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Child inclusive mediation in parenting disputes where domestic violence is an issue.

Child Inclusive Mediation in Parenting Disputes Where Domestic Violence is an Issue

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ABSTRACT

Domestic violence is a common driver of family dissolution and cases involving domestic violence are core businesses in the Australian Family Law jurisdiction. Family mediation is growing as a mandated and voluntary alternative to litigation for separated families in dispute over parenting arrangements. The specialised intervention of child inclusive practice is increasingly being used by mediators to resolve family disputes in the best interests of the child. However, this child empowering practice is often avoided by mediators where domestic violence is an issue. This paper discusses some of the complex factors that need to be addressed in the appropriate use of child inclusive mediation to enhance social justice for the child subjects of parenting disputes from violent families.

In the context of social diversity and change in the contemporary Western world where there are significant rates of family breakdown (Bagshaw 2007), there is an ongoing concern about children's adjustment to parental separation. Contemporary research shows that at the stressful time of separation where children experience uncertainty and unpredictability in their family relationships, as well as in other important areas of their lives, children do not receive sufficient information from their parents about the family dissolution (Kelly & Emery 2003). At this critical stage of transition, communication between children and their parents is adversely affected by family conflict (Bagshaw et al 2006) and violence that often escalates at the stage of family breakdown (Buel 1999). Children are not in a position to advocate for their own needs and interests and they are often not consulted about their wishes and what parenting arrangements are in their best interests (Smart 2001; Bagshaw et al 2006). Children who are excluded from decision-making on issues that directly affect them have no say in their own future and often feel marginalised and powerless (Campbell 2008). This is especially concerning for children who have been exposed to domestic violence as they often feel too ashamed to seek help, may not admit need, and they experience a "catastrophic loss of power" (Batmanghelidjh 2006, p.53).

Children's post-separation adjustment and the growth of child inclusive mediation

The adjustment of children following divorce has been widely researched and a range of variables that influence children's adjustment have been identified (Kelly & Emery 2003). A major issue of contemporary concern is children's exposure to ongoing or high level inter-parental conflict. This is commonly perceived by legal and social science

professionals as being the prime issue that adversely affects children's adjustment to family breakdown (Murch 2005). Parents' failure to resolve their conflict is seen to lead to increased emotional instability, academic problems, behavioural and psychological disorders and other symptoms in the children (Kelly 2000). Based on this understanding, mediation in Australia is growing as a mandated and voluntary alternative to litigation for separated families in dispute (Flynn 2005; Martin & Douglas 2007). Government funded community based Family Relationship Centres provide a range of services including family mediation. These organisations are mandated to help families build better relationships, keep a focus on the children and protect children from conflict (Attorney-General's Department 2007).

The appropriate inclusion of children in mediation over decisions that directly affect them has gained momentum since the mid 1990's (Campbell 2008). This approach has, as its foundation, the social justice principle of the child having the right to be heard (United Nations 1989). Political support for this approach emanated from the House of Representatives' Standing Committee Report 2003 that legitimised concerns about how in the litigation process children's voices were marginalised in decisions about post-separation parenting (Bagshaw 2007). It has also been influenced by findings from empirical research on the psychological impact of divorce on children's development and well-being (McIntosh 2007).

Empirical and clinical evidence informs how child inclusive mediation assists the resolution of post-separation conflict by influencing parents' understandings of the child's experience, needs and wishes (McIntosh 2007). Child inclusive mediation can result in children's views being sensitively gained, their actual experiences and developmental status identified and understood, and their needs accurately transmitted to the parents (McIntosh 2007). However, the growing evidence based on how child inclusive practice refocuses attention on the individual child's best interests relates to evaluations of practice models that may include cases with a broad range of levels of conflict but that usually exclude cases where domestic violence is an issue. This appears to be related to the evidence based targets embedded in this approach that include aims to: reduce inter-parental conflict; reestablish parent alliances to include shared cooperative decision-making; and increase involvement by the fathers wherever appropriate for the children (Hewlett 2007; McIntosh 2007). The fundamental targets of this model are not all appropriate in cases where children grow up in families where risks are inherent in patterns of domination, coercive control and humiliation that characterize a violent relationship (Jaffe, Lemon & Poisson 2003). Violent family relationships are highly complex and often involve significant conflicts (Johnston 2006). Targets for intervention in these cases must aim to accurately identify the special needs of children exposed to violence, minimise the adverse effects on children, and to protect adult and child victims from further violence (Johnston 2006). In order to meet these targets and facilitate decision-making in parenting disputes, bearing in mind the best interests of the child, specialized skills are required in the application of child inclusive mediation.

