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The role of solicitors in divorce: a note of caution

*Katherine Wright**

Drawing on a research project in which 40 clients and their solicitors were followed throughout the divorce process, this article examines certain aspects of the role that is now performed by solicitors. Noting that solicitors appear to have modified and developed their practice, possibly as a result of the emergence and promotion of mediation, this article raises questions about how the most recent developments will meet the needs of the divorcing public.

INTRODUCTION

As the push towards encouraging greater use of mediation within family breakdown continues¹ and practitioners within the family justice system are developing new methods of dispute resolution such as collaborative law,² it is timely to re-examine the role of the family law solicitor. Drawing on a study in which 40 clients and their solicitors were followed throughout the divorce process, this article will look at the role performed by these solicitors in the resolution of the spouses' financial and property disputes arising on divorce. In particular it will consider the implications for policy of the continued promotion of mediation, and of recent advancements in practice, namely collaborative law.

Unlike mediation, which has a long history in many cultures, collaborative law is a relatively recent development. The practice evolved in the USA in the early 1990s and has subsequently been adopted by family law practitioners in Canada, Ireland and the UK.³ Like mediation, collaborative law is a pro-settlement approach to dispute resolution.⁴ Also, as with mediation, it is argued that collaborative law allows clients more involvement in resolving their disputes and devising the eventual outcomes than exists in the traditional system of solicitor negotiation. Finally, both mediation and collaborative law are held to have important relationship benefits for the clients when compared to the more 'acrimonious' traditional system of legal representation.⁵ This article, by considering how the traditional system of solicitor negotiation meets certain specific needs of clients, will raise a number of questions about the benefits for clients of both mediation and collaborative law.

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¹ A recent example being the report by the National Audit Office *Legal Aid and Mediation for People Involved in Family Breakdown*, HC 256 (TSO, 2007)

² Resolution, the professional association for family lawyers in the UK, reported recently that they have approximately 700 members who are trained in collaborative law techniques and anticipate that by the end of 2007 this will have risen to 1000, 20% of their membership. S. Lloyd, 'The continuing growth of the collaborative process' [2007] Fam Law 270.

³ P.H. Tesler, 'Collaborative law' [2004] IFL 153.

⁴ Tesler writes, 'the model's core element is an agreement that no participants, neither lawyers nor clients, will threaten or resort to court intervention', *ibid*, at p 154.

⁵ National Audit Office, *Legal Aid and Mediation for People Involved in Family Breakdown*, HC 256 (TSO, 2007), at p 8.

The focus for the analysis in this article is on three key areas. The first is partisanship. Partisanship is a key form of support which may be provided by solicitors to their clients but cannot, by definition, be provided by family mediators, who adhere to a goal of neutrality. It is therefore one of the most significant differences between these two professional practices. This article will discuss the research findings in relation to the concept of partisanship and report on whether and to what degree a partisan service was provided to the clients in this study. The views of both the solicitors and the clients on the need for this type of support will also be discussed.

The second area considered concerns the relative contributions of the solicitors and their clients towards resolving the disputes. This again is arguably one of the crucial differences between solicitors and mediators. Mediators act as facilitators assisting couples to reach their own agreements. The traditional view of a solicitor is that they perform a more central role, negotiating the terms of the settlement with the opposing side and, if appropriate, invoking the court. The data from this current study, however, indicates that solicitors may also perform a facilitative role, some clients being observed carrying out much of the negotiation directly with their spouse.

The third and final area concerns the 'paramountcy of the relationship objective'. One of the benefits claimed for mediation⁶ is that it is a less acrimonious dispute resolution process than the solicitor-led service, leading therefore to better post-divorce relationships. However, existing evidence refutes this, showing instead that solicitors likewise adopt strategies to avoid exacerbating spousal conflict.⁷ Rather than revisit the question of whether and how mediation or lawyer negotiation does impact on the spousal relationship, this article considers the implications which might follow from the pursuance of the relationship objective by both the solicitors and their clients.

In order to assist the reader, forenames have been allocated to quotations from solicitors and titles and surnames for clients. All names given are of course fictitious to preserve the anonymity of the research participants.

METHODS

The research methods employed have been detailed elsewhere.⁸ Very briefly, in this longitudinal study,⁹ data was collected as 40 clients went through the divorce process. Meetings between the solicitor and client were observed, and semi-structured interviews were carried out with both the solicitor and client (separately) after each meeting. All cases were continuously monitored in this way until they reached conclusion. In addition, solicitors were individually interviewed before the research began to ascertain their stated views of the divorce process and to allow them to describe and justify their own approach. The solicitors partaking in the study were also interviewed at the conclusion of the research and invited to make comments on the findings.

⁶ Recently reiterated in the report by the National Audit Office, *Legal Aid and Mediation for People Involved in Family Breakdown*, HC 256 (TSO, 2007), at p 8.

⁷ See, for example, G. Davis, S. Cretney and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994); R. Ingleby, *Solicitors and Divorce* (Clarendon Press, 1992); J. Eekelaar, M. Maclean and S. Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000).

