A New Approach to Family Law Conflict[1]

"*Your life doesn't just "happen." Whether you know it or not, it is carefully designed by you. The choices, after all, are yours. You choose happiness. You choose sadness. You choose decisiveness. You choose ambivalence. You choose success. You choose failure. You choose courage. You choose fear. Just remember that every moment, every situation, provides a new choice. And in doing so, it gives you a perfect opportunity to do things differently to produce more positive results."*[2]

The Theory

Communication

Central to the work we do in family law is a clear understanding of the purpose of our communication. Staying true to that purpose then informs our conduct.

In our work we start from the first purpose: why are we communicating at all?

The purpose of our communication as family lawyers or mediators is to assist parties to resolve the issues that arise upon the breakdown of a domestic relationship. That is further defined as a relationship that had as central to it: common values, a shared purpose, and a financial partnership the loss of which has severe financial and emotional consequences for both or either of the parties.

The central goal of our work is resolution. Helping parties to reach an agreement. This goal is no different to the goal of any lawyer engaged by a client. Lawyers are risk adverse and so are we and in considering our risk profile for our clients we weigh additional components for ourselves and our clients.

What is the cost of relationship loss?

What might impede or impact on coming to an agreement?

These two considerations are central to our view of a client's risk and cost profile and as a result central to our approach to reaching agreement.

Having determined our purpose, we engage in a mode of communication designed to ensure that those risks inform our purpose and are central in each communication, be it verbal written or non-verbal. It is very hard to fake the non-verbals!

Communication is obviously a key skill in the work of lawyers and mediators but is purpose always maintained as central to communication in the day to day business of lawyering? Do we keep in mind that our goal is to reach agreement and that our clients may not be as impressed by the verbal zinger much beloved of the verbally competent who find themselves when they wake up as adults, to be lawyers?

Is there an auto pilot of approved communication style that causes a misstep in the path to resolution? Do we engage in indulgent communication? Or do we adopt the discipline of purpose driven communication all the time?

We find ourselves as two experienced practitioners who don't flinch from the pointy end of work after a relationship ends. Instead, we try to find new ways to do things and impose on ourselves the discipline that work focussed on agreement without conflict requires.

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[2] Stephen Covey – the 7 Habits of Highly Effective People: https://www.stephencovey.com/7habits/7habits-habit1.php

Our seeking new ways and different ways to work towards agreement is driven by a desire to engage in the high function work of resolution not the easy well-worn path of dispute. Dispute is easy. Resolution takes effort. Perhaps a description as simple as impulse control paints the picture readily. It is not just the clients who must embrace impulse control though. We must too. As Viktor E Frankl so eloquently stated:

"Between stimulus and response there is a space. In that space is our power to choose our response. In our response lies our growth and our freedom."[3]

Behaviour

Neuroscience now informs us that there are many complex elements to impulse control but central to staying centred and calm, is a sense of safety. If parties feel safe they are less likely to be managing primal impulses from their bodies: chemicals to enhance the capacity to deal with threat and the drive to survive.

To say that safety is important is banal but how do lawyers make people feel safe?

- Technical competence
- Access to best resources
- Communicating to the client that they can win with that lawyer so win becomes a goal
- Being willing to exploit weakness which might make your client feel stronger
- Hiring the best counsel on the topic[4]
- Hiring the most aggressive counsel to intimidate
- Being someone who can take the burden from the client and be a defender or warrior
- Being trustworthy

The list of characteristics is long and varies from client to client.

Do lawyers ever model an expectation that agreement without conflict is achievable?

Is the dispute foregrounded or is the resolution?

By using terms such as "dispute resolution" and "conflict resolution" are we frontloading parties to believe they are in conflict or will experience it? Are we creating a self-fulfilling prophecy? If we, the lawyers or mediators act as if there is a conflict or will be one, are we potentially creating it for the parties or accepting that their being in conflict is normal or inevitable.

We are so often the 'first responders' to a separating couple. We have the ability to set the tone for the way they will approach their divorce.

We consider our roles in our model to be to guide the parties towards agreement by problem solving. We accept and acknowledge that there will be different perspectives, difficult

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[3] Man's Search for Meaning: Viktor E Frankl

[4] In Queensland we have a divided profession. We have Barristers and Solicitors. Solicitor has a very different meaning in Australia than in North America. We do not sell goods door to door! We are the attorneys who do the day to day lawyering on a file and appear in Court on the less complex issues (rarely on a contested trial). Kay and Jennifer practice as Solicitors. The reference to 'counsel' is to a Barrister who generally appear in Court and provide written advice on complex matters. They do not have day to day conduct of a matter – that is the realm of a Solicitor.

moments, disagreements about what might be best for their children, but we do not couch this in the language of conflict or react to it in that way. It is simply a problem that needs to be solved.

