maintain a positive post-separation relationship, while mediators tended to express the same idea in terms of encouraging parties to think of themselves as a parental team (as opposed to individuals with separate concerns and interests). This was illustrated in several of the recorded mediations, such as recorded mediation 206:

> I sometimes say and I think I started saying with you in terms of looking beyond where you are now and to where you want to get to is kind of giving you a bit of a vision of co-parenting so that you can work for the children so that you are kind of team parents.…
>
> I do think that if we were to come back in so many weeks' time just to kind of see how we can review what's happened and see where perhaps there can be more of the underpinning of your co-parenting in terms of that being the relationship that will be the relationship that endures for the rest of your lives…

In relation to communication, Ed Jamieson, a practitioner trained in all three processes, said that whatever process he is using he encourages parents to communicate by way of a weekly phone call where possible, to minimise disruption to the children. A further value which was not generally articulated in interviews but was evident in the recorded mediation sessions was the need for parents to contain their adult conflict rather than exposing children to it. In the words of Patricia Vardy, one of the co-mediators in recorded mediation 209, 'What's important for any child is not to see arguments going on between parents'.

These practitioner norms relate very generally to child welfare rather than involving commitments to any particular kind of outcome. They are implicitly predicated on the notion that future parenting will be in some way shared, and this was reinforced by a solicitor, Freya Mountford, and a mediator, Donald Green, who said that if one parent wanted to punish the other by withholding contact, they would remind that parent of the child's right to contact with both parents. Likewise, in recorded mediation 209 the co-mediators made it clear to the mother throughout that the child had a right to a relationship with both parents and the child's contact with the father must be restored and become regular.

In terms of more specific notions of what is good for children or what children need, a number of practitioners said they give clients research-based information, or we observed them giving such information to clients,

about how children respond to parental relationship breakdown, how to manage separation in the interests of children, child development, attachment theory and how small children think and behave. Again, this was a practice shared by solicitors, mediators and collaborative lawyers. The information might take the form of a verbal discussion, a booklet or other printed material, referring parties to material available on the Internet, or sending them to a Separated Parents Information Programme or a Parenting after Parting course. David Leighton, a lawyer who gave his clients a lot of information about managing separation in their children's interests in both collaborative law and solicitor negotiations, described children's welfare as a 'very powerful lens' for his clients because 'it imposes an external set of norms or values which pulls them towards fairness because it imposes on them a sort of level of objectivity'. As with the encouragement of cooperative parenting, this information tended to be used to discipline parents and encourage them to focus on their children rather than to promote any particular kinds of outcomes.

Generally, practitioners were quite circumspect when it came to expressing views on substantive outcomes, and only three did so in interviews. Mediator Melanie Illingworth said she did not personally believe 50/50 shared care arrangements were in children's best interests; mediator Gordon Russell said he had 'strong views' that, absent safety issues, children of whatever age should have overnight contact with their fathers; and Martin Appleby, a practitioner in all three processes, thought the approach to be adopted in whatever process should seek to ensure the children have continuity in their experience of parenting pre- and post-separation. Further, in only one of the four recorded mediations concerning children's issues did the mediator steer the parties towards a particular outcome. This was recorded mediation 210 in which the mediator clearly supported the mother's argument that the child needed stability and emotional security with her as the primary carer against the father's argument for equal shared residence. While the father invoked research, surveys, reports and studies to support his contention that equal shared residence was good for children and in his child's best interests, this view received no endorsement from the mediator, and shared residence was tacitly dismissed as an option in favour of a small increase in the existing level of contact. By contrast, in another of the recorded mediations in which the parents were polarised in exactly the same way, the mediator did not indicate a preference for either option but strove to promote agreement by finding a 'third way' between them.

In summary, practitioners were universally committed to children's welfare, but at a fairly abstract and procedural level. They were concerned to ensure that parties focused on their children's interests and needs,

maintained a cooperative post-separation relationship, had the skills to communicate constructively within that relationship, and tried to minimise their children's exposure to conflict. Substantively, they were committed to the child's right to have contact with both parents, but it was rare to find clear preferences for any particular form of child-care arrangements beyond that.

### The shadow of the law

The practitioner interviews and recorded sessions revealed three main ways in which practitioners might bring the shadow of the law to bear in FDR processes: first, by telling cautionary tales about the law and the court process in pursuit of the procedural norm of reaching agreement out of court; secondly, by giving information and/or advice to clients about the substantive law in order to influence the content of their agreements; and thirdly, by measuring the proposed agreement against what a court might order in order to determine its acceptability. In each case, practitioners expressed and demonstrated a variety of views and practices.

#### *Encouraging agreement and deterring clients from court proceedings*

Several collaborative practitioners and mediators appeared to represent the law to clients as something that is either unhelpful or positively dangerous, and therefore to be avoided. For example, practitioners such as lawyer-mediator Jane Davison stressed the uncertainty of the law and the unpredictability of discretionary decision-making:

> I have certain little visuals, sort of analogies that I use, painting pictures that I hope help them to remember things. Twelve different District Judges in a room with the same set of facts come out with 13 different decisions and things like that…

While collaborative lawyer Clarissa Chesterton stated in collaborative law process 214:

> Well who knows, toss a coin what the law says because we have got such a discretionary system in this country, you can argue until the cows come home, you know. And that's why kind of in a sense law is helpful on one level but very unhelpful on another.

Similarly, mediator Peter Young explained in recorded mediation 207:

> What I can say [about going to court] is it is an uncertain outcome. I guarantee neither of you will predict the outcome because it depends on evidence, it depends on six months of statements and witnesses and a barrister and the judge on the

> day, the opinion.… Well, you ask your lawyer, ask your solicitors, 'Can you guarantee me an outcome?' And if they can't, then that's why mediation is the way to go. If they can't guarantee an outcome…

By contrast, solicitors involved in traditional negotiations tended not to say they represented the law as uncertain to their clients, even if they were personally conscious of the uncertainty of adjudicated outcomes and therefore attempted to negotiate agreements out of court. Solicitors trained in all three processes did, however, join with collaborative lawyers and mediators in representing the court process as slow, costly, intrusive, emotionally draining and damaging for children, again as a means of encouraging clients to reach agreements without resorting to court proceedings. In recorded solicitor-client meeting 202, for example, the solicitor's main effort throughout the interview was devoted to discouraging the client from going to court:

> I could easily sit here and say to you yes, you should make an application to the court for specific times to see the children, possibly even for the children to come and live with you erm, they are sort of things that we could do erm and that, that would take you into the court process which would be a lengthy process which may or may not improve things *[laughter]* depending on how things pan out, erm may or may not actually make things worse because erm the court process is very adversarial and therefore if people that are locking horns, it tends to make them lock horns more…which can be very unhelpful when what you are trying to do is actually build up some sort of communication and trust so that you can see the children on a regular basis.…
>
> I think, in terms of going to court, what I am thinking is we need to always have that at the back of our minds and it may well be that that's what you need to do.… But I think it's worth trying some other things first.…
>
> If you are, potentially you are looking at an application to the court for a non-molestation order, application regarding the children, an application regarding the finances. If you did all of those, you could be looking at somewhere of £60,000 to £100,000.… So that's the other reason I am very keen…to look at other avenues.

While agreement out of court may indeed be the preferable mode of resolution in the majority of cases, the presentation of court proceedings as

frightening, unpredictable and wholly undesirable is arguably more self-serving for practitioners than helpful for parties. In particular, for some categories of cases, such as those involving domestic abuse or an entrenched refusal to negotiate, our findings suggest that court proceedings should be recognised as the first and most appropriate option available. Further, the realistic ability to commence court proceedings can be an important bargaining chip for some weaker parties, in order to obviate poor negotiated outcomes based on sacrifice or self-preservation. The routine demonisation and discouragement of court proceedings can result in unjust settlements. The interests of justice would appear to require greater acknowledgement of when courts have an important role to play and greater concern and effort to make them more accessible.

*Giving legal advice or information*

Through giving legal advice or, in the case of mediators, legal information, practitioners may act as 'norm educators', equipping clients with knowledge of legal norms which might differ from and potentially trump clients' personal norms. The way in which, the extent to which and the purposes for which practitioners do this appears to vary according to the form of FDR and the type of case.