⁸ See K. Wright, 'The divorce process: A view from the other side of the desk' [2006] CFLQ 93, at pp 94–95.

⁹ The research project began in the late 1990s and was concluded in 2004.

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The research was carried out in a large northern city. A leading member of the local Solicitors' Family Law Association¹⁰ was contacted about the research; this solicitor was able suggest a number of firms specialising in family law who might be approached. Eventually it was decided to concentrate on four firms which varied along the lines of size, location and characteristics of their client base.¹¹ The number of solicitors participating from each firm varied from one, in the smallest firm, to five in the largest practice. Active steps were taken to ensure that senior partners were included in the study as well as their more junior colleagues. Ten solicitors participated in the study, three of the solicitors were male, seven female. All were family law specialists¹² spending the majority of their chargeable time on family law matters. Of the 40 clients in the study 15 were male and 25 female. For the purposes of analysis the sample was also divided along the lines of socio-economic class,¹³ 17 being categorised as middle class and 23 working class.

FINDINGS

Did the solicitors provide the client with a partisan?

Partisanship, where solicitors act in manner designed to maximise their client's interests, may be seen as one of the core principles of legal professionalism.¹⁴ However, evidence from this study and the existing literature¹⁵ suggests that this principle may not fully permeate legal practice in the sphere of family law.

The term partisan has been used in the literature examining the role of solicitors in the divorce process. Lynn Mather et al in their study on divorce lawyers in the USA provide the following definition in relation to legal practice, 'partisan advocacy, in which lawyers pursue legal strategies in an effort to maximize their clients' interests',¹⁶ This definition suggests that solicitors described as partisan adopt a 'hired gun' or adversarial approach to resolving disputes. However, existing research has indicated that this is not an approach adopted by the majority of family lawyers,¹⁷ who instead

¹⁰ The Solicitors' Family Law Association has since been renamed Resolution.

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¹¹ In some of the firms the client base was predominantly middle class privately funded, while other firms in the sample had a large legal aid practice.

¹² The definition of a family law specialist being adopted in this study is that provided by M. Maclean, J. Sidway and S. Beinart in 'Family solicitors – the workforce' [1998] Fam Law 673, who describe a family law specialist as a practitioner who spends at least 50% of their fee earning time on family work.

¹³ Class was assigned on the basis of the Registrar General's six-point scale, whereby class is allocated according to the occupation of the head of the household or chief wage earner.

¹⁴ L. Mather, C.A. McEwen and R.J. Mainman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001). Also implicit in the title of the seminal work by G. Davis, *Partisans and Mediators: the Resolution of Divorce Disputes* (Clarendon Press, 1988).

¹⁵ For example see, G. Davis, S. Cretney and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994).

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¹⁶ L. Mather, C.A. McEwen and R.J. Mainman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001), at p 110.

¹⁷ For example, see G. Davis, S. Cretney and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994), J. Eekelaar, M. Maclean, S. Beinart, *Family Lawyers: the Divorce Work of Solicitors* (Hart Publishing, 2000).

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reportedly demonstrate a commitment to the whole family and work within notions of fairness.¹⁸

If one employs a definition of a partisan as one who acts as a champion for their client, or who seeks to maximise their client's interests, there was little indication of such an approach among the solicitors in this study. When asked to describe their approach, prior to the fieldwork, the majority claimed to adopt a conciliatory approach. Tom put it succinctly, 'Practical, conciliatory, unemotional, non-belligerent'. Only one solicitor in the study markedly deviated from this type of response. William, when asked what he considered to be his primary responsibility in representing clients in divorce replied, 'To get them the best possible settlement', And continued, 'I'll be shot down in flames for that one', indicating that it might not be considered appropriate to admit to pursuing such an approach.

Although most of the solicitors in this study could not be described as strongly partisan in their approach, there was clear variation. If one simplifies the matter a little and draws a line with a strongly partisan at one end and strongly conciliatory¹⁹ at the other, William (see above) would be at the strongly partisan end whereas another solicitor from the study, Mary, was at the strongly conciliatory end of the dichotomy. Mary, far from championing her clients' cause at the expense of the other spouse would instead encourage clients, wherever possible, to talk to their ex-partners and reach their own agreements. Other solicitors were observed offering what could be described as a mildly partisan service, that is, while not proactively pursuing strategies to maximise their clients interests, would take advantage if certain situations arose. For example, exploiting errors made by the other side, or taking advantage of feelings of guilt²⁰ in the opposing spouse.