By our shifting the foregrounding to resolution (without the addition of the words conflict or dispute) our clients are often relieved to find they are not going to be subject to game playing. We are not going to indulge ourselves nor them in that way. Communication is purpose driven. The purpose is clear and articulated. If a word, thought or action might endanger that purpose, it is reconsidered. We quite literally try to map out paths that won't cause trouble. We drill down into plans and ask questions about how those plans might feel or play out for them. We are problem solving experts acting as guides. If a problem arises, we are there to defuse it, normalise it and help the parties develop options, based on their interests. We are listening primarily with the intention to understand – our clients and each other – not to respond.

Stephen Covey's described this as Habit 5 in his book, The 7 Habits of Highly Effective People:

> *"Communication is the most important skill in life. You spend years learning how to read and write, and years learning how to speak. But what about listening? What training have you had that enables you to listen so you really, deeply understand another human being? Probably none, right?*
>
> *If you're like most people, you probably seek first to be understood; you want to get your point across. And in doing so, you may ignore the other person completely, pretend that you're listening, selectively hear only certain parts of the conversation or attentively focus on only the words being said, but miss the meaning entirely. So why does this happen? Because most people listen with the intent to reply, not to understand. You listen to yourself as you prepare in your mind what you are going to say, the questions you are going to ask, etc. You filter everything you hear through your life experiences, your frame of reference. You check what you hear against your autobiography and see how it measures up. And consequently, you decide prematurely what the other person means before he/she finishes communicating. Do any of the following sound familiar?*
>
> *"Oh, I know just how you feel. I felt the same way." "I had that same thing happen to me." "Let me tell you what I did in a similar situation."*
>
> *Because you so often listen autobiographically, you tend to respond in one of four ways:*
>
> ***Evaluating:*** *You judge and then either agree or disagree.*
>
> ***Probing:*** *You ask questions from your own frame of reference.*
>
> ***Advising:*** *You give counsel, advice, and solutions to problems.*
>
> ***Interpreting:*** *You analyze others' motives and behaviors based on your own experiences.*
>
> *You might be saying, "Hey, now wait a minute. I'm just trying to relate to the person by drawing on my own experiences. Is that so bad?" In some situations, autobiographical responses may be appropriate, such as when another person specifically asks for help from your point of view or when there is already a very high level of trust in the relationship."*[5]

[5] https://www.stephencovey.com/7habits/7habits-habit5.php

We have not suddenly lost our experience and expertise as lawyers or mediators. We just change the lens so the colours break down differently.

Many clients express fear and concern that they will become powerless when lawyers are involved. They shy away from engaging lawyers, because we have a reputation for the fight. This unfortunately means that in some cases when appropriate advocacy would resolve power imbalances, that advocacy is not sought. Formal legal processes are difficult to navigate. Many people feel strongly that it was their relationship and they seek their own solution. Often it is one party who feels more strongly about that and they impose their will upon the other. It is for us as lawyers and mediators to balance the power and create an environment where both have a voice, at the same time ensuring the person who needed their own solution, has 'buy-in' to the ultimate agreement.

We have all heard various versions of the expression[6]

"*Criminal lawyers see bad people at their best. Family Lawyers see good people at their worst"*.

However, we think that Frankl provides a far better summation for the way that people act during a divorce:

"An abnormal reaction to an abnormal situation is normal behavior."[7]

People experiencing divorce are not 'good' or 'bad'. They are simply people finding themselves in a situation in which they did not expect to be and may not have chosen. They are grieving – whether they were the leaver or the leavee – and we are expecting them to make decisions about the rest of their lives. This is an abnormal situation for them. If they react to that situation in a way which might be abnormal for them – or abnormal by society's standards, that is normal. To reduce conflict in a family law matter, we, the lawyers, must first shed our preconceptions of what constitutes normal behaviour. We do this everyday. Our clients do not.

Once we shake off expectations of behaviour, it is then up to us to build trust – with our client of course, but also with the other lawyer and their client. Building trust (and avoiding dignity violations) enables us to cope with and normalise the abnormal reactions.

Engendering trust is central to our purpose. Remember we are acutely aware of the importance of our choreography. We are not passionate evangelists. We are purposeful professionals. This is difficult and serious work.

For those who love the feeling of being 'on' in the midst of adrenalin driven dispute, this is work to make your heart sing.

You all know how much practice it takes to make something look really really easy.

We want the frontal cortexes of those present to be in charge to ensure best cognition. Ours and theirs.

We need to feel safe too.

It may seem strange in such a robust profession as the law to express the need to feel safe but we are not robots. We bring a human being to our meetings too.

