

Dispute Resolution

A psychodynamic model for family mediation

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‘Unexpressed emotions will never die. They are buried alive and will come forth later in uglier ways.’ (Sigmund Freud (1856-1939))

This article explores how the mediation process can be enhanced and supported by a model incorporating psychodynamic thinking, which takes as a starting point that we all have an ‘inner world’ powerfully influencing how we behave, what we think and our feelings. This applies not only to mediation clients but also to the mediator. Here, I look at the benefits of such an approach for clients and for the mediator. The article also considers too the benefits of working in a multi-disciplinary environment and how this is aligned with current judicial thinking from The President of the Family Division and the Family Solutions Group.

Both the President, in his recent speech to the Jersey International Family Law Conference (October 2021), and the Family Solutions Group in their recent wide-ranging report, endorsed a more holistic view being taken in resolving family disputes and encouraged a multi-disciplinary approach. It is true to say that the profession has endorsed this thinking for a number of years now, recognising the way in which clients struggle emotionally with the breakdown of their relationship, at the same time as they are navigating the family law justice system. Often divorce coaches, counsellors and Family Consultants are routinely available to clients as part of the family law firm service. However, this support is too often engaged simply to enable clients to deal with the present court-based adversarial system.

As has regularly been noted, if you were setting up a family law justice system from scratch, you would not start from here. The historical legacy of divorce and family separation being heard in the same court as shipping and probate disputes is still felt today given the number of people who think that the courts are the starting point in a divorce, and not an end point when nothing else has worked.

Logically and rationally, judges, lawyers and clients know that fuelling mistrust and acrimony by contentious litigation only increases it, which is not good for the children involved, their parents or, indeed, the lawyers and judges. Indeed, from a psychodynamic point of view, an emphasis on establishing ‘the truth’ of a matter can create court orders which are not sustainable, particularly in children disputes, when strongly held differing parental accounts cannot both be validated, and future relationships can be damaged irreparably.

Everything points to mediation, but it is hard. The court-based system offers a structure and a timetable with supportive lawyers. Mediation can make clients feel vulnerable and unsupported at a time when a huge amount is expected of them. They are encouraged to be civilised, conciliatory and compromising in a situation in which they can have strong feelings of betrayal, loss, grief, and mistrust. As Freud

pointed out, in the quote above, however people are exhorted to put those feelings to one side, for the greater good of themselves and the children, it is often not possible. Many of the other models of counselling focus on the development of personal coping strategies that target solving current problems without reference to the history of the individual or the couple. In supporting mediation, the focus is usually on the areas of effective communication and on dealing with overwhelming feelings that impair concentration and logical thinking, to the exclusion of any wider emotional understanding.

The psychodynamic model used in mediation by The Mediation Space LLP works with those feelings and memories, beliefs and fantasies which comprise a client's inner world, and does not ask them to disown or to diminish them. It accepts them and works with them. Understanding in psychodynamic thinking goes beyond 'I know how you must feel'. It is an approach which deals with concepts such as the unconscious, conflicts, anxieties and defences and our patterns of relating. It is concerned with subjective experience and does not attempt to make a client look at things of importance simply and exclusively in a rational or logical manner. It deals with the person as they are, with all their conscious and unconscious mental life. So how in practise does this work and what is the mediation model?

Putting concepts into practice: what happens in psychodynamic mediation?

The questionnaire

Many mediation practices use a questionnaire that they ask clients to complete before the Mediation Information and Assessment ('MIAM') meeting, for information purposes and to screen for safeguarding. The Preliminary Form used by the Mediation Space LLP is a more comprehensive questionnaire asking for additional information about personal history, family of origin and early childhood experiences. This is because it is indisputable that our childhood experiences, particularly our relationships with our primary carers influence our adult personality, shape our ways of relating to others and our conscious and unconscious perceptions of the world. Enquiry can often elicit significant information such as bereavement, parental bankruptcy or traumatic experiences of many sorts. These early experiences can impact on acquiring a stable sense of the self and on our capacity to relate to others as separate and unique. In the joint sessions in mediation this ability to see a partner as separate and unique is often elusive. Repeatedly what we observe is an extension of the interpersonal relationship between two people who are locked in a battle in which they are unable to see themselves as separate from their former partner or co-parent. There is at work unconscious or unfinished business from the past in the mediation room. Such clients have a way of relating to each other which is extremely hard to relinquish because it is fundamental to their inner world, their sense of self and to truly separate from the other involves the painful work of loss, grief and mourning.