A degree of partisanship, when offered was appreciated by the clients in the sample. 'I felt that she was very good in working for me. She knew exactly what she wanted and went all out for it'. (Mrs Dale). The reputation of a solicitor as a partisan was also seen to be beneficial:

'[client's husband] knows I've got Helen [solicitor]. Some close friends of ours – well, she got Helen – [husband] knows she got a good settlement. So I think that's made him nervous.' (Mrs Egan)

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Clients' views on the solicitors from the conciliatory end of the spectrum were less positive, 'I felt he was not 100% on my side. He was easy to talk to and explained things well, but did not fight for me'. More specifically, the approach of some solicitors in seeing both sides of the dispute was not always appreciated, 'Sometimes I felt he [the solicitor] was working for him [the husband] rather than me'. (Mrs Lawson)

All the solicitors in this study, apart from William (see above), claimed that they would not offer a strongly partisan approach, Richard's view was typical:

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¹⁸ G. Davis, S. Cretny and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994). See also Resolution's code of conduct. The overarching concept of 'fairness' in relation to divorce disputes was enshrined in case-law in *White v White* [2001] AC 596.

¹⁹ This simplification is being used to illustrate the different degrees of partisanship being offered by solicitors in this study. 'Conciliatory' does not imply the tone of interaction of the solicitor, but whether they adopt the mediators' approach of seeing the needs of both sides.

²⁰ This research found clear evidence in this study of solicitors being willing to exploit perceptions of guilt in opposing party which led to the 'guilty' party being willing to accept a lesser share of the marital 'pot.' See K. Wright, 'The divorce process: A view from the other side of the desk' [2006] CFLQ 93, at pp 106–109.

'No, it's not important, and it's not what I would offer. If war breaks out they want you on their side. But not too partisan – I prefer the term even handed and supportive.'

Although it was acknowledged that this might not be what the client actually wants from them.

'My job is to be objective and provide advice on what can best be achieved. They [clients] do want someone on their side – and you tread a middle line and they complain, "you're all for my husband" or "you're colluding with my husband's solicitor". It's difficult to balance representing them with offering objective advice.'
(Claire)

This conflict between what the client wants and what the solicitor is willing to provide, could be seen as problematic. One solicitor reported how this conflict was dealt with:

'It's quite complex, there's a balance. It's difficult especially if you're for a client wanting revenge. You have to give the impression you're on their side but be neutral. You have to step back and see how you can resolve it. You mustn't get involved and must stay objective. Give the impression that you're on their side but really not be – be neutral. The two solicitors should have the same view and they should each persuade their client that this is what should happen.'
(Emily)

If the view of Emily is typical it appears that solicitors may be creating a third view which is distinct from the view held by either of the two parties involved in the dispute. According to Emily it is the duty of the solicitors involved, having agreed between themselves a third view regarding the appropriate resolution, to persuade their client into accepting their perspective. The case may then progress towards a prospective resolution neither of the parties initially wanted.

The theme of co-operation among both the solicitors involved in the resolving the dispute and working towards a settlement which was 'fair' was a common one. Notably, a 'partisan' solicitor, adopting a stance which seemed to be appreciated by clients, was much maligned by their legal peers. When asked for any strongly held views on divorce practice Sarah stated, 'I'm extremely irritated by hostile solicitors who are needlessly aggressive'. Mary had a similar response to the same question, 'I object to solicitors who are terribly partisan and aggressive – it's not that common though'. There was only one solicitor in this study who adopted an overtly partisan approach (William – see above) and in the local legal community he had a reputation of being very difficult to work against, although one solicitor acknowledged that he was very popular among his clientele because he 'fought for them'.

There was an indication in the study that perception of partisanship as an anathema to family law practice was not something that was present in the past. One of the longest serving solicitors in the study stated, 'When I started out it was as if I was suing Nat West. It was all "bleed the bugger dry".'

The term 'partisan' did not appear accurately to define the approach of any of the solicitors in the study, apart perhaps from one. The support provided by the majority of solicitors in this study could more appropriately be described as support which promotes the client's interests up to a point perceived by the solicitor as objectively fair. This support could perhaps be better described as support for a third view,

possibly distinct from that of the two parties, the lawyers' views of the desirable outcome to the dispute.

Resolving the financial and property disputes: the relative contributions of solicitors and clients

Both solicitors and clients have a contribution to make towards resolving the financial and property issues which arise on divorce. Solicitors communicate with the opposing side (be that a solicitor or an unrepresented spouse), negotiate the terms of a possible resolution, invoke the court if appropriate, and provide knowledge to enable the client to take decisions and provide the solicitor with instructions. Clients provide information to their solicitor and, based on their solicitor's advice, take decisions and provide instructions. Clients will often have to resolve the matters in which solicitors are unwilling to become involved which, in this study, included such aspects as child contact and the sharing out of the household contents.

As this study progressed it became apparent that the degree of solicitor involvement in resolving the financial and property disputes varied widely. Some cases had a very high degree of solicitor involvement, the solicitors negotiating the eventual terms of settlement with either the opposing solicitor or, where unrepresented, directly with the other party. The client's involvement being limited to providing instructions and signing the necessary documentation. At the other end of the scale, there were cases in which the role of the solicitor was very much reduced, as clients undertook a great deal of the negotiation work themselves, the solicitor's role being more concerned with drafting the legal documentation.