The solicitors interviewed were generally agreed that the primary role of a lawyer in solicitor negotiations is to explain the law applying to the client's dispute and how that dispute might be decided by a court. Advice about the law and legal process could be used both to deflate clients' unreasonable expectations and to protect clients from selling themselves short. Solicitors mentioned managing parties' expectations by reference to what a judge would be likely to order in relation to both financial and children's matters. For example, Eleanor Patterson noted: 'I always refer back to relevant law and what the expectation can be for a judge to decide or a Cafcass officer to look at the situation, and to give advice, even if it's not necessarily the advice that they want to hear'. Similarly, where one party was motivated by a desire to punish the other for their behaviour in ending the relationship, solicitors said they would educate clients that the courts view conduct and the circumstances of the relationship breakdown as irrelevant to financial outcomes, and that the courts will not support the withholding of contact on the basis of adult grievances. Conversely, if a client was motivated by guilt over their own behaviour in ending the relationship, solicitors would give them clear advice about how the court would approach the matter and the likely outcome if the case was to go before a judge. This was seen, for example, in recorded solicitor-client meeting 205, in which the client appeared to be feeling overly generous towards his former civil partner. The solicitor advised that, in the circumstances, the

ex-partner's needs would be adequately covered by half of the value of the house, 'But he doesn't need more than half', and she firmly discouraged the client from offering more.

Mediators uniformly invoked the distinction between information and advice, for example Maria Ingram explained that she would flag up factors the court might take into account when deciding a fair financial settlement, but not advise on how those factors would be applied to the particular circumstances of the case. The value of providing legal information included helping parties to overcome an impasse by explaining what courts sometimes do, or guiding parties as to what would be legally acceptable to the courts for the purposes of a financial consent order. Melanie Illingworth acknowledged, though, that sometimes clients might think she is not being neutral when she is 'merely making an objective statement about what I think the court would do'. This chimes with some of the observations from the party interviews discussed in Chapter 6. A few mediators said that if they thought a person was giving too much away due to guilt, they would tell them if they thought what they were proposing was beyond the parameters of a court order, try to steer them away by warning that the court may not ratify their agreement, and/or express their reservations in the MOU.

The other strategy employed by mediators with regard to the introduction of legal norms was to refer clients for legal advice. For example in recorded mediation 212, a financial case, the mediator strongly and repeatedly encouraged the parties to obtain legal advice before making any decisions, and provided them with a list of questions drawn up by the mediation service which people could ask of their legal advisers. In recorded session 207, the mediator attempted to manage expectations by suggesting both parties get legal advice. Here, the father claimed that the courts were in favour of shared residence and children spending equal time with both parents, while the mother asserted equally forcefully that no court would make such an order in their case. The mediator responded:

> [A]bout the shared parenting, representing 50/50, yeah, I mean, it probably is important to get some advice about it if you haven't because if you are looking at the alternative, which is court, you both need to know, ultimately, the context within which you are, you know, differing and the likelihood of achieving better results outside of this crisis.

As discussed earlier, however, the option of parties obtaining legal advice alongside mediation is considerably less available to those reliant on legal aid following the LASPO Act. Consequently, there would appear to be a

greater onus now on mediators to provide legal information at the outset in order to inform parties' decision-making.

We also observed a notable contrast between the recorded mediation cases concerning children's matters and financial matters. Out of the four mediation cases concerning post-separation parenting arrangements, cases 206 and 209 (both involving lawyer-mediators) contained no references at all to the law, legal principles, courts or judges, while references to the law and courts in cases 207 and 210 (one lawyer and one non-lawyer mediator), as discussed above, mainly concerned their unpredictability and undesirability. By contrast, the financial mediation case was saturated with law. Its structure, content and goals were all legally determined. Unlike the children's mediations, which involved fairly free-flowing discussions of the issues raised by the parents, the financial mediation was tightly structured by the mediator and followed the legally necessary steps of disclosure of assets and income, determination of expenses and future needs, determination of the basic principle of division, and decisions about the redistribution of assets to effect that division. (The collaborative financial cases were structured in exactly the same way.) The content, as noted, included both extensive legal information and urgings to obtain legal advice. And the goal was to reach an agreement which could be turned into a consent order by a solicitor, which in turn meant that the terms of the agreement had to be within the bounds of acceptability by a court. This is consistent with similar observations of financial mediation cases made by Maclean and Eekelaar (2016: 97, 112–13, 115). As discussed in the previous chapter, court orders are available, encouraged and positively desirable in financial cases, but not in children's cases. The need to persuade the court to ratify a consent order thus exerts a certain discipline in terms of both the procedure followed (disclosure, legal information) and the outcome proposed (in accordance with legal principles). In children's matters, on the other hand, the legal acceptability of the outcome is not a concern in FDR, and hence education about legal norms is taken to be less centrally part of the mediator's role in children's cases.

The collaborative lawyers interviewed reflected themes from both the solicitor and mediator interviews. On the one hand, they saw the advantage of collaborative law, compared to mediation, as being their ability to give legal advice directly as part of the process. As explained by Kirsty Oliver:

> [W]here people maybe have a misapprehension about the law, they need clarification of the law, I find that sometimes a little frustrating [in mediation] because obviously you can't say what I know the law to be and I have to say to them 'you need to go

> and speak to your respective solicitors to seek legal advice on this point'. Although from that point of view the collaborative approach is more immediate because everybody's here, legal advice is being given to clients.

On the other hand, what a court would decide in the particular case was not the primary focus of negotiations. As Matthew King put it, clients usually sign up to the collaborative process because they want to come to an agreement that is more creative than a court-ordered outcome. An instructive contrast in this regard emerged between the recorded financial mediation case (212) and one of the recorded collaborative cases (213). The facts of these cases were very similar, both involving an older couple with no dependent children separating by mutual agreement, and both resulting in an equal division of assets and a clean break. As well as urging the parties to obtain legal advice, as noted above, the mediator in the former case provided a great deal of information about the provisions of the Matrimonial Causes Act 1973 and principles derived from case law. By contrast, the collaborative process contained very little explicit legal advice, other than on the specific issue of inherited property. Since the parties arrived at the legally expected outcome by their own devices, there seemed little need for direct legal intervention. Arguably both cases occurred within the fairly strong shadow of the law, but perhaps counter-intuitively, this was much more overtly stated in the mediation case than in the collaborative case.

*Assessing proposed agreements*

Once practitioners have provided parties with advice or information about the law, there remains the question of how that impacts on the outcomes of FDR. Again, practitioners varied in the ways in which and the extent to which they were concerned to ensure that agreements accorded with legal norms. Four basic positions were identified on a spectrum ranging from no shadow of the law to strong influence of the law. First, some practitioners considered parties' autonomy to be paramount when it came to outcomes, regardless of legal norms. Secondly, many practitioners said they would be concerned that proposed agreements fell within the parameters, the 'band of reasonableness' or the 'ambit of discretion' within which a court might decide. Thirdly, some practitioners were concerned to ensure that outcomes were fair, and used the law to promote fairness. And finally, some practitioners talked about benchmarking any proposed agreement against what the court would be likely to order. The degree of adherence to these different positions again varied by FDR process.

A handful of solicitors engaged in traditional negotiations acknowledged that, having given their clients clear advice, the clients were entitled to

ignore that advice and settle for less for their own reasons. Some said they would be concerned that any agreement fell within the parameters of possible court decisions. However, solicitors engaged in traditional negotiations tended to place less emphasis on the range of possibilities and more on benchmarking proposed agreements against the likely court order. This was expressed not necessarily as a matter of choice for the parties but as an indicator of the solicitor's own professional competence. Indeed three solicitors demonstrated their positional orientation by saying that an even better outcome would be if they could do better for their client than what the court would be likely to order, if they could 'exceed the parameters' or 'beat the curve'.

As Maclean and Eekelaar have pointed out, the Codes of Practice of the different mediation organisations vary in what they say about mediator neutrality concerning the outcomes of mediation (2016: 79–81). For example, while the Resolution *Guide to Good Practice on Mediation* (2015: 11) states that the mediator has a responsibility to inform clients if they consider proposed outcomes might or would fall outside that which a court might approve or order, the FMC Code of Practice (2106: 5.3) states that mediators must not seek to impose their preferred outcome on participants or influence them to adopt it, whether by attempting to predict the outcome of court proceedings or otherwise. However, it goes on to specify that if the participants consent, the mediator *may* inform them that the resolutions they are considering might fall outside the parameters which a court might approve or order. It is difficult to know how a mediator should respond in this situation if one party consents but the other does not (Maclean and Eekelaar 2016: 80).