Arguments for developing a framework for child inclusive practice where domestic violence is an issue

Domestic violence is not the exception in separated families (Sheehan & Smyth 2000) and significant numbers of parenting disputes involving issues of domestic violence proceed to litigation before the Family Court of Australia (Brown et al 2001; Shea Hart 2004; Moloney et al 2007). Research shows that there are potentially concerning outcomes for the children in cases that proceed to court as it is unusual for the Family Court of Australia to deny time spent between the perpetrator of domestic violence and the child, even in cases of serious violence (Shea Hart 2004; Kaspiew 2007).

In the contemporary Western world, children's exposure to domestic violence is starting to be more widely recognised as an issue of social concern. Numerous research studies reveal that where children are exposed to domestic violence, the normal tasks of childhood are disrupted and their problems resemble those of children who have been directly abused by their parents (Wolfe et al 2003). There can be short and long term adverse effects on children that can include serious physical, psychological, cognitive, behavioural, developmental, emotional and relational problems affecting the children's life satisfaction, self-esteem and future relationships (Eisikovits & Winstok 2002; Wolfe et al 2003). Importantly, children's exposure to domestic violence is one of the two variables most closely associated with the development of Post-Traumatic Stress Disorder (Adams 2006). Also, a broad range of research consistently shows that the presence of domestic violence is a significant indicator of possible risks to the child from direct forms of abuse (Edleson 2002).

The process of separation for all families is unique and dynamic, but where domestic violence is present, children face a distinctive predicament that must be recognised and understood if their best interests are to be served (Jaffe et al 2003). There are heightened risks for the child and adult victims following family dissolution (Jaffe et al 2003). Children as individuals are linked in complex ways to both their parents and to the violent situation (Featherstone & Trinder 1997). Children, whose special needs have not been identified and prioritised in post separation parenting decisions, may continue to live in fear (Mullender et al 2002). Where children spend time with their violent fathers and are not protected by their mothers, they can become the prime focus of the perpetrator's violence (Harne 2004). To address the needs and interests of children from domestic violence families the multiple risk factors must be reduced and the multiple protective factors must be supported (Hughes et al 2002). Therefore, it is important to identify, as early as possible, the individual child's special needs, potential risks and the moderating factors (Humphreys 2006; Batmanghelidj 2006).

In research on domestic violence where children have been directly involved in the studies, children have stated their wish to be included in discussing decisions about responding to the violence and in deciding their family's future (McGee 2000; Irwin et al 2002; Mullender et al 2002). Children have been found to be reliable witnesses to their parents' separation and are competent to contribute to post-separation decisions that directly affect them (Kaltenborn 2001; Smith & Taylor 2003). Asking children about violence can have positive results for them in overcoming their fear of potential

disclosure (Hester 2006). Also, childhood resilience studies show that children's coping capacity is actually enhanced when children's views are respected and their autonomy is supported (Grotberg 1997). Where child victims of domestic violence are not heard, or not taken seriously by adult caregivers and decision-makers, they feel powerless and their distress is aggravated (McGee 2000). Children should not be constructed as 'vulnerable victims' of their own circumstances, but rather as individuals who bring unique and important perspectives about their family environment to the decision-making process (Smart & Neale 2000; Nairn & Smith 2002). This challenges the dominant belief that children are placed at risk from being involved in decision-making processes. Rather, the exclusion of children from decision-making, particularly those children whose life experiences have already subjugated them, needs to be recognised as the oppression of children (Smith & Taylor 2003) and not as the protection of children.

To facilitate informed decisions that meet the needs of the child, the development of parental understanding of each child's individual needs and experiences, as well as what are appropriate and realistic interventions is essential (Mullender 2006; Batmanghelidjh 2006). Also, where mediation provides acknowledgement of the experience of violence, it can help not only the child, but in the restoration of the adult victim's identity and self-esteem and provide motivation for the adult victim to stand up for the child's needs. There can also be positive outcomes for the perpetrators of violence who become motivated to seek individual interventions, some of which are successful (Rakil 2006) in addressing the violent behaviour and learning different ways of having their own interests met (Flynn 2005).