The degree of solicitor and client involvement in negotiating the resolution not only varied between cases but also within cases. There were examples in this study of solicitors being actively involved in the early stages of the process but the client taking over during the later phases, negotiating directly with their (ex)spouse. Mrs Gibson was such a client. Despite the early involvement of the solicitor the eventual outcome was negotiated between the spouses. 'To start off with she [the solicitor] did it, at the end we did it ourselves'. In another case the client was very highly involved in the resolution process throughout, Mrs Lawton negotiated the details of the settlement with her husband (who was unrepresented) and the building society herself; the involvement of the solicitor in the case was minimal.²¹

It important to ascertain from those clients who had been highly involved in the negotiations whether there was a perception that they could have resolved their dispute without their solicitor. The responses were surprisingly uniform, 'I found it very helpful having a solicitor. He [the ex-husband] sacked his. I thought good I'll really get what I want' (Mrs Lawton). Mr Farrell, although his solicitor had initially been very involved in the negotiations, eventually resolved the dispute directly with his spouse. The resolution arrived at by Mr Farrell and his ex-wife was very close to the position he had agreed with his wife before going to the solicitor. His solicitor commented, 'I tend to feel what a waste of time – 18 months and no further forward'. Mr Farrell, however, held much more positive views, 'If I didn't have a solicitor I wouldn't have got anything'.

No clients who had been more involved in the process expressed the opinion that they could have proceeded without their solicitor. Although partisanship may have been lacking (although not always overtly), clients were supported by their solicitor in the provision of legal knowledge of possible entitlements. It may be that this provided

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²¹ The outcome negotiated by this client was viewed by her solicitor as favourable. It is possible that the solicitor may have intervened more in negotiations had this not been the case.

the client with a degree of authority in their negotiations. Solicitors were also observed acting as 'shields' for the spouse's hostility, any demands which could be perceived as unreasonable being blamed on the solicitor.²² Given such support, some clients were willing to negotiate directly with their spouses. They were willing to assume a degree of responsibility for resolving the dispute but only if supported by their solicitor. Such clients could be said to be negotiating in the 'shadow of their solicitor'²³ that is, negotiation carried out by clients against a framework of possible legal entitlements, which has been provided by their solicitor.

For other clients there was little possibility of spousal negotiation. Mrs Dale admitted in the final interview, 'I shouldn't have had to use her [the solicitor]. We should have been able to sort it out, but we couldn't'.

It was notable that in cases where the solicitor did undertake the majority of the negotiation work, and the input of the clients into the process was minimal, client's views were rather critical, the amount of work being done (and charged for) being perceived as excessive:

'It was very long and drawn out – and costly no doubt. I'm frustrated by it – solicitors are playing little games with one another.' (Mr Jarvis)

'It took longer than I thought I suppose, but then both solicitors were digging their heels in a bit. There seemed to be a lot of letters which I thought weren't really absolutely necessary – copies of letters. Copies of this and that.' (Mrs Egan)

The solicitors in this study generally expressed a favourable view concerning clients negotiating directly with their spouse, although there was a belief that not all solicitors did share that opinion. Clare made the following comment:

'You do find this a lot, two levels of negotiation going on. One on paper between the solicitors, and one between the clients themselves. I don't discourage it. Some solicitors do, you get some clients saying that their husband or wife says "my solicitor says not to discuss it with you". I think it's a bit high and mighty of solicitors.'

Emily, however, although not discouraging spousal negotiation, was observed cautioning clients as to the limitations:

'she earns more than you, it's not much more. What people do and it's a big mistake, they sort things out between them and because the court have never made an order and never dismissed a claim, later on one can ask for more money. So by all means reach agreement then let me know and I'll draft a court order and a dismissal.'

Despite the above cautionary note it was notable in this study that a number of clients did negotiate the terms of the eventual settlement directly with their spouse. The

²² See K Wright, 'The divorce process: A view from the other side of the desk' [2006] CFLQ 93, at pp 103–104.

²³ A similar concept was introduced by R.H. Mnookin and L. Kornhauser in their seminal article 'Bargaining in the shadow of the law: The case of divorce' [1979] 88 *Yale Law Journal* 950 They discuss how lawyers negotiated settlements using the framework provided by their knowledge of legal entitlement that could be invoked by a court, should the cases proceed to trial. The current study encourages the broadening of this concept to client/lawyer, as opposed to lawyers/court.

solicitor provided knowledge in the early stages as to possible outcomes should the case be adjudicated and would draft the final order. In some cases the solicitor was quite critical of the eventual outcome, and this will be discussed in the next section. The point that needs to be made is that by encouraging the parties to undertake some of the negotiating, the role of the solicitor comes close to the facilitator role undertaken by mediators. However, by providing the client with knowledge of their legal position, and possible back up should the negotiations fail, the actual service provided by solicitors remains quite distinct.