In our practitioner interviews only a minority of mediators – all from legal backgrounds – expressed total adherence to the value of party autonomy. Sarah Hamilton, for example, explained that 'you can say, "This is what the law says, this is what judges think, this is how they make decisions, but this is mediation and you two can make the decisions in this", and you always have to remember that, that it is their decision'. While she would reality test proposed agreements, she would not measure them against what a court would be likely to order. Gordon Russell similarly thought it was important for parties to make financial decisions with knowledge of how a court might decide, but it was not the mediator's function to replicate what a court would do; a good outcome was one which was realistic and worked for the couple. Yvonne Newbury highlighted the need to recognise that parties have different priorities, and so long as an agreement is reached without undue pressure, if it is workable for the parties and their children it is not for the mediator to interfere. She qualified this, however, by drawing a distinction between children's matters,

in which parents should be left to make their own judgement call as to what is in their children's best interests (short of causing them harm), and financial cases in which she would be concerned if the agreement was not within the parameters of a likely court order. Two other lawyer-mediators, Mike Carter and Maria Ingram, also expressed support for party autonomy in children's cases but not in financial cases.

Rather than adhering to an 'anything goes' version of party autonomy, the majority of mediators said they would be concerned that proposed agreements fell within the parameters of what a court might decide. This applied to both financial and children's cases. If a proposed agreement fell outside this ambit, they would provide information about what courts have laid down as fair and appropriate in similar circumstances, explore other possible options, reality test and discuss the practical implications, recommend legal advice and/or flag their concerns to the parties' solicitors in the MOU (see also Maclean and Eekelaar 2016: 101). Some noted their duty under the Resolution Code to point out to the parties that their proposed agreement may not be accepted by a court. By contrast, Hannah Phillips, a non-lawyer mediator, said she might judge a proposed settlement against what the court is likely to do in her head, but she would not articulate this to the parties. Melanie Illingworth provided an illustration of outcomes that would and would not fall within the parameters of legal acceptability. While she did not personally think 50/50 shared care arrangements were in children's best interests, she said she would not necessarily try to dissuade parties from agreeing to such an outcome on the basis that courts do approve such arrangements. However, if parties wanted to agree financial arrangements that would leave the children homeless, she would tell them they could not do so because the courts would not allow it. Clearly, the notion of legal parameters is a way of reconciling party autonomy with the shadow of the law: autonomy can still be honoured within a fairly wide but not unlimited range of possibilities. As such, it resolves a particular problem within mediation and it is thus perhaps not surprising that so many mediators espoused this approach.

In terms of the third possibility, some mediators said they would assess the proposed agreement against what a court would order and if they thought it was too favourable to one party, they would try to get the parties to look at it from each other's perspectives, caucus with the parties separately to try to understand their motivations for the agreement, tell them a court would be unlikely to make such an order and/or suggest the need for legal advice. Mediator Emily Jacobs said that 'For me it's so important so that, you know, if I think an agreement isn't really fair to one party, that I am able to say, "Go and see your solicitor before I draft the final MOU"'. Again, this approach appears to apply to both children's and financial

matters, although specific understandings of fairness were more evident in relation to financial matters. Two mediators commented on the need to explain the principles of fairness to parties in financial cases, in terms of contributions, needs and equal sharing (derived from the case of *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618). One of these, Mike Carter, noted the tension between men's expectations of formal equality and legal notions of fairness:

> The problem is that people don't always appreciate that…just because, you know, you have got a house that is jointly owned, you don't have to share it 50/50. That seems to be obviously what a lot of men in particular think is going to be the outcome, and of course you have to say 'well, it isn't necessarily the case and what we need to do is to take into account of all the factors that the law says you should take into account before a decision is made' and erm, that often means it isn't quite as equal as they would like it to be.

Collaborative lawyers were most prominent among the group espousing party autonomy. For example John Astwood said that in a traditional negotiated financial case he would judge the outcome against the criteria in s. 25 of the Matrimonial Causes Act 1973, but in a collaborative case, while he would certainly ensure he advised the client as to the court's likely approach, the client was entitled to take a different approach. Rachel Matthews acknowledged that what the court might order would influence her perception of a good outcome in a collaborative case, but 'the collaborative process has taught me to let go of that to a certain extent'. So long as the client understands the long-term implications of their decisions and does not feel pressurised, it is up to them if they choose to reach an agreement which is outside the parameters of what a court is likely to order. David Leighton said he would consider the likely court outcome as a bare minimum safety net, but collaborative law worked at a different level, with the parties' aspirations rather than court outcomes being the guiding principles.

Fewer collaborative lawyers expressed their position in terms of working within the ambit of judicial discretion, although some did, and we observed this approach in operation in recorded collaborative process 214. Here, the husband's lawyer explained the parameters in terms of meeting the wife's needs at one end of the spectrum and dividing the assets equally at the other end. She continued that if the parties were 'having a horrible dingdong' in court, the court would look at the s. 25 factors, but in fact there was no right answer and it was up to the parties to decide, between the two extremes, where they felt was a fair position

in the middle. The wife's lawyer reinforced the fact that 'there isn't an answer, there's a range'.

Some collaborative lawyers adopted a more objective notion of fairness by reference to likely court outcomes, rather than leaving it to the parties to decide what was fair. As Richard Benson said, measuring a proposed outcome against what the court might order 'means that…it sits more comfortably with you.… You have to have conversations about fairness'. A good illustration of such a conversation occurred in recorded collaborative process 204 in which Richard Benson was one of the lawyers. The husband, Gary, was happy to share the proceeds of the sale of the house equally but wanted to maintain all other assets and liabilities as they stood. That would leave him with his pension intact and the wife, Sandra, with a substantial debt incurred in her name but used for the welfare of the family. Moreover, Gary would be buying a new house while Sandra, who worked part-time, would be going into rented accommodation with the children and would remain as the primary carer. Both lawyers made an effort to convince Gary that such an outcome would be perceived as unfair, by reference to the court's approach and the risk that the court would not accept a consent order embodying such an unequal division. These arguments were not effective in shifting Gary's position, however. He reluctantly agreed to nominal maintenance, but could not see any unfairness in the division of assets, and threatened to seek equal shared residence of the children if forced to share his pension. In the end, it was Sandra who gave in, displaying elements of pragmatism and sacrifice in acknowledging that Gary was adamant and would not change his mind, insisting that she had enough to meet her needs, and being prepared to agree to get it over with and keep the peace. This case illustrates the limits of practitioners' ability to use the shadow of the law as a persuasive tool in negotiations, and also illustrates the potential for the collaborative process to operate to the advantage of dominant men and result in poor outcomes for women when the achievement rather than the content of settlement is prioritised.

*Conclusions*

When it comes to the shadow of the law, there appear to be real differences between FDRs. The law casts the deepest and most extensive shadow over solicitor negotiations, with the process being focused on the application of legal principles and the default option of a court determination. Solicitors used the law to boost or deflate clients' expectations and benchmarked proposed negotiated agreements against what a court would be likely to decide in the case. Nevertheless, something of a spectrum of solicitor approaches was evident. At one end, solicitors who had most fully embraced the values of non-adversarialism, as evidenced in their

training in all three processes, were concerned to deter clients from considering court proceedings, while at the other end, 'hired gun' solicitors were pleased if they could achieve a result for their client which was better than they might get from a judge.

The law casts a lighter but still discernible shadow over mediation, more so in financial than in children's cases. On the one hand, mediators stressed the undesirability of going to court and the indeterminacy of court outcomes, and some mediators placed the value of party autonomy above legal norms. On the other hand, mediators did not hesitate to provide legal information, especially in financial cases, and attempted to use that information to manage parties' expectations. The majority of mediators were concerned to ensure that agreements reached fell within the parameters of legal acceptability and/or accorded with legally-defined notions of fairness, while those who gave absolute priority to party autonomy were more likely to do so in children's than in financial cases. Indeed, the recorded mediation processes indicated a substantial contrast between the much more free-flowing, open-ended and non-directive style of mediation in children's cases and the highly structured and legally bounded style of financial mediation, with financial mediation directed towards the achievement of a legally enforceable court order. At the time of our research, solicitors played an important role in helping to bring the shadow of the law to bear on mediation, by giving advice before or alongside the mediation process, checking agreements were fair and drawing up consent orders; and mediators relied on them to do so, especially where they had reservations about the agreement. This role, however, has been substantially diminished by the LASPO legal aid reforms, with the possible result that the law has become less normative in mediation.

