



# **Legal Aid, Lawyers and Family Mediation: Glimpses of a Post- LASPO World**

ILAG Conference 2013 –  
Rosemary Hunter, University of Kent and  
Anne Barlow, University of Exeter

# Background

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- ▶ **Family mediation an attractive option for legal aid**
  - ▶ general promotion of private ordering
  - ▶ cheaper for the LSC (if successful)
- ▶ **LSC Funding Code**
  - ▶ if applying for funding for legal representation for divorce and related matters, must first attend a meeting with a mediator
  - ▶ if mediator determined dispute suitable for mediation, would be funded for mediation only
- ▶ **Pre-Application Protocol: 1 April 2011**
  - ▶ extended requirement to attend a MIAM to all parties wishing to commence court proceedings, regardless of funding status
- ▶ **LASPO: 1 April 2013**
  - ▶ private family law proceedings taken out of scope of legal aid, with limited exceptions for domestic violence and child abuse



# Research: Mapping Paths to Family Justice

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- ▶ Comparative study of out-of-court dispute resolution methods
  - ▶ Solicitor negotiations
  - ▶ Mediation
  - ▶ Collaborative Law
- ▶ Which pathway(s) is/are most 'appropriate' for which cases and parties?
- ▶ Which ADR(s) should be supported by public funding?
- ▶ Three phases
  - ▶ National survey (see preliminary findings in *Family Law* [2013] 306)
  - ▶ Interviews with 90 parties, 40 practitioners
  - ▶ Analysis of transcripts of a small number of solicitor-client interviews, mediations and collaborative law sessions



# Interview Data

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- ▶ **Out of approx 80 interviews, 26 involved at least one legally aided party (c.33%)**
  - ▶ Interviewee only (or other party's status unknown) = 15
  - ▶ Both parties = 4
  - ▶ Other party only = 7
- ▶ **Dispute resolution used**
  - ▶ 4 used only traditional solicitor negotiations
  - ▶ 22 attended mediation or at least a MIAM
    - ▶ 10 mediation only
    - ▶ 12 combined with solicitor negotiations
  - ▶ 8 ended up in court (2 following SN, 6 following SN+Med)



# Mediation Issues

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## ▶ Routes into mediation

- ▶ Self-referral
- ▶ Choice (solicitor gave options)
- ▶ Court-referred
- ▶ Most commonly, solicitor referral
  - ▶ Including legal aid solicitors referring straight to mediation regardless (n=11, i.e. half of all mediated cases)
  - ▶ Interviewees strongly convey impression that solicitors told them they had to *do* mediation rather than simply attend a MIAM for assessment
    - Only 2 legally-aided parties reported deciding not to proceed with mediation



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- ▶ e.g. Sonia – seeking divorce in 2012; solicitor said only options were mediation or court; best bet to go to mediation, too expensive otherwise; didn't offer solicitor negotiations because of time it would take and not enough legal aid to pay for solicitor's time
  - ▶ e.g. Wendy – saw solicitor 2012, referred to mediation, didn't offer any other form of dispute resolution, "she just said the quickest way was to go to mediation"; Wendy's ex had been emotionally abusive; solicitor said to tell the mediator about the abuse and she'd probably be excused from mediation and then could have legal aid, otherwise would have to go through a panel. Felt the solicitor didn't really understand about the abuse: "I think the solicitor's perspective was that because he hadn't hit me, then it was fine".
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- ▶ **Worryingly numerous reports of lack of screening for domestic violence**
    - ▶ Not asked any questions about abuse or violence
    - ▶ Joint MIAM with no separate time with the mediator and no ability to raise the issue
  - ▶ **Or lack of appropriate responses to disclosure of violence**
    - ▶ e.g. Sara – was fearful of her ex and he specifically threatened her in relation to mediation; she mentioned fear during MIAM and asked to be in separate rooms; when arrived for first joint session, ex had got there first and persuaded mediator to put them together; mediator asked if she agreed and she said yes because she was so scared. In the mediation, “I said yes to everything” – whatever he wanted.
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▶ **Outcomes: a spectrum**

- ▶ Full resolution and happy with the result
- ▶ Full resolution with some reservations about the result
- ▶ Full 'resolution' but unhappy with the result
- ▶ Mostly resolved, with supplementary assistance from a solicitor
- ▶ Outstanding issues unresolved
- ▶ Unhappy with the process and unresolved (n=7)
  - ▶ e.g. Leo (not legally-aided, self-referred) – had one mediation session, felt bullied by mediator and ex-partner, made 'agreement' totally on ex-partner's terms because it was the only way to resume contact with his son; refused to continue with mediation and went to see a lawyer





# Issues in Solicitor Negotiations

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- ▶ **4 cases with SNs only**
  - ▶ Two separated mid-1990s; mediation not available
  - ▶ One separated 2007, before Funding Code tightened?
  - ▶ One separated 2009, but interviewee's ex-partner wouldn't agree to mediation
- ▶ **Mediation before SN (n=6)**
  - ▶ Solicitor initially referred to mediation, but mediation unsuccessful so reverted to SN
  - ▶ Time lapse between interim arrangements dealt with by mediation, and finalisation of divorce dealt with by SN
- ▶ **SN before mediation (n=5)**
  - ▶ SN unsuccessful, planning to go to court but required to attend a MIAM first