Working towards resolution, the paramountcy of the relationship objective

It has been noted elsewhere that for the majority of clients in this study an overarching goal was that the divorce process and eventual resolution should not further damage the relationship between the spouses. In the study this achieved a higher importance rating than 'getting the best deal possible' or achieving a resolution which is fair to both sides.²⁴

Similarly, as is well documented in the literature, solicitors also aim to minimise any exacerbation in spousal conflict.²⁵ This is also apparent in the professional code of practice for Resolution²⁶ and the Law Society's Family Law Protocol. This goal of minimising spousal conflict and attempting to maintain as reasonable a relationship between the parties as possible in divorce was one which appeared to be shared by both the solicitor and the client.

The minimisation of spousal conflict may appear to be always a laudable goal; however, data from this study suggests that this assumption is questionable. Apparent low spousal conflict could indicate existence of a continuing power imbalance. The case of Mr Ramsey illustrates this point. Both Mr Ramsey and his solicitor had claimed that the level of spousal conflict at the start of the process was mild. Although Claire (Mr Ramsey's solicitor) indicated that conflict was low because of her client's subservience:

'They get on really well. He's feeling guilty. He keeps talking of not wanting to rock the boat or ruffle feathers. I suspect there's no conflict because he's treading carefully.'

'They go out together, but there's fear and guilt. In the end it will be resolved. It will be resolved however she (wife) wants it to be.'

The relationship between Mr Ramsey and his ex-wife did appear to remain amicable throughout the process. He spoke frequently of days out and meals together. Although

²⁴ In the study 73% of the clients claimed that not damaging their relationship with their spouse was important or very important. This compares to 70% for a settlement which was fair to both sides and 55% for seeking 'the best deal possible'. See K Wright, 'The divorce process: A view from the other side of the desk' [2006] CFLQ 93, at pp 98–100.

²⁵ See, for example, J. Eekelaar, M. Maclean and S. Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000), G. Davis, *Partisans and Mediators* (Clarendon Press, 1988) and G. Davis, S. Cretney and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994), R. Ingleby, *Solicitors and Divorce* (Clarendon Press, 1992), L. Mather, C.A. McEwan and R.J. Mainman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001), A. Sarat and W.L.F. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (Oxford University Press, 1995).

²⁶ Formerly known as the Solicitors' Family Law Association.

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Mr Ramsey's case was not finalised at the close of the fieldwork, most of the financial issues had been resolved, this left Mr Ramsey very little apart from his pension. Mr Ramsey admitted, 'Well she's unpredictable and volatile, it's made me hold back'.

It was notable, in this study, that there were a number of cases where it seemed that power imbalances may have been replicated in the final resolution. Often this occurred in cases where the client had done much of the negotiation with their spouse directly. Mrs Gibson was such a client. At the time of her first appointment with the solicitor Mrs Gibson was not seeing much of her husband, as they had already separated. The solicitor told the researcher that there was potential for a huge increase in conflict in this case. Mr Gibson had recently benefited from a 'windfall' as a result of an employee share scheme. Mrs Gibson had become aware of this through a fellow employee. Pursuing a share of new found wealth would, the solicitor felt, inevitably lead to difficulties in the couples' relationship.

As referred to above, Mrs Gibson did get very involved in negotiating the resolution. She saw her husband more frequently and negotiated the final terms of the settlement directly with him. Her solicitor was critical of the final resolution which gave Mrs Gibson only a very small share, after a long marriage, of the marital assets. Mr Gibson's windfall remained intact. Mrs Gibson, however, reported being very satisfied with the outcome. At the close of the process she was still on good terms with her ex-husband and this was important to her.

The overriding influence of the relationship objective was clearly observable in a number of cases both throughout the process and in the eventual outcome. This did appear in some situations to lead to what in financial terms could be seen as unfair outcomes which reflected power imbalances of the parties. Such imbalances of power appeared, sometimes, to be linked to the personalities involved or arose out of the perceived cause of the marital breakdown.²⁷

Boundaries of fairness

Linked to the notion of the paramouncy of the relationship objective is the concept of 'boundaries of fairness'. That is a client's intrinsic idea what a fair outcome was for them in their particular circumstances.²⁸ Outcomes which may appear to the outsider as unfair may, in fact, fall within the client's own boundary of what is fair to them. As we have seen, relationship objectives can be very relevant factors to the parties concerned and can form a central element in the 'calculation' of the appropriate outcome. As in the case of Mrs Gibson (see above) the terms of the eventual settlement, which the client had negotiated herself, did not meet her solicitor's idea of fairness. However, for Mrs Gibson the outcome did, at the time, fall within her boundary of fairness, the improved relationship with her ex-husband forming an important element of that. Other examples from the study include Mr Farrell who, appeared to be dominated by his ex-wife. Mr Farrell settled for a lesser deal than was advocated by his solicitor. Mr Ramsey likewise agreed to less in order to placate his ex-wife and remain on reasonable terms with her and their son.

These 'boundaries of fairness' did not always lead the client to seek less. Mrs Lawton, who successfully negotiated a very generous (and possibly one-sided)

²⁷ For example, feelings of guilt were observed to link to clients seeking a much smaller share of the marital assets and feelings of innocence leading to a desire to obtain a larger sharer.