Finally, the shadow of the law appears to fall most lightly of all on collaborative law processes. Collaborative lawyers were very likely to stress the undesirability of court proceedings and the indeterminacy of court outcomes. They certainly gave their clients legal advice as part of the process, but legal rules and what a court might decide were not a central focus; rather, they (or the parties) aimed to get beyond legal norms and find creative solutions for their particular circumstances. Consequently, collaborative lawyers displayed the greatest level of adherence to the value of party autonomy, or alternatively, a commitment to (subjective or objective) fairness within the range of legal possibilities rather than standard legal outcomes. Both material and ethical difficulties could arise, however, if clients failed to live up to their lawyers' ideals. In this situation, the commitment to party autonomy, the norms of cooperation and the inability to protect a vulnerable party with a credible threat of court proceedings could mean that power dynamics between the parties went unchecked.

## The encounter between party and practitioner norms

As discussed in Chapter 7, not all of the cases of the parties interviewed or which were observed in the recorded sessions were resolved by means of an FDR. The following discussion deals only with matters that were resolved and where an outcome can therefore be identified and categorised. As with the norms brought into FDR processes by the parties, the norms evident in outcomes differed between children's cases and financial cases. The particular outcomes reached resulted from a combination of the similar or different norms brought into the process by each party, the norms espoused by the FDR practitioner(s), and the ability or willingness of the parties to compromise.

### The norms embodied in outcomes

In children's matters, outcomes were fairly evenly split between those reflecting norms of formal equality, primary carer/status quo and child welfare. Most of these outcomes were achieved in mediation since, as noted in the previous chapter, few children's matters from our party interviews were settled in solicitor negotiations or collaborative law. In financial matters, agreements reached in mediation were more likely to be based on formal equality, while those reached in solicitor negotiations were more varied (reflecting norms including child welfare, contributions, guilt and pragmatism), although formal equality and needs were the predominant bases for agreements. Outcomes from collaborative law were split between those reflecting norms of formal equality, needs and contributions. The needs cases included some in which the wife received a settlement which met her immediate needs but constituted less than 50 per cent of the assets.

While some of the norms brought into the FDR process by the parties – as discussed above – were reflected in outcomes, others tended to be discarded along the way. In children's cases fathers' arguments for formal equality and mothers' primary carer/status quo arguments were often successful, whereas fathers' arguments based on rights and both father's and mothers' arguments based on punishment were not. In financial cases husbands succeeded with formal equality and contributions-based arguments, while wives succeeded with formal equality and primary carer/needs-based arguments, although wives' guilt and pragmatism might also be reflected in agreements. Wives' arguments for compensation for relationship-generated disadvantage do not appear to have been successful.

All of the norms reflected in the outcomes in children's matters are, in the abstract, within the parameters of both the law and child welfare knowledge, although the appropriateness of those norms to the resolution of the particular case would depend upon the facts and circumstances of

that case. At the same time, the norms discarded during the FDR process were those which run counter to legal principles, that is, fathers' rights and a desire for punishment of the other party. In the party interviews, parties felt themselves steered in a particular direction by either their solicitors or mediators less often in children's cases than in financial cases, although a number of parties did mention being given information or advice about 'appropriate' outcomes in children's cases, with information from mediators being reported almost as often as advice from solicitors. In the largest group of these cases, it was fathers whose expectations were managed downwards. For example, Stuart wanted primary residence of his children, but he moderated his stance on advice from his solicitor about how the legal rules would operate if he went to court. As a result, he agreed to a 50/50 shared residence arrangement in solicitor negotiations. He said that his solicitor gave him a 'reality check' and explained that his wife would not be punished for having an affair. Harry's solicitor advised him of his right to see his child regardless of the fact that he had formed a new relationship. However since the child was only 12 months old and lived a considerable distance away, the solicitor advised him against pursuing staying contact. Paul said that at the MIAM, his desire for 50/50 shared residence was not endorsed by the mediator.

In financial matters the relationship between the norms brought into the process by the parties and legal norms was more complex. Agreements based on child welfare, the needs of the primary carer, formal equality and contributions would all fall within the parameters of the law in the abstract, and again their appropriateness in a given case would depend upon the facts of that case. But financial outcomes also reflected guilt, pragmatism, sacrifice and self-preservation, which should have been trumped by or discarded in favour of legal norms. And they also failed to reflect claims for compensation – a legal norm which appears to have been discarded. In each case, as discussed in the previous chapter, the presence of guilt, pragmatism, sacrifice or self-preservation, as well as the absence of compensation norms, tended to operate to the disadvantage of women.

Parties described being steered towards a particular outcome in financial cases almost twice as often as they did in children's cases, and in this instance, they were considerably more likely to have received advice from a solicitor than information from a mediator about appropriate outcomes, including solicitors giving advice prior to the parties entering mediation. The largest group here were women who, as discussed in previous chapters, felt empowered by the advice they received, not having realised that their non-financial contributions to the welfare of the family and their role as primary carer would be taken into account in decisions about the division

of property. For example, Ruth felt empowered in solicitor negotiations on learning that she had more rights financially than she had thought. She said her solicitor tried to dispel her guilt and get her to focus on her own needs and those of her children. Likewise, Kim was reassured in solicitor negotiations by advice from her solicitor that the law would support her desire to stay in the family home with the children, when her ex-husband wanted to sell it and divide the proceeds:

> I felt fully supported and I was unaware how...kind of...how much the law protected me, so.... Just seeking the advice from a solicitor made a huge difference.... I didn't know anything about the process. So just talking to the solicitor, finding out my rights just massively put my mind at rest.

Esther said that her solicitor told her straight out what a reasonable financial settlement would be, and she was then happy to mediate armed with that knowledge. Tilda said her mediators made it clear that the primary carer should not get less than 50 per cent of the equity in the family home. In the collaborative process, Jenny said she expected to be punished for her decision to end the marriage, but the lawyers informed her of her rights, including the issue of compensation:

> The lawyers, not through sympathy particularly, but just through sort of saying 'this is how the court would see it' or 'this is how the law sees it', but, you know, I had this input into, not necessarily his career, although kind of, I think they do frame it like that, but you know, that as a wife which I had played that role a bit, you know, that I had been supportive of, you know, of his earnings.

Yet, as discussed earlier, several of the women in our party interviews and one in a recorded collaborative processes (204) chose to ignore their legal advice and settle for less for reasons of guilt, pragmatism or sacrifice. Indeed, Matthew King, one of the collaborative practitioners interviewed, noted that he had had cases in which men had been keen to use the collaborative process because they perceived their wives were feeling guilty, with the implication that the process would therefore deliver them a better deal. In his view, this indicated a need to work through emotions at the outset of the process, although in our observations this did not routinely occur, and it might be more of an argument for screening such cases out of collaborative law.

Equally concerning were a group of cases in which women's lawyers apparently failed in their professional obligations to explain their legal position adequately or to pursue their financial interests. For example,

Jayne felt that in mediation she was negotiating in a legal vacuum. She had wanted her solicitor to give her advice about a reasonable percentage split of the assets but they failed to do so, and she was forced to do her own research on the Internet. In solicitor negotiations, Freda's solicitor did not pursue her ex-husband's pension, and she wished in hindsight that they had. Given the small number of collaborative cases in our party sample, it is of some concern that in two out of six cases the wife felt insufficiently advised, or reached a clean break agreement in circumstances in which she had a clear need for ongoing spousal maintenance.

In summary, our data indicates that the outcomes achieved by the parties interviewed and observed in both children's and financial cases broadly followed legal norms, that non-legal norms brought in by the parties were often jettisoned in the negotiation process, and that these results were attributable to (explicit or implicit) interventions by both lawyers and mediators. The exceptions were some financial cases in which women received no support in mediation and were solely concerned with self-preservation (as discussed in Chapter 5); in which women's guilt, pragmatism (settling for what they could get) or sacrifice overrode legal advice; or in which women were poorly served by their solicitors failing to pursue matters such as maintenance, pension shares or compensation for relationship-generated disadvantage. However, the broad reflection of legal norms in outcomes is partly a reflection of the fact that legal norms are themselves broad and multiple (Dewar 1998), with the real issue being how the various norms are applied in the circumstances of each case. In order to achieve a more fine-grained assessment of the norms embodied in case outcomes, it is useful to consider frequent patterns of norm combinations found in the party interviews and recorded cases and their typical outcomes.

