



The End of Voluntary Mediation?

SLSA Annual Conference 2013 –
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Background to three year ESRC-funded project Mapping Paths to Family Justice

- ▶ Increasing emphasis on and encouragement towards out-of-court resolution
 - ▶ Pre-application Protocol
 - ▶ Family Justice Review
 - ▶ Legal aid cuts
 - ▶ ‘Appropriate dispute resolution’
- ▶ Which pathway(s) is/are most ‘appropriate’ for which cases and parties?
- ▶ Which ADR(s) should be supported by public funding?
- ▶ Little recent research to inform this
- ▶ National survey phase of project on awareness and experience in England and Wales of 3 ADRs studied (mediation, solicitor negotiation and collaborative law) now complete
 - ▶ See preliminary findings in *Family Law* [2013] 306



Methods

Study Design

- ▶ **Phase One – Two National Surveys**
 - ▶ 3000+3,700 adults, nationally representative.
 - ▶ 6,700 adults -awareness of ADR processes.
 - ▶ 3000 adults -experiences of ADR processes for those divorced/separated since 1996.
- ▶ **Phase Two – Semi-structured Interviews**
 - ▶ Practitioners: solicitors, collaborators, mediators (c.30).
 - ▶ Parties (c.90).
- ▶ **Phase Three – Transcripts**
 - ▶ Recording and analysing lawyer-client interviews, collaborative meetings, mediation sessions.
- ▶ **Advisory Group appointed**

Current stage (March 2013)

- ▶ **Phase One**
 - ▶ First Omnibus survey completed (n =2974) Jan 2012.
 - ▶ Civil & Social Justice Panel Survey (n = 3,700) results received Aug 2012
 - ▶ Initial analysis done
- ▶ **Phase Two**
 - ▶ Interviewing of participants from both surveys and recruited via practitioners (75 of 90 done).
 - ▶ Further recruitment and interviewing of men to party sample on-going.
 - ▶ Practitioner interviewing complete.
- ▶ **Phase Three**
 - ▶ Database of practitioners constructed, recording underway.



Preliminary findings from national study: Mediation Experience

- ▶ From our divorced/separated post 1996 national subsample, satisfaction rates for both process and outcomes are far higher for solicitor negotiations and collaborative law than for mediation
- ▶ Satisfaction rates with mediation (41%) have remained broadly the same as found in Janet Walker's 2004 study (46%)
- ▶ Gender differences in mediation: women offered mediation less likely to take it up (49%) than men (71%); women more likely to be neutral about the process (40%) while men more likely be to dissatisfied (55%)



The voluntary nature of mediation since 1996

- ▶ 75 party interviews to date: 49 women, 26 men
- ▶ This analysis: 35 parties who went to mediation (21 women, 13 men) + 11 parties where either they or their ex-partner rejected mediation; time period 2002-2012
- ▶ We looked at how people came to enter mediation (or not) and what their experiences were if they did
- ▶ Whilst we have accounts of positive experiences of mediation, some troubling themes around pressure put on people to try mediation and a lack of appropriate screening for domestic violence or mental health issues also emerged more recently, raising the issue of whether voluntary mediation is already disappearing



Reasons for choosing mediation

- ▶ Where mediation was more obviously freely chosen (throughout the period), reasons included –
 - ▶ Wish to be amicable or avoid animosity
 - ▶ Desire to avoid going to court
 - ▶ Desire to save costs (of both court and solicitors)
 - ▶ Professional knowledge or connections with mediation
 - ▶ Positive experiences by friends
 - ▶ ‘I found out about it independently and wanted it to be amicable and save costs.’ (Seth, who mediated in 2004)
 - ▶ ‘I knew the mediation firm professionally and went to them after getting initial legal advice on reasonable outcomes.’ (Claire, about mediating in 2005)
- ▶ Also, accounts throughout period of referrals by pro-mediation solicitors (even if mediation may not have been objectively appropriate) –
 - ▶ ‘My solicitor was very pro-mediation and said it was a good starting point, although my ex had mental health issues.’ (Charlotte, who mediated in 2003, and who was happy with process)



Increasing pressure to mediate?