The MIAM

All the mediators in our firm are either practising barristers or solicitors and are all psychodynamically trained. The MIAM is an especially important part of the model for us. It comprises two distinct parts and is two hours long in total. The first part is an hour-long meeting with the mediator to discuss both the regulatory information set down in the Agreement to Mediate and gives time for information gathering about both the legal and factual background and about the client in a more personal way. It allows feelings about, hopes and fears for the mediation to emerge as thoughts that can be vocalised. Tentative steps can be made to commence the task of discovering or discussing what is important for the

client.

The second part of the MIAM is an hour-long meeting with our therapist. This offers a time and space to explore freely and in a less structured way the more emotional aspects of the issues. The therapist encourages the client to share their feelings, however distressing or difficult, in confidence, and offers her own thoughts in return to help make more sense of them. This safe and boundaried setting enables clients to say what is on their minds, beyond the facts and the figures, which clients find containing and which helps prepare them for successful joint mediation sessions.

Following these two parts of the MIAM the mediator and therapist will have an opportunity to discuss and to share their thinking about the suitability for the matter proceeding to mediation. They will discuss too and involve the clients in a decision as to the therapist's ongoing involvement in the Mediation process. Sometimes the therapist will have no further part to play, but often the recommendation to the clients or the clients' request is that she joins some or all of the joint sessions.

The joint meetings

Where the clients request the involvement of the therapist in the joint meetings this is sometimes because many of the mediations referred to the Mediation Space LLP are high conflict in nature or have particularly emotionally challenging issues to resolve. However, many clients want the therapist to attend, at least at the initial joint meeting, because they have already experienced being listened to in a way that aims to understand, beyond the surface meaning of the words spoken, the feelings behind or underneath and have found this helpful to them. They will also have formed the beginnings of a relationship with the therapist that gives confidence and feels supportive, and it is this that in turn allows the therapist to give support to the mediation process going forward.

A key concept in psychodynamic thinking is that of transference. Transference is an emotional experience in the present which recreates or repeats an experience or relationship more properly belonging to the past. It is the redirection to a substitute, often the therapist, or in their absence, the mediator, of emotions that were originally experienced in early life. This can prove a particularly challenging aspect of the process for mediators, however experienced and professional, and can impact on their own effectiveness in the mediation room. Our model believes this needs to be understood and taken into account. The mediator, particularly when they are working on their own, can experience counter-transference feelings themselves which have arisen in response to the client's unconscious communications or state of mind. If a client is extremely upset or angry or has other strong emotions, then this can be very destabilising and disturbing for the mediator as there maybe something in their own unconscious that is stirred up by what the client is bringing. It is important and helpful for the mediator to be aware of what belongs to their own emotional experience and what belongs to that of the client and psychodynamic training makes this more possible.

If the therapist is also present in the mediation, then whilst transference issues will still occur, it is the therapist's role to be attuned to, listening for and speaking to the emotions in the room, which in turn frees the mediator to focus on their own role and task in thinking of solutions to suggest to the clients and on dispute resolution. The process described is facilitated by a psychodynamic concept called containment. In the process of emotional development an infant communicates his feelings by projecting them into another (first the mother) who accepts them and makes sense of them before giving them back to the baby in a more manageable form by her thoughtful response to his needs. All good mediators do this without having psychodynamic theory in their skillset by reframing and acknowledging difficulties. However, in very challenging mediations the heightened emotions can make this difficult or perhaps

impossible. This can partly be overcome by co-mediating with an experienced mediator, but we believe that the presence of a therapist in the mediation room can be invaluable in offering containment and by bringing a different but complementary perspective to bear on matters.

Very often there can be a great deal of conflict in mediations. Indeed, it would be surprising if there were not. Rather than seeking to avoid conflict or suppressing it to make the mediation feel more comfortable to all involved, psychodynamic thinking sees struggle and conflict as intrinsic to mental life and change. The psychodynamic model sees the experience of being human as being an intrinsically difficult and uncomfortable one, full of anxiety of different kinds. We all must reconcile the conflict and tension between those things we want – consciously and unconsciously - and what is possible in reality. We must all make compromises between what we want or think we want and what is possible. This includes the task of reconciling the fantasy of how we thought our lives would pan out, our hopes and dreams with the reality of relationship breakdown, of loss and endings. There may be new partners to accommodate in this picture, changes in circumstances and lifestyle of many kinds, a new sort of relating as parents to navigate. These are the adjustments required of us in our external world, but psychodynamic thinking recognises that there are also significant adjustments which need to be made within our own internal emotional worlds too. Recognising these internal conflicts can be helpful to clients when they are full of more conscious impulses and instincts as to how to do the best thing for themselves and their dependants and much less aware of the emotions involved which fuel their actions.