### The relationship between norms and resolution

Where both parties shared the same norms, whether of formal equality or child welfare (for children or finances), primary carer (for children) or primary carer's needs (for finances), the matter almost inevitably resolved with that outcome, regardless of how the case may have been decided by a court. In situations of norm disparity or norm conflicts, however, three possible outcomes were observed. One was that the parties reached a compromise, which split the difference between them in a way which generally fell within the parameters of legal possibility, although may have not have reflected how the court would have decided the particular case. The second was that the practitioner(s) intervened to steer the outcome in accordance with legal or child welfare norms. The third was that the matter remained unresolved. The common patterns of norm disparity and their outcomes are set out in Table 8.1.

**Table 8.1** Typical norm disparities and outcomes

| *Issue* | *Father/Husband* | *Mother/Wife* | *Resolved* | *Unresolved* |
|---|---|---|---|---|
| Children | Formal equality/Rights | Primary carer/ child welfare | Compromise on substantially shared care, or primary carer supported by practitioner | One or both entrenched |
| | Primary carer (self) | Primary carer (self) | Compromise on equal shared care | Both insist on being primary carer; leave to remove cases |
| | Punishment | Primary carer | Child welfare (residence with mother) supported by practitioner | Refusal of father to compromise |
| | Child welfare/ rights | Punishment | Child welfare (contact for father) supported by practitioner | Refusal of mother to allow contact or degree of contact sought |
| | Child welfare/ rights | Child welfare (different conception) | Reach common understanding of welfare or compromise in child's interests | Unable to compromise; fundamental concerns about welfare |
| Finances | Formal equality/ contributions/ own needs | Primary carer's needs/ compensation/ child welfare | Compromise on formal equality, or needs-based supported by practitioner | Unable to compromise |
| | Formal equality/ contributions | Guilt/sacrifice/ pragmatism | Wife conceded husband's position, or needs- or fairness-based supported by practitioner | |
| | Needs/child welfare | Needs/child welfare (different conception) | Needs-based compromise | Entrenched differences in conception of needs |

Among our recorded cases, mediations 207 and 210 fell into the first category in which the father was asserting his 'rights' to an equal shared care arrangement while the mother asserted her role as the children's primary carer. Mediation 210 was resolved by a small increase in contact with the mother's position being supported by the mediator, while mediation 207 remained unresolved. Mediation 206 fell into the fourth category of the mother wishing to punish the father for his behaviour in ending the relationship, and the matter remained unresolved with the mother refusing to commit to unsupervised contact at the father's home. Mediation 209 fell into the fifth category: the father wished to see his child but the mother had stopped contact due to concerns about the child's welfare in the father's care. After the mother had vented her anger at the father, the two reached agreement that it was in the child's best interests to see his father and new contact arrangements were agreed.

In two of the recorded financial cases, mediation 212 and collaborative process 213, there was no conflict of norms as both parties agreed on a formal equality outcome. Collaborative process 204 fell into the second financial category: the husband wanted a mix of formal equality and contributions, to his own advantage, and the wife agreed for pragmatic reasons, despite the legal advice she received. Collaborative process 214 fell into the third financial category, with the parties seeming to place most emphasis on meeting their own needs and those of their children. Even though it was a big money case and could arguably have resulted in equal sharing of the assets, the lawyers tacitly accepted that a needs-based approach was fair to both parties in the circumstances (including the fact that they had separated several years previously) and steered them towards that outcome – a result which gave the wife less than 50 per cent of the assets.

Table 8.1 also indicates that practitioner intervention based on legal norms is important in shifting outcomes from a 'default' position of formal equality to one that better meets the interests of children and/or the needs of the party in the more vulnerable or weaker financial position, in acting as a tie-breaker between parties' competing concerns, and in steering outcomes away from 'inappropriate' fault-based or exploitative norms. On the other hand, legal norms may have only a limited or no role to play when the parties' initial norms are in agreement; when one party's guilt, relationality or unwillingness to sustain a strong position has an overriding effect on the outcome; or when the parties' disagreement is within legal parameters.

### Just settlement?

It was argued in Chapter 1 that the fact that agreements reached in FDR fall within the parameters of the law does not necessarily make them just. The above discussion bears out this argument. In particular, agreements and

compromises on formal equality in both children's cases (equal or substantially shared care) and financial cases (equal division of assets), may often be legally acceptable, but may not represent an objectively just outcome.

In Chapter 1 we identified our own, feminist conception of family justice based on recognition (of the value of care work, relationality, and the need for safety and freedom from violence and abuse) and redistribution (taking account of gendered power differentials, the social and economic context of decision-making, and striving to achieve substantive equality between the parties). In the financial context, this means understanding the gender division of labour within the family and the extent of relationship-generated disadvantage incurred by the primary carer, the social and economic contexts of the parties' future lives and their respective ongoing caring responsibilities, and attempting to achieve an outcome which provides each party with an equal ability to move on with their lives. In the context of child arrangements, this means applying a relational concept of child welfare which takes into account the child's needs in the context of relationships and the interests of caregivers, and guarding against gender discrimination in so doing (in particular over-valuing fathers' caring *about* and under-valuing mothers' caring *for* their children).

On this analysis, the outcomes we found in the party interviews and observed FDR processes gave rise to injustices in two different ways. First were the financial cases where women settled for less than they should have due to guilt, pragmatism, sacrifice or self-preservation, or were not supported in pursuing compensation for relationship-generated disadvantage, or where their needs for ongoing maintenance were subordinated in the interests of achieving a clean break. These cases were occasions of oppression for the wife. They resonate with Piper's observation (1993: 194) that women might be seen as more amenable to compromise than men and Grillo's (1991) concern that women would be more likely to give ground and surrender their rights in the interests of remaining on good terms with their ex-spouse because of their greater relationality. The crucial difference, however, is that Piper and Grillo were referring to women's (potential) disadvantages in mediation over arrangements for children, whereas our data in this regard relates to women's disadvantages in reaching financial settlements in any FDR. It is particularly concerning that criticisms of a process involving direct negotiations turn out to be true also of processes supported by lawyers.

The second way in which outcomes in our study gave rise to injustices were the situations where a formal equality outcome was agreed which fell well short of substantive equality. In children's cases, equal time or substantially shared care arrangements may appear to represent a reasonable compromise between parents' competing positions, but they may well be

discriminatory in undervaluing the role of the parent (usually the mother) who has hitherto been the children's primary carer, and overvaluing the desire of the other parent (usually the father) to maximise his contact with the children post-separation. Moreover, such arrangements may not be in children's best interests. The research evidence on shared care arrangements suggests that for such arrangements to work well, parents must be highly cooperative and child focused (Fehlberg et al. 2011; Neale et al. 2003; Trinder 2010). Several of the parties we interviewed agreed substantially shared care as a compromise from parental positions which were far from child focused. In these cases, shared care arrangements amount to something like the judgment of Solomon – agreeing to cut the children in half in order to satisfy the demands of both parents. The research evidence also suggests that shared care arrangements in situations of parental conflict can result in poorer outcomes for children as they are more exposed to that conflict and its detrimental effects (Fehlberg et al. 2011: 8; McIntosh et al. 2010; Trinder 2010: 290).

In financial cases, likewise, agreeing to split the assets equally between the parties meets a superficial notion of fairness to both parties. But of the financial cases in our study in which a 50/50 split of the assets was agreed (generally on a clean break basis), only one could be described as a 'big money' case (so that equal division was likely to take care of each party's future needs) and only one also had an equal shared care arrangement for the children (so the parties' future needs, at least as regards child care, were likely to be equal). In a number of these cases, the equal division of moderate assets took place in the context of conventional residence/contact arrangements for the children, and are therefore likely to have left the primary carer and the children insufficiently provided for. Equal division did not compensate the primary carer for relationship-general economic disadvantage, did not take into account the greater economic costs of child care to be incurred by the primary carer, and did not provide each party with an equal ability to move on with their lives. Rather than providing substantive equality, these arrangements trapped women and children into conditions of relative poverty. In one collaborative case, for example, a wife who had been a stay-at-home mother was finding half the assets but no maintenance inadequate to meet her support needs. It is notable that both forms of injustice identified operated to the detriment of women.