- ▶ From 2005 onwards, reports from legally aided parties that solicitors referred them directly to mediation, no alternatives offered:
 - ▶ Solicitor said it was compulsory even though H was abusive. 'In this city they won't take a case unless you've been to mediation. You are not given a choice.' (Gloria, 2005)
 - ▶ Solicitor advised that 'for legal aid we had to try mediation', nothing else was offered (Brenda, 2006-7)
- ▶ A number of participants felt their partners put them under pressure to mediate. Sometimes it was used successfully, against the odds:
 - ▶ 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.' (Rebecca, 2010)

But more often this pressure made mediation feel unevenly balanced:

- ▶ '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.' (Laura, 2005)
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- ▶ Into the MIAM era, the stories of pressure become more frequent and further sources added.
 - ▶ Two parties who went to court in 2010 say they were ordered by the judge to mediate
 - ▶ Iris had refused mediation due to physical violence during the relationship. At a review hearing at court, the judge ordered the couple to attend mediation to sort out their financial dispute.
 - ▶ Sandra suggested mediation initially to her ex-husband and later via her solicitor but he refused. They went to court on contact but the judge refused to hear the case and insisted they must mediate.



▶ Solicitors referred clients to mediation in clearly inappropriate cases.

- ▶ Sara went to a solicitor for divorce and DV injunction but was told an injunction was not possible. Solicitor sent her to mediation 'to save costs' but told her to ask for separate rooms (2010).
- ▶ Tilda, whose partner had been violent and recently threatened her with a car jack, was referred to a solicitor by a domestic violence service. The solicitor then referred her to mediation (2012).
- ▶ Harry, whose ex-wife was emotionally abusive towards him, was advised by his solicitor to go to mediation 'because the court would look favourably on it' (2012).



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- ▶ The requirement to attend a MIAM became blurred with with a perceived requirement to mediate.
 - ▶ Stan, a former cohabitant, who mediated in 2009 when he was legally aided and again in 2011 when he wasn't, stated –
'My solicitor said if we wanted to go to court we had to mediate first. It was forced upon us again when contact arrangements following the court hearing broke down later, even though we knew it would not work.'
 - ▶ Tilda (2012) got the impression she had to try mediation and if she didn't do so, it wouldn't look good if her case went to court.



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- ▶ Helen's experience in 2011-12 encapsulates the theme of feeling the need to appear co-operative, being pressured by the other side, and the new experience of being contacted directly by a mediation service rather than being referred via a solicitor
 - ▶ She had a couple of letters and phone calls from a mediation service inviting her to go for a MIAM at the instigation of other side.
 - ▶ Her ex-husband's solicitor at court also suggested mediation.
 - ▶ She was concerned about the cost, didn't want to be in a room with him, and didn't think any agreement likely but agreed to go to a MIAM to demonstrate to his solicitor she was being cooperative.
 - ▶ At the MIAM, it was made clear she had a choice whether to mediate or not, but she felt she was being given a sales job.
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Screening for domestic violence in mediation

- ▶ In a number of recent cases the parties have either not been seen separately during the intake session, or if seen separately, they have not been screened for domestic violence
- ▶ E.g. Tilda, with a serious history of abuse, was only offered a joint intake session with the mediator in 2012. She was not asked if there had ever been abuse and she did not feel able to mention it. During the mediation her ex-husband was very specific with his demands and the mediators told her she also had to be clear about what she wanted, but she says –
 - ▶ ‘I couldn’t. I didn’t know how to say what I wanted. I felt intimidated in the room with him.’



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- ▶ Some who had reservations nonetheless achieved a positive outcome or felt positively about the process
 - ▶ Kim, in 2012, felt constrained to go to mediation though she was very reluctant. She feared she would be bullied by her ex-partner. However it was different from what she expected. The mediator was more involved than she expected and made useful suggestions. She felt supported. They agreed a resolution in one session. She was happy with the process and the outcome.
 - ▶ However, others either abandoned mediation or were unhappy with both the process and outcome.
 - ▶ e.g. Lorna, in 2006, was recommended to mediation by her solicitor, despite her husband's emotional abuse. The mediator finally terminated the sessions but Lorna felt,
 - ▶ 'it was just another arena in which he could bully me.'



Conclusions

- ▶ We have identified a surprisingly high amount of pressure on parties to mediate from solicitors, the courts, relationship counsellors and partners even in cases which we would have expected to have been screened out.
- ▶ Separate intake sessions/MIAMS are not undertaken in all cases and this is a contributory factor to failure to screen properly and for a lack of confidence in the subsequent mediation process for some people
- ▶ Other types of dispute resolution are frequently not offered, especially where the party is legally aided
- ▶ These factors are not necessarily a recipe for the failure of mediation, but there is a clear correlation.
- ▶ From April 1st these problems risk being magnified