Failure to proactively address these issues reinforces the social tolerance of domestic violence (Batmanghelidjh 2006). Where adequate and specialised conflict resolutions, and other support services are not provided in these cases, the perpetrators of violence continue to exercise power and control in entrenched litigation (Johnston 2006). This can have profoundly negative impact on the coping capacity of both adult and child victims of violence (Jaffe et al 2003). Therefore, children's exposure to domestic violence and the individual impact of this on each child must be centralised in the mediation process. To prevent parenting arrangements that are gambling with the child's well-being because of exclusion of the child from the decision-making process (Shea Hart 2004), mediators need to take responsibility for developing specialised skills in knowledge to manage child inclusive mediation, in appropriate cases, where domestic violence is an issue.

The challenge for mediators

It is not a simple straightforward process to effectively facilitate the child's inclusion in cases where domestic violence is an issue (Smart 2002). Some of the numerous challenges for mediators will now be discussed.

i. Dominant protectionist beliefs

For professionals dedicated to child inclusive mediation, there are difficulties in overcoming dominant beliefs that children exposed to domestic violence should not be included in the dispute resolution process as this would automatically increase their vulnerability. What is important to recognise is that over the years there, has been considerable movement away from the belief that mediation created more risks and vulnerability for the adult victims of violence. More stringent mediation policies, practitioner accreditation and monitoring of accredited organisations that provide family mediation (Charlesworth, Turner & Foreman 2000) have led to mediator training in screening for and managing cases where domestic violence is an issue. Strong support for the inclusion of adult victims of violence in mediation is based on mediator skills in managing safety issues and power imbalances to ensure safe and appropriate participation in mediation (Flynn 2005). Mediation has emerged as an empowering process for the adult victims of violence (Flynn 2005). Positive outcomes have been found to include agreements where the parties create more emotional and physical distance from each other, and communicate over parenting arrangements by abiding by agreed rules and limits (Charlesworth et al 2000). This is significant progress away from the prior exclusionary attitudes to adult mediation in cases where domestic violence is an issue. It provides hope that the benefits of developing mediator skills and safety management by organizations offering family mediation can lead to recognition of and support for child inclusive practice in domestic violence families. However, strong advocacy for this intervention will be required to overturn dominant paternalistic, protectionist perspectives that define children as incompetent, vulnerable beings (Taylor 1998) who should be protected from participation in dispute resolution processes.

ii. Capacity to deliver

In the application of child inclusive practice in these cases, it is essential to appropriately monitor and manage complex dynamics including: power imbalances in adult and child relationships within the family; levels of professional knowledge and expertise; and resource allocation. All of these impact on the capacity of professionals to properly engage in and deliver the interventions (Smith & Taylor 2003). To avoid tokenistic approaches that could exacerbate risks for the child, the mediators need to have: up-to-date knowledge of domestic violence; developed specialised skills in the management of these cases; and access to adequate resource allocation. A child-friendly environment is essential in catering for different age groups of children and youths who will be involved. Also, because of the complexity and unpredictability of these cases, the intervention process must be flexible and comprehensive, and sufficient time allocation needs to be provided to properly address the complex and, at times, urgent issues that emerge during the dispute resolution process. This is problematic where there are limited financial and human resources and where case allocation requires a limited number of mediation sessions.

iii. Screening

At the initial stage of mediation between parents, an essential technique is to screen for family violence and to assess whether the case is suitable to proceed with the mediation process. When mediators are contemplating the suitability of child inclusive practice, however, the assessment of violence must be understood as not a single process. It is an ongoing assessment as full accounts of the history of violence in the family, as well as the status of risk factors, need to be appraised over time. Before offering the option of child inclusive mediation, the mediator needs to identify: that the threat of violence is not current, or that the perpetrator cannot have access to the adult and child victims; there is no access to weapons; and that suitable support systems are in place for the parents and child.

iv. System of safety

In cases where child inclusive mediation proceeds, because of the volatile and unpredictable nature of these complex cases, an ongoing priority must be ensuring a system of safety for the adult and child victims of violence, as well as the professionals involved (Cooley & Frazer 2006). This includes ongoing assessment of risks, undertaking the child assessment on a day when the perpetrator is not present, and often involves techniques used for mediation with adults from violent relationships such as caucuses, presence of support persons, and gender balanced co-mediation (Flynn 2005). The system of safety also involves organisational responsibility in addressing the potential for mediators and child consultants to develop vicarious trauma. This is a common response to repeated exposure and empathic engagement with traumatic material (Bride 2007). Adequate professional supervision and debriefing needs to be provided to help the professionals deal with the experience of shock and other emotions from what children disclose, as well as the stressors generated by the perpetrators.