## Conclusion

This chapter has examined the settlements reached in FDR from four different normative perspectives – those of the parties, practitioners, the law, and our feminist conception of substantive justice. Combining these

perspectives enables us to understand both the normative dynamics of FDR, and how the agreements reached in FDR may be assessed.

In terms of dynamics, parties enter FDR with a finite range of clearly gendered norms relating to children and/or finances. The particular norms held, or the degree of norm conflict between the parties, may influence which particular FDR they choose or default into. In FDR, parties encounter practitioners who are likely to steer them in particular directions by reference to child welfare knowledge and legal principles. The steering provided by reference to child welfare knowledge tends to be procedural rather than substantive and, as Piper (1993) earlier observed, focuses on disciplining parents to focus on their children's needs, maintain good co-parental relationships and communication, minimise conflict for the benefit of their children, agree between themselves rather than going to court, and ensure that children maintain ongoing relationships with both their parents, regardless of parental 'fault'. The steering provided by reference to the law varies in intensity between solicitor negotiations (high-level), mediation (mid-level, and more in relation to finances than children) and collaborative law (lower-level). This steering tends to come in the form of discouragement from commencing court proceedings, advice from lawyers about legal entitlements and potential legal outcomes, protection of clients from surrendering their legal position for emotional reasons and management of clients whose expectations exceed the bounds of legal possibility. In particular, practitioners can play an important role in informing women about the legal value placed on non-financial contributions to the family and assisting them to obtain substantively fair financial settlements, although our data suggests that some practitioners fail women clients in this regard and, more generally, the principle of compensation for relationship-generated disadvantage established in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 is rarely honoured.

The encounter between party and practitioner norms generally results in 'inappropriate' party norms not reflected in the law or child welfare knowledge – such as norms of fathers' rights and revenge – being discarded, although practitioners appear to be less successful (or possibly less assertive) in talking women out of self-defeating norms such as guilt, sacrifice and pragmatism. At this point, if the parties' norms converge, that is what will be reflected in the outcome. But if the parties' norms remain in conflict, three possible options are available. The parties may reach a compromise position, which may or may not reflect legal principles and/or children's best interests. Our data suggests that such outcomes often involve compromise in the direction of formal equality or less by the wife/mother for relational reasons which may ultimately work to her detriment. Secondly, the practitioner(s) may support the position of one of the parties and steer the

outcome in that direction. Thirdly, the parties may fail to reach agreement and the matter will either proceed to some other form of FDR or to court.

In terms of the normative assessment of outcomes, parties compelled to give up a rights- or revenge-based position will inevitably feel aggrieved, while parties who achieve an outcome they expected or better will be happiest. In between is a wide spectrum of relative (dis)satisfaction, as discussed in Chapter 7. Practitioners' assessments of proposed agreements focus to a greater or lesser degree on their legal acceptability. In solicitor negotiations, solicitors measure proposed agreements against what a court would be likely to order; in mediation, while a minority of mediators take a laissez-fair attitude in line with the principle of party autonomy, the majority, *contra* Genn's account of mediation (2010: 117), are concerned to ensure that proposed agreements are within the court's ambit of discretion or the parameters within which a court might decide. Collaborative law practitioners, by contrast, appear to be most invested in party autonomy and the possibility of creativity beyond the law, constrained only by more or less legally-anchored notions of fairness. As we observed, this can leave some financially weaker parties – most often women – unprotected in the collaborative process.

Finally, from our own substantive justice perspective, we have concerns about two categories of cases. First are those in which mediators and legal practitioners fail to offer sufficient information, advice, protection, support or representation to women to enable them to obtain a substantively fair financial settlement. Second are those where women agree to formal equality as a compromise, to their detriment and that of their children, in circumstances in which practitioner intervention to steer away from such an outcome would have been possible. This applies in all processes, but the concern perhaps needs to be heeded most particularly in collaborative law where the pull towards formal equality is great and the reluctance to intervene against it appears strongest.

# 9
# Conclusion

The original aim of this study was to create an evidence base about the experiences and outcomes of family dispute resolution in order to inform future policy development. In the background was the ongoing neoliberal transformation of family justice, which had seen an increasing emphasis on private responsibility for the resolution of family disputes away from courts and lawyers. As the study progressed, however, the neoliberal transformation of family justice rolled on, with the further minimisation of state provision, de-legalisation and encouragement of private responsibility brought about by the LASPO Act, involving the elevation of mediation and marginalisation of lawyers and courts for the substantial numbers of those with family disputes who are reliant on legal aid. As such, our study became a retrospective evaluation of that policy, in light of the evidence gathered about the operation of family dispute resolution prior to the LASPO Act.

One immediate point to be noted, therefore, is that the legal aid reforms, together with the 2011 Pre-Application Protocol for Mediation Information and Assessment and its subsequent enactment in the Children and Families Act 2014, were not evidence-based, and in fact flew in the face of the available evidence. Existing UK research on mediation was dated, and provided no grounds to suggest mediation's superiority as a form of dispute resolution over its major rival, solicitor negotiations. Furthermore, the existing evidence on family solicitors suggested they were not the 'fomenters of strife' imagined by policy-makers, but in fact generally worked in a conciliatory manner and offered real benefits to clients. Our study, however, was the first to investigate how family mediation had developed since the late 1990s. It was also the first to compare directly the three FDRs which were now available – solicitor negotiations, mediation and the more recent entrant to the field, collaborative law. The study's methods, involving a nationally representative survey with thousands of respondents, a large number of qualitative interviews with parties who had experienced one or more of the FDRs and with practitioners offering one or more of the FDRs, together with recordings of solicitor-client first interviews and mediation and collaborative law processes, enabled us to gain a holistic understanding

from multiple angles of levels of public awareness, experiences and actual practices of the three FDRs.

In addition to our research questions concerning awareness, usage and experiences of FDRs, we were concerned to explore the normative dimensions of family dispute resolution. Contrary to the neoliberal position, we take the view that family justice is a matter of public concern. Family breakdown is a frequently occurring and costly phenomenon which impacts on the lives of many members of society. It matters whether people needing assistance to resolve disputes over post-separation arrangements have access to justice, and it matters how those disputes are resolved – in terms of children's welfare, and the gendered distribution of resources in society. Thus, we also asked about the extent to which family dispute resolution takes place in the shadow of legal norms; the kinds of normative commitments people bring into and the choices they make within each FDR; and the extent to which outcomes reflected our own conception of substantive justice, based on the recognition of different gendered identities and vulnerabilities arising from relationships and the distribution of material resources congruent with that recognition.

Our findings do not supply the missing evidence to support the overwhelming policy preference for mediation over other FDRs. Rather, they make clear that each FDR has both advantages and drawbacks, and this is just as true for mediation as for the other FDRs. Much depends on the skill of the practitioner in each process, but it is illegitimate to compare instances of well-conducted mediation with instances of poorly-conducted solicitor negotiations, or to compare mediation with court proceedings as if other FDR options did not exist, as much of the promotional literature on mediation tends to do. Mediation has undoubted value as a process and many of the people we interviewed were happy with the choice they had made to engage in mediation and very satisfied with their experience. However, it also has drawbacks as noted by a number of our interviewees, such as the unenforceability of mediated agreements, the lack of partisan support and legal advice, and its relative ineffectiveness in protecting vulnerable parties. The other FDRs offer advantages that mediation does not, making other FDRs more suitable for particular kinds of parties and cases (Hunter et al. 2014). And in fact, rather than choosing between FDRs, the evidence suggests they can work very effectively in combination. Mediation can offer a better experience when it is preceded by legal advice and followed by formalisation of agreements. Parties who experienced collaborative law particularly appreciated the ability to bring in other professionals such as counsellors and financial advisers. Wealthy parties could have a process tailored to their particular needs. This kind of joined-up thinking appears to hold much more promise than attempts to impose a one-size-fits-all solution on everyone.

One of the greatest drawbacks of mediation is that both parties must agree to mediate, and this is difficult to achieve for a range of understandable reasons, not merely reducible to charges of irresponsibility, selfishness or an irrational preference for court proceedings. Our findings suggest that mediation's failure to take off as expected following the LASPO Act is not a product of lack of awareness of mediation on the part of either the general public or the divorcing and separating population. Awareness of mediation is relatively high, but many people simply do not find it attractive at a time in their lives of real stress and emotional turmoil. Moreover, the withdrawal of information about dispute resolution options and encouragement to try mediation that solicitors previously provided has cut off an important pipeline into mediation.