²⁸ The subjective nature of the concept of fairness has been highlighted by Lord Nicholls of Birkenhead in *White v White* [2001] AC 596. 'But everyone's life is different. Features which are important when assessing fairness differ in each case. And sometimes, different minds can reach different conclusion on what fairness requires. The fairness, like beauty, lies in the eye of the beholder', at p 599.

settlement for herself, justified this by reference to her husband's adulterous behaviour.

There were numerous examples from this study of the client's own boundaries of fairness exerting a strong influence on the eventual outcome. This was most apparent in the cases where the client had significant direct involvement in the resolution process.

DISCUSSION

It could be argued that the role performed by the family law solicitor is quite distinct from other areas of legal practice. Partisanship, described by Mather et al as one of the core principles of legal professionalism,²⁹ appears now to be an anathema to the culture within family law practice. Moreover clients of family law practitioners may be encouraged (and trusted) to undertake much of the negotiating work themselves and, where this is not possible, the two solicitors work together towards achieving a settlement which they see (the third view) as 'fair'.

It has been argued that the increasing prominence of family mediation (at least in policy terms) has led to family lawyers modifying their approach to their work.³⁰ The two professions are not, however, completely separate, as there are many solicitors who are also family mediators. In this study, which involved 10 solicitors, two had been trained in mediation, although only one of these actually took part in mediation on a regular basis. It would be naïve to assume that being trained and practising as a mediator has no impact on a solicitor's approach to their work. The solicitor in this study who had the most extensive mediation experience was also one of the most conciliatory in his approach. This is only one solicitor and it is not possible to ascertain if this solicitor's temperament had predisposed him to practice mediation, or whether his mediation experience had influenced his approach to legal representation.

In reviewing the evidence from this study regarding the approach solicitors adopted toward resolving the financial and property disputes on divorce, it appears that solicitors in the study were not always acting as 'solicitors'. The majority of solicitors in this study were not partisan; adopted a conciliatory approach to their work; took steps to minimise conflict, which sometimes led to power imbalances being reproduced into unfair agreements; would act as facilitators encouraging their clients to negotiate directly with their spouse; and would seek a resolution which the solicitor regarded as fair to both sides. These characteristics are similar to those used to describe mediation. It was also notable that a number of solicitors would advocate remaining neutral and seeking a settlement which they regarded as objectively fair, the language used reflecting the ideals and values of mediation.

It appeared, in this study, that the solicitors had absorbed some of the ethos behind mediation. This may be as a result of the Government's advocacy of mediation (and need to retain their market share) and criticisms made of solicitors' approaches in the past. This study is very small and was never intended to provide an account of how all family law solicitors approach divorce. However, the data indicate that there may be a new hybrid profession emerging, influenced both by the tenets of mediation and by the principles of legal representation. This hybrid group may provide legal knowledge, expertise and very clear guidance and direction, while also adopting a conciliatory

²⁹ L. Mather, C.A. McEwen and R.J. Mainman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001), at p 110.

³⁰ J. Walker, 'Is there a future for lawyers in divorce?' [1996] *International Journal of Law, Policy and the Family* 52.

approach, encouraging spousal negotiation (where feasible) and seeking agreements fair to all sides. Hybridity can, however, lead to confusion and contradiction. An example would be a solicitor's pursuit of a fair settlement but willingness when the opportunity arises to exploit weakness (such as feelings of guilt) in the opposition.³¹

Hybridity is not a new concept within family law. Gwynn Davis and Julia Pearce³² have argued that there was a degree of hybridity emerging from the various professional groups (court welfare officer, barristers, district judges and solicitors) involved in resolving disputes under section 8 of the Children Act 1989. For Davis and Pearce, however, hybridity appears to consist of a consensus of ideas between the different professional groups, and the adoption of shared skills. Such a professional consensus is shown by Davis and Pearce to be that disputes should be resolved in the way, perceived by the professionals, as being in the interests of the whole family, but which may not actually accord with the wishes of the individuals involved. Such an idea is similar to that of the 'third view' articulated earlier in this article. The 'hybridity' referred to here relates to the adoption by solicitors of some of the skills of family mediators, and not necessarily that they have ceased to follow clients' instructions. In this view the hybridity of solicitors' practice and the 'third view' approach to resolution are two distinct concepts.

If there is a new hybrid profession of family lawyers emerging we need to consider how this meets the needs of the divorcing public. It appears that solicitors working within family law have evolved their practice partly as a result of the Government's promotion of an (initially) alternative and later complimentary service/profession – that of family mediation. This evolutionary development appears to have been further refined in the development of collaborative law. Collaborative law draws on the values and ideologies of both mediation and the traditional lawyer-led service and it addresses many of the criticisms previously levelled at solicitors. Thus this new service protects family lawyers from the accusations of policy makers in the past and helps protect their market share.