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- ▶ **Complaints/problems with quality of legal aid service providers**
    - ▶ Dilatory, taking a long time to respond to correspondence, missing deadlines
    - ▶ Putting in little effort: a mailbox between parties rather than actively progressing negotiations
    - ▶ Not giving (good) advice, not supportive of the client
    - ▶ Creating costs and delay for non-legally aided parties
      - ▶ e.g. Paul – ex’s solicitor didn’t do a very good job because she was legally aided; didn’t put in much effort and didn’t advise her well; missed deadlines; made extra work for his solicitors to chase up
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▶ **Outcomes: similar spectrum to mediation**

- ▶ e.g. Jim - fully resolved, fully satisfied
- ▶ e.g. Annette - fully resolved, very satisfied with process but poor financial outcome: felt it was the best she could do in the circumstances
- ▶ e.g. Dominic – finances resolved by SN but had to go to court for children
- ▶ e.g. Brenda – resolved issues around sale of house (though she did most of the work to make it happen), but contact issues still unresolved



# Court Cases

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- ▶ All cases re. children (residence/contact + I PR)
- ▶ Only one included financial issues
- ▶ Mostly court orders rather than in-court negotiations resulting in agreement and consent orders
  - ▶ Cf. Paul – went to court after SNs got nowhere; resulted in consent order for contact and finances resolved at second FDR
  - ▶ Cf. Gwen – ex-partner applied for PR; in negotiations at court, solicitor pressured her to agree because would look better for her, but very unhappy about it
- ▶ Some good reasons for not agreeing, e.g. need for Cafcass report, serious safeguarding issues
- ▶ Dominic – ex-wife's use of ex parte applications as a tactic?



# What would happen to these cases post-LASPO?

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- ▶ **10 cases: no change**
  - ▶ Resolved by mediation, or
  - ▶ Mediation + direct negotiations, or
  - ▶ Mediation + additional SN not legally aided, or
  - ▶ Some issues resolved by mediation + other issues not resolved





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▶ 4 cases with DV

- ▶ Sara would remain eligible for legal aid...but first solicitors sent her to mediation anyway
- ▶ Lynn would remain eligible for legal aid; did mediate but unsuccessful so now going through court process; likely same
- ▶ Wendy and Tilda would have difficulty getting legal aid because violence = emotional abuse and physical threats so wouldn't have the kind of evidence required
  - ▶ As before, they may end up in mediation, without adequate screening or safeguards
  - ▶ Deteriorating mental health and behaviour of Wendy's ex resulted in police involvement, which would make her eligible for legal aid



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- ▶ 12 cases would no longer be able to get legal aid for SN or advice from a solicitor
    - ▶ Relatively minor assistance
      - ▶ e.g. Jim wanted solicitor's advice re. status of accident compensation claim and to sort out divorce; may now be able to get free advice but would have to pay for divorce work
    - ▶ Non-legally-aided party with no incentive to settle: usually ex-husband in no hurry to sell the house; if wife in this situation reliant on legal aid, LASPO considerably reduces her bargaining endowments
      - ▶ e.g. Norah: mediation unsuccessful because ex-husband wouldn't agree to split FMH which he'd inherited; wouldn't now be able to get legal aid for SN; would have to either give up or take to court as LiP
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- ▶ Other cases in which ex-husbands may benefit
    - ▶ e.g. Dominic – unless ex-wife pressed criminal charges against him, would be unable to get legal aid to bring ex parte applications; may have to engage with him more on residence issues; not clear how finances would be dealt with; would she have agreed to mediation?
  - ▶ Likely to end up in court as litigants in person?
    - ▶ e.g. Stan – neither party would have legal aid for SNs; would have to try mediation earlier; on his account, ex-partner not keen to agree contact arrangements so may still have to make court application for contact order as LiP or privately paying, with ex-partner as LiP respondent
    - ▶ e.g. Gwen – ex-partner keeps wanting to change contact arrangements; without legal aid he'd be more limited in ability to do so and she could simply refuse to respond, but on her account, he may well make court applications as LiP and force her to respond as LiP
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# Conclusions

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## ▶ Before 1 April 2012

- ▶ Mediation in almost all legal aid cases
- ▶ Around half combined with SN (mix of pre- and post-mediation)
  - ▶ Around half of these ended up in court
    - All concerning children
    - Resulting in court orders (i.e. unable to agree, sometimes for good reasons)
- ▶ Solicitors = major route into mediation
  - ▶ Telling clients they must mediate; sometimes inappropriately
- ▶ Lack of screening and inadequate responses to domestic violence in mediation
- ▶ Quality problems with SN
- ▶ Spectrum of outcomes from both processes: not captured by 'resolved/unresolved'



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## ▶ After 1 April 2013

- ▶ Solicitor referral route to mediation dried up
  - ▶ Number of referrals has plummeted
  - ▶ If eligible for legal aid, mediation inappropriate by definition
- ▶ Same concerns about inadequate screening for/responses to dv in mediation, especially re. emotional abuse
- ▶ Around half of cases would have same process and outcome
  - ▶ Resolved by mediation (for better or worse), or
  - ▶ DV cases going to court
- ▶ Other half, in absence of SN, results may be
  - ▶ Financial disadvantage (financial cases)
  - ▶ Going to court as LiPs (children cases)
  - ▶ Issues remain unresolved