Two particular types of cases unsuitable for mediation have been discussed: cases in which one party is not emotionally ready to negotiate and cases of domestic violence and abuse. In the former type of case, it is clear from our study that if one party has not come to terms with the separation and is emotionally unready to agree post-separation arrangements, then no form of FDR is likely to be successful. However, the lawyer-led FDRs appeared to be better at identifying emotional unreadiness and slowing down the process to give that party more time to adjust, whereas there seemed to be less recognition of this issue in mediation, resulting in experiences of failed mediation. In cases of domestic violence and abuse, our findings revealed both inadequate screening and inadequate responses to disclosures of violence and abuse. Based on the evidence from our study, we argue that these were not isolated instances of poor practice but a result of structural and systemic approaches to violence and abuse within mediation. There is too much faith in the ability of mediation to provide a better process for victims of violence and abuse than the available alternatives, and this has been exacerbated by the recent reforms to legal aid. Our findings demonstrate that this faith is misplaced. In fact, victims of violence and abuse whom we interviewed had the worst experiences in mediation and outcomes were either non-existent when mediation failed, or involved the victim of abuse capitulating to the abusive partner's wishes. Solicitor negotiations and collaborative law provided more protective processes than did mediation, although some outcomes from these processes were also less than ideal for victims and their children. For people reliant on legal aid post-LASPO, mediation must develop more sophisticated and effective approaches to screening for and responding to disclosures of violence and abuse, beyond the superficial physical safety strategies of different arrival and departure times and shuttle mediation. These should include the abolition of joint MIAMs, proper risk assessments, advising and assisting parties to obtain legal aid where possible,

and collaborative working with domestic violence services and pro bono legal services to ensure victims are adequately supported and not coerced into detrimental agreements.

Our findings show more generally that the availability of choices and good information about options necessary to attain procedural justice have become a privilege of the wealthy. At the other end of the spectrum, a vast amount of information is provided on the Internet but its quality, reliability and relevance is very difficult to determine, and actual choices have become even more constrained. This is not conducive to the exercise of individual agency or autonomy. Given that not every case or party is suitable for mediation, it appears perverse that self-representation in court remains as the only option for those who need help but cannot afford solicitor negotiation to resolve a family dispute.

As reported by our party interviewees, mediation had a higher resolution rate than solicitor negotiations, but so too did collaborative law. This appears to be related to the fact that more cooperative parties were likely to choose mediation or collaborative law in the first place, and hence were more amenable to settlement, whereas solicitor negotiations was the default option for those for whom mediation or collaborative law was unsuitable. Across all three FDRs, however, financial matters appeared easier to settle than children's matters. Mediation did deliver its claimed 'fringe benefits' such as reduced conflict and improved communication in some cases, although this tended to be associated with resolved rather than unresolved cases, and parties also reported that solicitor negotiations had helped to reduce conflict in some cases, regardless of the outcome. Partial resolutions in mediation could be a source of dissatisfaction, as this obviously left some matters unresolved. In a number of instances, an apparent agreement in mediation was very quickly repudiated by one of the parties. Some attempted more than one FDR in an attempt to resolve their dispute, with failed mediation leading on to solicitor negotiations or vice versa. For cases that did not resolve in FDR, some managed to complete the process by means of direct negotiations, but the court provided a necessary backup in many of these cases. Post-LASPO, however, where mediation fails, the parties can only try direct negotiation or go to court (as litigants in person) rather than being able to attempt solicitor negotiations. While it may be appropriate to require parties in most cases to try to resolve their matter out of court by means of an FDR, it is clearly unrealistic to imagine that all cases will be resolved in FDR – let alone solely in mediation – so court proceedings must remain accessible. In particular, where parents are unable to agree, it is in children's interests that a decision be made so they can move on with their lives. Moreover, when cases did proceed to court in our study, legal representatives would often broker an agreement at the door of

the court, whereas this is much less likely to occur when parties go to court without legal representation (Trinder et al. 2014).

While collaborative law participants had high rates of satisfaction with both the process and the outcomes of their cases, those who had used mediation or solicitor negotiations tended to be more satisfied with the process of dispute resolution than with the outcome of the case. Since outcomes often involve compromise or a deflation of initially unrealistic expectations, these findings are not surprising. However, we were also able to identify some systemic features of outcomes and settlement dynamics which help to shed light on parties' reports, and on what is happening in FDRs more generally.

Firstly, while practitioners varied in the extent to which they adhered to the absolute value of party autonomy or were concerned to promote legal and/or child welfare norms, there was no dichotomy between mediation and the lawyer-led processes with regard to the 'shadow of the law' in FDR. Rather, in all FDRs, practitioners tended to steer the parties more in financial matters than in children's matters (which may help to explain why children's matters had a lower resolution rate), and mediators fell somewhere between solicitors in negotiated cases and collaborative lawyers in their concern for the legal acceptability of outcomes. While mediators used different techniques from solicitors to bring the shadow of the law to bear, the majority did not remain strictly neutral as to outcomes. That said, however, the discretionary nature of family law means that the goals of mediation can be relatively readily reconciled with legal norms by means of the concept of 'the parameters of legal possibility' within which parties are free to make their own decisions. The parameters in children's cases are very wide, in financial cases somewhat less so, hence the different levels of steering in the different types of cases. Solicitors in negotiated cases tended to take a narrower view of the likely outcome if the case was to proceed to court, while collaborative lawyers preferred to stress creativity beyond the law, constrained only by more or less legally anchored notions of fairness.

Secondly, parties brought a range of norms into FDR relating to children and finances, but these norms clearly divided on gender lines. Where norms coincided – often around either formal equality or fairly traditional resident parent/contact parent arrangements – a resolution was relatively easy and the outcome predictable. Where norms were in conflict, the prospects for resolution and the nature of the outcome achieved depended on two factors. One was the extent to which the practitioner(s) intervened to support one or other of the parties. For example, where parties brought 'inappropriate', non-legal norms into any of the FDRs, such as claiming rights to their children or a desire to punish the other party, these norms were not

allowed to drive the outcomes. In the absence of practitioner intervention, however – or sometimes despite attempted practitioner intervention – the other factor was the ability of the parties to reach a compromise on their own. Such compromises were often in the direction of formal equality, that is, substantially shared care of children and an equal division of property, regardless of either the children's or the parties' best interests. In a notable group of cases, however, this involved not a mutual compromise but a gendered outcome whereby the wife gave up her own interests and agreed to the husband's wishes for reasons of guilt at ending the relationship, an overwhelming desire for closure (pragmatism) or in order to maintain good relationships, look after the children or avoid repercussions (sacrifice).

The gendered nature of family life and hence of family dispute resolution cropped up again and again in our interviews. Parties noticed the gendered effects of legal principles, for example homemaker wives felt empowered by the law on financial issues, while primary carer mothers felt the law was pro-fathers on contact issues, but at the same time, fathers complained that the law placed too much emphasis on the interests of primary carers. Gender issues in mediation also attached to the process, with men in particular perceiving women mediators to be biased against them. This was intensified in cases of co-mediation with two women mediators. The gender effect of most concern, however, was that just noted, whereby women agreed to detrimental financial settlements for reasons of guilt, pragmatism or sacrifice, or compromised on a formally equal split of matrimonial property (often without maintenance) in circumstances in which they had lower incomes and earning capacity and/or remained the primary carer of the children. These outcomes cannot be dismissed simply as individual choices. Rather, they are a product of gendered patterns of relationality and gendered power imbalances which went unchecked in the FDR process. This phenomenon occurred in all processes, where solicitors failed sufficiently to protect their clients' interests, or mediators failed to take responsibility for a substantively unfair agreement. We would contend that all practitioners should be much more alert to these kinds of cases and should be more prepared to intervene in order to ensure substantive justice.

Finally, the exclusion of children from FDRs can result in failures of both substantive and procedural justice. Our findings suggest that there is a great reluctance within all FDRs to consult children directly. But while parents are relied upon to represent their children's interests, our data also showed the difficulty in practice of maintaining a focus on children's welfare in all of the FDR processes. In addition, we saw the limits of trying to get parents to cooperate by encouraging them to focus on their children's best interests, and the possibility for the value of agreement to be prioritised over children's interests. These findings lend weight to calls for a greater

commitment to direct consultation with children within FDRs (Family Mediation Task Force 2014).