This hybrid professional group, with their specific skills, may be uniquely placed to build on the willingness of clients to negotiate the terms of their settlement directly with their spouse. This study found that clients are willing to do this when supported by a solicitor. This support consisted of three main elements: first, the imparting of information in relation to legal entitlements; secondly, as a 'shield' to protect them from spousal conflict/hostility; and, thirdly, as a 'fallback' system should the negotiations fail. Clients in this study did not appear willing to assume responsibility for negotiating the final outcome without such support, and when interviewed were strikingly emphatic that they could not have proceeded via mediation. Clients instead preferred to conduct their negotiations in the 'shadow of their solicitor'. It may be that in collaborative law practice, where the two lawyers are physically present during the negotiations, the shadow, or shield role, will be much enhanced, consequently empowering the client. Empowerment of clients has been stated to be one of the key benefits of collaborative law.³³

A core element of the collaborative approach is that it is very much pro-settlement. Indeed, if the process is not successful the lawyers involved are contractually

³¹ Solicitors in this study were observed taking advantage where they had a 'guilty' party on the opposing side. This is discussed in K. Wright, 'The divorce process: A view from the other side of the desk' [2006] CFLQ, 93 at pp 106–109.

³² G. Davis and J. Pearce, 'The hybrid practitioner' [1999] Fam Law 547.

³³ P. Tesler, 'Collaborative family law' [2004] IFL 153.

prohibited from proceeding to the court and the clients must employ a new legal team should a court hearing be required. Mediation is likewise settlement-orientated, the recent report from the National Audit Office³⁴ highlighted the advantages to families of resolving their disputes through mediation as opposed to the court. The paramountcy of the relationship objective links very closely with promotion of settlement, as settlement is said to be more conducive to better post-dispute family relationships. However, the pro-settlement approach has not been without its critics.

Problems with settlement and the paramountcy of the relationship objective

Gwynn Davis, writing back in 1988,³⁵ claimed that as mediation had expanded, lawyers had moved from a 'lamentable disinclination to engage in constructive negotiation' to pursuing 'settlement in virtually all cases'³⁶ and warned that adjudication may become 'so much a last resort that it is stigmatised as the refuge of the obsessive and the intransigent'.³⁷ Writing in that same period Howard S. Erlanger, Elizabeth Chambliss and Marygold S. Melli³⁸ reported that their research in the USA revealed that settlement was often achieved after contentious negotiations involving threats, intimidation and pressure from attorneys. They stated that settlement was being imposed as much as adjudicated decisions. They cautioned:

'Settlement and agreement are not synonymous terms. There is settlement but not agreement when contentious parties sign unsatisfactory stipulation out of impatience, frustration, or emotional distress.'³⁹

There have been many changes to the divorce procedure since these articles were written, the emphasis on settlement, however, remains. More recent research by Fran Wasoff into agreements entered into as a result of private ordering in divorce, led her to make the following very similar comment:⁴⁰

'The term "agreement" is, in itself, misleading, since almost all of those interviewed said that they had not willingly agreed but had felt pressured into signing because they thought that the alternatives were worse ... Perhaps a better term for describing the outcome is settlement.'⁴¹

Wasoff carried out in-depth interviews with men and women who had made out-of-court agreements in the previous one to two years. Wasoff reported that, although the agreements had been the result of negotiation, 'on the whole respondents were dissatisfied with their terms, felt that they had been pressurized to

³⁴ National Audit Office *Legal Aid and Mediation for People Involved in Family Breakdown*, HC 256 (TSO, 2007).

³⁵ G Davis, *Partisans and Mediators* (Clarendon Press, 1988).

³⁶ *Ibid*, at p 118.

³⁷ *Ibid*, at p 205.

³⁸ H.S. Erlanger, E. Chambliss and M.S. Melli, 'Participation and flexibility in informal processes: Cautions from the divorce context' [1987] 21 *Law and Society Review* 585.

³⁹ *Ibid*, at p 602.

⁴⁰ F. Wasoff, 'Mutual consent: Separation agreements and the outcomes of private ordering in divorce' [2005] *Journal of Social Welfare and Family Law* 237.

⁴¹ *Ibid*, at p 247.

agree and also that they had lost out financially'.⁴² If there are problems with settlement it could be asked why the goal is so persuasive.

According to Gwynn Davis et al the primary motive behind the development of such a strong settlement culture is economic, enabling more efficient case management, but it is justified with reference to concepts such as fairness and conflict reduction.⁴³ Although the primary motive among the policy makers, and perhaps the practitioners, may be economic, this may not be the primary incentive for the clients. Clients in this current study claimed that their overarching goal was that the divorce process should not further damage their relationship with their soon to be ex-spouse. Concerns about maintaining their relationship on as reasonable terms as possible appeared to dominate many clients as they went through the divorce process; to them the relationship objective was paramount.