v. Informed choice

In the process of exploring parental commitment to and consent for child inclusive mediation, the mediators need to understand and accurately predict how the adult victim and perpetrator of violence may interpret and respond to the option of child inclusive mediation. A number of issues need to be considered, which include:

- a. Child inclusive mediation requires that the parents fully comprehend the purpose and scope of this intervention, commit to the full process and give informed, voluntary consent to invite and engage the child in this process. This is consistent with the mediation principle that both adult participants should always have the choice of participation (Flynn 2005). Assessing the capacity of each parent to give informed consent, as well as their emotional readiness to be able to properly engage in the process and listen to feedback from the mediator about the assessed needs of the child, is often complicated in these cases. The psychological and emotional health of both parents needs to be understood. Adult victims of domestic violence often present with a range of psychological, emotional, and relational problems, the aetiology of

which is likely to be their victimisation (Johnston 2006). This affects their capacity to make rational decisions about whether or not it is in the best interests of the child to be involved in child inclusive mediation. As trust in the mediator and the mediation process develops, a more rational informed decision about involving the child may or may not be able to be made.

- b. Because of the misuse of power in domestic violence relationships, the power imbalances between the parents, as well as between the violent parent and the child, must be carefully managed. It is important that the adult and child victims do not feel pressured to comply with this intervention. This is a particularly relevant consideration, given the socio-political climate in the Australian Family Law jurisdiction where mother victims of domestic violence feel compelled by dominant normative expectations to be cooperative and comply with reaching agreements about parenting arrangements (Shea Hart 2003). Children need to be given age appropriate information and an invitation to attend. There are a variety of ways that this can occur, for example, writing in age appropriate way to the child, or having both parents invite the child, etc. How this invitation occurs needs to be negotiated and agreed to by the parents as part of the mediation process as it has significant influence on the child's willingness to participate. The mediator needs to be available to address any questions or concerns the child has about the process. The mediator needs to inform both parents about conveying consistent information about the process to the child and not to place pressure on the child to comply.
- c. Understanding and predicting the behaviour of violent perpetrators is also essential for the mediator. Because perpetrator power and control has been challenged by the separation (Jaffe et al 2003), child inclusive mediation may be seen by the perpetrator as a potential mechanism to use coercive control over the child to influence the child to support the needs of the violent parent. The perpetrator, by use of threats or manipulation, may seek to control how the child presents at his or her assessment. There may also be a risk for the child of direct reprisals for exposing his or her experience of violence (Cooley & Frazer 2006). It is essential, therefore, to identify: whether the perpetrator accepts responsibility for past violent behaviour; demonstrates adherence to agreed ground rules; shows some patience and empathy; has ability to focus on the future; and is prepared not to use intimidation as a response to mediator's feedback on the child's needs, perspectives and experiences.

vi. Specialized assessment

Because child inclusive mediation is not a simplistic process about “finding out what kids want” (Grimes & McIntosh 2004, p.114), specialised child consultants are needed to undertake the child assessment. The child consultants must be skilled in working directly with children to facilitate competence in them recounting the details of their experiences (Smart 2001) and in accurately identifying their needs (Hester 2006). The impact on children from exposure to domestic violence varies depending on a range of variables (Batmanghelidjh 2006) and without proper knowledge and skills, there is a distinct danger of misidentification and simplification of the issues for the child (Johnston 2006).

The child consultant needs to be skilled in the assessment of: child development; childhood trauma; child coping strategies; patterns of attachment; risk and protective factors; child experiences of parenting practices of each parent; scripting of the child by either parent; and cost/benefit analysis of the child spending time with the violent parent. The child's lived experiences of violence, as well the child's perspectives on his or her own needs and interests, and the child's attitudes and behaviour toward both parents need to be professionally unpacked (Jaffe et al 2003). Any special needs must be identified.

Where a child victim of domestic violence expresses a wish to spend time with the violent parent, it is crucial for the child consultant to investigate what unpins this wish, as children are often coerced into complying with meeting the needs of the perpetrator of violence at the expense of meeting their own needs for protection from future harm (Jaffe et al 2003). Out of fear, the child may present as aligned with the violent parent (Johnston 2006) and this needs to be explored to fully understand the position of the child. Without this specialised expertise, professionals are prone to minimise the child's exposure to domestic violence (Cooley & Frazer 2006) and distort the child's problems (Shea Hart 2003).