We have suggested above a number of ways in which mediation might be modified in response to identified concerns. Solicitor negotiations and collaborative law also received criticism, particularly around the issue of partisanship. The value for parties of having a lawyer on their side was an undoubted strength of both processes, although in traditional negotiation this can clearly be taken too far. On the other hand, and echoing previous research, parties in both processes identified insufficient partisanship as a potential problem. In other words, it appears that while adversarialism can be taken too far, so too can the principles of conciliation and collaboration. Here, again, there is a risk that the value of reaching agreement may be prioritised over the client's interests, and in our data, this had a systematically gendered effect. It was women who lost out materially when lawyers failed to protect their financial interests sufficiently robustly. As stated above, we would urge reflection on and greater efforts to avoid such results.

Given its current position of policy dominance, however, it is mediation which we would argue requires the most sustained attention. Despite its intention to promote mediation, the LASPO Act has become a prime example of the socio-legal concept of unintended consequences, by in fact making mediation more difficult. In the absence of a reliable stream of referrals from solicitors, mediators now have to do their own recruitment. Many clients arrive at MIAMs un-screened and un-encouraged by a lawyer, and un-advised as to their legal position. More challenging parties and cases are entering mediation. But for mediators who can see the parties' need for legal advice or have concerns about a proposed agreement it is now more difficult to refer parties to a lawyer or to flag up concerns in an MOU. Prior to LASPO there was a symbiotic relationship between family lawyers and family mediators. After LASPO that relationship has been broken and mediation is the poorer for it. There is an urgent need to consider how mediation can be re-designed to operate more effectively and can re-establish the interdisciplinary linkages it needs to provide a better service in these neoliberal times.

# Appendix 1

*Summary of Project Information Available on UK Data Service*

Filename – Mapping Paths to Family Justice Phase 1 & 2 Data
This file includes –

(a) Mapping Paths to Family Justice Phase 1 - Structured Questionnaire and Showcard for the National Omnibus Survey. This pdf file relates to the National Omnibus Survey Data file (see (b) below) and was a module of structured questions on the TNS-BMRB omnibus survey used to collect data from the England and Wales nationally representative sample over two waves in 2011 and 2012. A showcard was used to inform participants of the definitions of the different Alternative Family Dispute Resolution processes.
(b) Omnibus variable labels. This XLS file sets out the variable names for the National Omnibus Survey Data in full.
(c) Mapping Omnibus Code Book Family Justice Survey. This SPSS file sets out the Code Book for the National Omnibus Survey Data.
(d) Mapping Paths to Family Justice Phase 1 - National Omnibus Survey Data. This is the SPSS file of data collected in Phase 1 from an England and Wales nationally representative face to face survey using a module of structured questions on the TNS-BMRB omnibus survey over two waves in November 2011 and January 2012, using the structured questionnaire in (a) above. Total sample size, n = 2,974.
(e) Mapping Paths to Family Justice Phase 2 - Party & Practitioner Project Information Sheets, Consent Forms and Interview Schedules. This pdf file contains the project information sheets, consent forms and interview schedules used in the two sets of semi-structured telephone/face to face interviews with (i) 95 parties and (ii) 40 practitioners. These relate to the interview transcript data described in (f) and (g) below. The 2 metadata files 'Data List Mapping Paths to Family Justice Phase 2 Party Interviews' and 'Data List Mapping Paths to Family Justice Phase 2 Practitioner Interviews' list the interviews and related information.

(f) Mapping Paths to Family Justice Phase 2 - Individual Interview Transcripts with Parties. These pdf files are transcripts of 95 interviews with parties who had experienced one or more Alternative Family Dispute Resolution processes (mediation, collaborative law, solicitor negotiation) when trying to resolve a dispute relating to children and/or financial issues on divorce or separation.

(g) These data relate to the relevant party interview schedules in (e) above. The Phase 2 Party Sample was a purposive national sample of people who had experienced relationship breakdown between 1996 and 2014 recruited in part from recruitment questions on both the national omnibus survey and from the Civil and Social Justice Panel Survey. Interviews were undertaken between 2012 and 2014. A list of the interviews and related information is set out in the metadata file 'Data List Mapping Paths to Family Justice Phase 2 Party Interviews'.

(h) Mapping Paths to Family Justice Phase 2 - Individual Interview Transcripts with Practitioners. These pdf files are transcripts of the 40 interviews with family practitioners (solicitors, mediators, collaborative lawyers) who are accredited to practise one or more of the Alternative Family Dispute Resolution processes (mediation, collaborative law, solicitor negotiation) to assist parties resolve family disputes relating to children and/or financial issues on divorce or separation. These data relate to the relevant practitioner interview schedules in (e) above. The Phase 2 Practitioner Sample was a purposive national sample of family mediators, solicitors and collaborative lawyers recruited via professional associations. Interviews were undertaken between 2012 and 2013. A list the interviews and related information is set out in the metadata file 'Data List Mapping Paths to Family Justice Phase 2 Practitioner Interviews'.

# Appendix 2

*Summary of TNS-BMRB Omnibus Survey Methodology*

### Why TNS Omnibus?

TNS is one of the world's leading market research groups. We provide insight, and innovative market research solutions, along with service excellence, making TNS the partner of choice for many of the world's leading companies.

### Why use CAPIBus?

It provides you with frequent and cost-effective access to large representative samples.

Uniquely, our in-home face-to-face surveys can reach from 1,000 to 4,000 adults aged 16+ per week and we offer fieldwork in either GB or with full UK coverage including Northern Ireland.

The sheer size of the total sample means that, whoever you want to talk to, we can locate your target groups quickly and efficiently.

### Approach/methodology

Two identical face-to-face surveys are operated by TNS, one with a fieldwork period from Wednesday to Sunday, the other with a fieldwork period from Friday to Tuesday. Therefore each week we conduct 4,000 GB adult interviews, using the latest CAPI technology.

Interviews all take place in respondents' homes, using a high quality sampling methodology – details of which are highlighted below.

This survey will be conducted amongst a starting sample of 3000 adults aged 16+ in England and Wales.

### Sample design

We have a sophisticated computerised sampling system which integrates the Post Office Address file with the 2001 Census small area data at output area level. This enables us to draw replicated waves of multistage stratified samples with accurate and up to date address selection.

To ensure a balanced sample of adults within effective contacted addresses, interlocking quotas are set on the basis of sex, presence of children and working status. In each wave, 2,000 interviews are undertaken in the UK.

## Weighting

The data will be weighted to ensure that the sample is representative of the total population of adults in GB in terms of standard demographic characteristics.

## Standards

As well as your questions, standard demographic questions are asked free of charge and can be used in your analysis.

| | *Detail* |
|---|---|
| **Sex** | Male, Female |
| **Age** | 16–24, 25–34, 35–44, 45–54, 55–64, 65+<br>*We collect exact ages and can thus change these bands if you require alternative groupings or exact ages as breaks* |
| **Region** | ITV regions<br>Government regions<br>North/Midlands/South<br>Urban/Rural |
| **Social grade** | A,B, C1,C2, D, E |
| **Working status** | Full time (30 hrs+)<br>Part time (8–29 hours)<br>Part time (below 8 hours)<br>Retired<br>Still at school<br>In full time higher education<br>Looking for work<br>Not looking for work |
| **Household size and composition** | Total people in household up to 5+<br>Total adults in household up to 5+<br>Total children 0–15 in household<br>Child in household, no child in household<br>Exact age and gender of each child is recorded, so any groupings can be provided |

| | *Detail* |
|---|---|
| **Status** | CIE Earner<br>Main grocery shopper |
| **Marital status** | Married/living as married<br>Single<br>Widowed/Divorced/Separated |
| **Tenure** | Own outright<br>Buying on mortgage<br>Rent from local authority<br>Rent privately<br>Other |
| **Telephone** | Has telephone<br>No telephone |
| **Internet** | Access at home<br>Access at work<br>Access elsewhere<br>No internet access |
| **Cable/Satellite/ Digital TV** | Any cable or satellite<br>Any digital<br>Other multi-channel<br>None |
| **Ethnicity** | Full breakdown or grouped as required |

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*Explanatory note: Author names included in the index relate to those directly cited in the main text. For further information and a full reference list, see the References section (p. 271)*