The clients' views of the most appropriate outcome for their case appeared to be heavily influenced by the perceived affect this outcome would have on their relationship. This was particularly apparent in clients', 'boundaries of fairness' and, as has been noted above, some clients agreed to settle for less, or negotiated a lesser deal themselves, than they might have been entitled to, in order to maintain a reasonable relationship with their ex-spouse. Wasoff similarly found, 'It was commonplace for agreements to be made in order to decrease the level of conflict', and further notes, 'This wish not only prompted the making of an agreement but also had a major influence on negotiations leading up to the agreement'.⁴⁴ This might not be problematic in itself – a good post divorce relationship, if agreement/settlement could help achieve this, seems a worthy goal, beneficial to both the parties and their children. However, leaving aside the lack of evidence over whether agreement/settlement can support relationships, there was a disturbing finding from the study by Wasoff:

'The wish to avoid conflict during separation and divorce sometimes had long-term financial and emotional consequences that led to long-term regrets. In nearly all cases, respondents thought that they had paid a high price for conflict avoidance and many said that they had felt under pressure to negotiate and make compromises which they felt were unacceptable even at the time, in order to avoid further stress or conflict.'⁴⁵

In the current study the clients have not been revisited so we cannot know if they hold similar views. However, the researcher and some of the solicitors involved in the study did view some of the eventual terms in the consent agreements with unease. Some outcomes did appear to reflect imbalances of power which were apparent in the relationship at the start of the process. There is some evidence which suggests that the process of private ordering in divorce may result in outcomes influenced by a range of relationship issues. Gwynn Davis [et al](#), in a project examining ancillary relief applications made in county courts, noted that the terms contained in some of the applications for consent orders were not terms which a court would have arrived at. They commented:

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⁴² Ibid, at p 246.

⁴³ G. Davis, S. Cretney and J. Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994).

⁴⁴ F. Wasoff, 'Mutual consent: Separation agreements and the outcomes of private ordering in divorce' [2005] *Journal of Social Welfare and Family Law* 237, at p 245.

⁴⁵ Ibid, at p 245.

'one might infer that the outcome in many of these cases depended as much on extraneous factors, such as generosity, guilt, or parental support, as it did on what might have been thought would be the principal determining factors.'⁴⁶

It may be that these agreements reflect the clients' boundaries of fairness which could include feelings of generosity, guilt and relationship objectives. The 'boundaries of fairness' and the client's initial views on the paramountcy of the relationship objective, however, may not be enduring.

Allowing the relationship objective to be paramount, which appears to be a goal pursued by both the solicitors in their professional codes of practice and clients themselves, may satisfy, the short term goal of conflict avoidance. Conflict in divorce is, however, inevitable not only on an emotional level but in terms of financial and property issues, as couples are competing for resources which are unlikely, in most cases, to fund the same lifestyle as enjoyed pre-divorce. It is arguable that clients need a solicitor precisely because they cannot think rationally and dispassionately about their future in financial terms. The client's adherence to the paramountcy of the relationship objective may not be in their long-term interests. The question needs to be asked whether solicitors should adopt a more long-term and paternalistic approach when looking at where the interests of their clients lie. The paramountcy of the relationship objective needs closer scrutiny and more research needs to be undertaken in this area. Wasoff's research indicates that clients may later regret agreeing to an outcome which satisfies the relationship objective, but divorce is a difficult business and we cannot be sure that their feelings of regret are not linked to other aspects of the divorce beyond the financial outcome. It is important that these issues are given consideration as collaborative law and mediation move the pro-settlement and the paramountcy of relationship objective further forward.

Facilitator or partisan?

Finally, as we have seen in this study, there was a willingness among clients to take responsibility for carrying out much of the negotiation themselves when appropriately supported by their solicitor. Collaborative law appears to offer an attractive new option. Clients may expect to receive stronger and clearer support from their solicitor. They are probably expecting a partisan – and this will be the service that they are paying for. However, in this study it was seen that only a very limited form of partisanship was offered – despite acceptance amongst the practitioners that clients wanted more than this. Solicitors would instead work together towards an outcome which *they* saw as 'fair'. It is possible that this 'third view' approach may become more prevalent in collaborative law. This may not be a bad thing but it needs to be open and clients need to know about the service they are paying for.

CONCLUSION

As a result of the pressure from the emergence of mediation and its continuing promotion by the Government, the profession of family lawyers have adopted some of its values and ideologies and have developed an alternative in collaborative law. However, it is arguable that some of the principles behind legal representation and mediation may conflict. Adopting a more facilitative role, leaving aside partisanship and pursuing relationship objectives may not be without long-term cost for the client.

⁴⁶ G. Davis, J. Pearce, R. Bird, H. Woodward and C. Wallace, 'Ancillary relief outcomes' [2000] CFLQ 43.

This article has indicated that some of the needs of clients, for example, for a partisan who will look beyond the short-term relationship objectives, might not be always being met by the new hybrid profession of family lawyers. These new skills are being further refined in collaborative law and are apparent in mediation. These practices can undoubtedly offer many benefits to those in the process of divorce; however, a note of caution is perhaps timely.

'Fairness' is now a cornerstone for resolutions achieved in court, it is important that this concept is not overshadowed in private ordering by the paramountcy of the relationship objective.

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