How often is a stalemate reached in mediation because of very fixed positions? These ‘positions’ can be seen through a psychodynamic lens as representing clients’ defences. The apparent issue might be a wish to split a child’s time equally down the middle with no exceptions, or to retain an outsized family home which can no longer be afforded. Mediation is based in reality and ‘doing the sums’ can often break the impasse in most situations. However, there are some situations, particularly involving children, where the feeling of the loss of what is familiar and reliable is so overwhelming that it is unbearable. Clients can employ powerful defences which protect them against feelings of loss by creating a narcissistic view of the world in which they are at the centre and anyone threatening change or asserting their own views and needs is seen as entirely bad. This means that reaching a proposal in such a situation is extremely unlikely without the containment offered by a therapist whose role it is to create a space in which those feelings can be expressed and understood in a more manageable form. In this way the impasse can be broken, and tentative steps forward can be taken.

Concluding mediation

Many participants in mediation are engaged in mourning the end of a relationship or are failing to engage in mourning. Many will find it difficult to accept its loss and may in addition be experiencing guilt and regret about their own behaviour in the relationship. All these things can affect whether a Memorandum of Understanding (‘MOU’) is made into a sealed Consent Order. It is a key aim of the Mediation Space LLP to create sustainable outcomes. Even if a Court Order is imposed, then a lack of real acceptance of the outcome can result in numerous breaches or returns to court for variations. In turn, if the ending is not properly dealt with in mediation, MOUs can be derailed before a Consent Order is even prepared. There is unfinished emotional and psychic business. Therapeutic support can be offered in the mediation room, and clients can be signposted towards therapeutic work in the future, to deal with the gradual relinquishment of loved but lost people and ideals and with the giving up of unrealistic expectations. The previous way of life must be mourned before people can begin to move on to acceptance and past conflict.

Freud theorised that humans have two innate drives which cause unceasing conflict: the life and death

drives. The death drive works in us to give up the struggle, to resign ourselves and works towards fragmentation and destruction. However, in contrast the life drive compels us to fight against those feelings and move towards creativity, growth and development. A considered ending to the mediation process enables greater acceptance in all the participants in the mediation of their situation and of seeing others more as they really are. This enables recognition that their former partner has both positive and less positive characteristics and see them in a more multi-dimensional, less black and white way than was often possible previously.

Thus, at the end of psychodynamically informed mediation, it is hoped that with the mediator or therapist as the containing figure, there will be a shift away from the angry, persecuted self-righteous state of mind against a perceived wholly bad former partner. Through the process of mourning this view will be relinquished and the ability to take on the new reality of post separation life will be facilitated.

We consider a therapeutically informed approach to mediation to be highly preferable in many cases, even if it does add something to the cost of mediation. As a consideration there does seem to be a divergence between what is thought acceptable as a mediation cost and what is acceptable as the cost of litigation. Clients spend tens, or even hundreds of thousands of pounds on lawyers and see it as an unavoidable expense. Yet a mediation that runs into several thousands of pounds per person is sometimes seen as expensive. There will be very many cases that would always be settled by mediation if used. Likewise, there will always be cases where only a court led process is suitable, particularly where there are safeguarding issues. However, most people involved in the Family Justice system would probably agree that the first group should be greatly expanded, and the latter group diminished. The former group will be expanded by tackling public perception and the President's leadership on this and the mediation voucher scheme will undoubtedly help. However, the latter group might only be reduced by providing specialised and highly supported mediation services such as that offered by us. Currently, the court-based system is the most attractive option for high emotion cases and takes up much court time and family resources.

History shows that not taking people's subjective experiences of life into account creates ongoing friction in relationships, leads to increased conflict and results in unsustainable outcomes. This can be true of both the court room and the mediation room. However, if we can find a way to take into account the frailties of the human condition, to work with the difficult and the painful emotions involved, then we can build more sustainable outcomes. More couples would be attracted to mediation and it would be considered as a first choice and resource, leaving the court as the forum of last resort. The courts and Judges' workload would be reduced, allowing them to concentrate on only those matters that unavoidably require their judicial input.

Reference: S Howard (2011), *Psychodynamic Counselling in a nutshell*, Sage Publications Ltd.