vii. The feedback process

Feedback is a sensitive process that requires well developed skills of the mediator and the child consultant (Grimes & McIntosh 2004). This is particularly so where violence is an issue as abusers can be volatile, intimidating people (Radford et al 2006), and can be highly reactive to any feedback that does not meet their own needs. The mediator should be briefed by the child consultant and both need to pay special attention to how sensitive information is provided to the parents, the order in which information is given, and what needs to be prioritised in the information sharing and subsequent dispute resolution sessions. For example, any positive feedback to the parents should be provided before informing them of information that may cause distress such as: the child's need for therapeutic intervention that should not be interrupted or disrupted by the child spending time with the violent parent who is not supportive, and does not appropriately respond to the child's symptoms and special needs (Feather 2007). Another sensitive issue is how to convey any expressed wishes of the child. In cases where the child may be put at risk for being 'himself' or 'herself' and expressing his or her own view, the emphasis in feedback to the parents should focus attention on the identified needs rather than the stated wishes of the child. Information provided to the parents on the child's needs should take into consideration the child's own perspectives and wishes, but these can be presented as part of the child consultant's appraisal of what is in the best interests of the child. In this way, the child consultant creates a child focused discussion where all relevant issues can be productively brought to the fore, and the child is not held accountable by the violent parent for expressing particular wishes.

viii. Subsequent mediation sessions

Where the child consultant is not present in following mediations, there are considerable challenges for mediators in helping parents assimilate and clarify issues that arose from

the feedback session with the child consultant. Maintaining a detailed, focused discussion on key issues such as, how the parents would address any identified special needs, including ensuring physical, emotional and psychological safety of the child, and helping the parents appraise the suitability of their proposed plans becomes very challenging for mediators where child consultants are no longer present. The continued presence of the child consultant, particularly where the children have special needs and where family dynamics are complex, is a more suitable practice in enabling a transformative approach that facilitates change and leads to decisions that are in the best interests of the children,.

Conclusion

Mediators involved in resolving post-separation parenting disputes are gatekeepers to facilitating or denying the identification of individual children's special needs and interests in cases where domestic violence is an issue. Where mediators continue to rigidly adhere to a dominant model of child inclusive practice that is designed to address cases of 'conflict' and not 'violence', significant numbers of children whose parents are in dispute over parenting arrangements will continue to be marginalised, have their special needs unrecognised, and any required interventions unidentified. Because family mediation precedes litigation, this means an opportunity is lost in bringing the unique predicaments of children to the fore. It also prevents parents making fully informed decisions about what steps need to be taken to address the needs of their child. Children who have not had participatory rights realised through the mediation process inherit the consequences (Jaffe et al 2003). Models of dispute resolution that exclude children who have been exposed to domestic violence without appraising the suitability of including them in the process disadvantage and further disempower the children. They remain the silent victims (Shea Hart 2003). This is a serious oversight, particularly when one considers the concerning outcomes when matters proceed for determination before the Family Court of Australia, where under highly discretionary decision-making by judicial officers, it is fairly likely that children will be required to spend time with their violent fathers (Moloney et al 2007). This provides a strong rationale for the development of a best practice model of child inclusive mediation to appropriately address these children's needs prior to the stage of litigation.

Positive outcomes for children from violent families can be achieved by implementing a more flexible model of child inclusive mediation that requires specialised knowledge and skills of mediators and child consultants. Children's coping capacity is enhanced when their disclosed experiences of violence are accepted and their views are respected (Mullender et al 2002). By involving children in the mediation process, in appropriately selected cases, this has the potential to identify and possibly reduce the risk factors and support the protective factors. Managing the risk and protective factors is essential for the child's recovery and well-being (Hughes, Graham-Bermann & Gruber 2002).

In the context of increasingly complex work, time constraints and accountability, there is a stronger demand for evidence based practice (Giles et al 2007). In developing this model of child inclusive practice, the complexities and challenges add to the already

significant responsibilities of practitioners and organisations to ensure positive gains for the children involved, and to ensure that risks for adult or child victims of violence are not elevated. In gaining acceptance of such a resource intensive model, attention needs to be focused on the individual, special and complex needs of child victims of domestic violence that must be identified in order to facilitate mediated decisions that are in the child's best interests. There needs to be recognition by society in general that these children's needs are different for those of children from separated families who have not been exposed to domestic violence. This knowledge challenges the politicised goal of restoring children's post-separation relationships with both parents and facilitating cooperative, ongoing parenting. Despite the controversial aspects of this model, this approach to child inclusive mediation has the potential to empower child victims of violence and aid their recovery through facilitation of informed parenting agreements that are in the children's best interests. To improve a child's life, experiences influence how that child will develop. How children then function as adults determines how society functions (Perry 2000).

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