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[6] For which there is no reliable citation

[7] Man's Search for Meaning: Viktor E Frankl

We do this in many different ways:

Think before you speak. Focus on the purpose of your communication. What is every word and action designed to encourage?

Some of our techniques have grown out of extensive training in collaborative practice and work in that model. Some have come from mediation training and experience. Some have developed between the two of us out of our willingness to try things out and not be afraid of conflict between us (the lawyers) if the ideas don't work. We have created a safe space. We consider that the outcome for the clients – and our relationship - is more important than our own egos.

Dignity

What we do know is this:

People are far more receptive to and able to engage in purposeful, respectful, communication when their dignity is intact.

Violating someone's dignity is for them to feel they are being treated as if they don't matter. Once you violate a person's dignity, they lose the capacity for empathy. Their emotions become like a tornado. Their limbic system overwhelms the cortex and their amygdala has been well and truly triggered. All capacity for rational thought goes out the nearest window.

Donna Hicks has done a great deal of work in the area of dignity and sets out what she considers to be the 'Essential Elements of Dignity'[8]:

- **Acceptance of Identity** – Approach people as neither inferior nor superior to you; give others the freedom to express their authentic selves without fear of being negatively judged; interact without prejudice or bias, accepting how race, religion, gender, class, sexual orientation, age, disability, etc. are at the core of their identities. Assume they have integrity

- **Recognition** – Validate others for their talents, hard work, thoughtfulness, and help; be generous with praise; give credit to others for their contributions, ideas and experience

- **Acknowledgement** – Give people your full attention by listening, hearing, validating and responding to their concerns and what they have been through

- **Inclusion** – Make others feel that they belong at all levels of relationship (family, community, organisation, nation)

- **Safety** – Put people at ease at two levels: physically, where they feel free of bodily harm; and psychologically, where they feel free of concern about being shamed or humiliated, that they feel free to speak without fear of retribution

- **Fairness** – Treat people justly, with equality, and in an even-handed way, according to agreed-upon laws and rules

[8] Copyright 2011 Donna Hicks from: Dignity: Its Essential Role in Resolving Conflict, Yale University Press. Reprinted with permission of the author

- **Independence** – Empower people to act on their own behalf so that they feel in control of their lives and experience a sense of hope and possibility

- **Understanding** – Believe that what others think matters; give them the chance to explain their perspectives, express their points of view; actively listen in order to understand them

- **Benefit of the Doubt** – Treat people as trustworthy; start with the premise that others have good motives and are acting with integrity

- **Accountability** – Take responsibility for your actions; if you have violated the dignity of another, apologise; make a commitment to change hurtful behaviours

In an ideal world, divorcing couples would file all of these essential elements in their interactions with each other. But we don't, of course, live in an ideal world. However, we can use mirroring and modelling as the lawyers or mediators in the room, to ensure that we do not violate the dignity of any other person in the room. That, of course, includes the other lawyer.

Trust your instincts

In Queensland where we practice, *de facto* property rights obtained a legislative pathway in 1999. Prior to that, Kay had a matter where the husband was the lawyer for a high flyer, he was unrepresented and her client had been a stay at home parent. At the time, contributions to the relationship had to be proved. Kay (without understanding the neuroscience behind it as we now do) understood that one verbal slip on her part could cost her client dearly. Before a phone call to the other party, she would spend time settling herself so she would not say anything that would engage his capacity for effective conflict. Every word spoken in his presence was weighed and considered. The matter resolved well for Kay's client. The experience stayed with Kay.

Later during settlement conferences on another matter, Kay corrected her client about a date, in front of the husband. From then on he listened to every word Kay said: she had treated the wife as he did. At the time Kay didn't know about mirroring, neuroscience or other techniques, but often would warn her subsequent clients that she might correct them and each time it had the same result.

As a high school teacher studying law at night Kay had learnt that if she bounced into a class room full of energy, the classroom became a discipline bomb site. If she walked in slowly and spoke slowly the class were fabulously easy.

There was something in these experiences that informed her that her behaviour was very important in the climate control of the environment she worked in, if she wanted to minimise conflict.

We encourage you as you consider the practice of our model to trust your instincts. Trust the training you have received and the experiences you have had. Our model is not 'rocket science' – it has developed from doing the work and being tuned in, considered and reflective. It has also involved a lot of honest communication with each other.

The Practice

We have set out the theory which informs our practice. We now turn to some examples of how we have put the theory into practice. We cannot describe every case, but present three examples of the primary ways we have put the model into practice.

Strategy one: No lawyer assigned

We developed this strategy in a matter where Jennifer was approached by an accountant who refers work to her regularly, who had two clients divorcing "but we need to keep it amicable."[9] One had re-partnered (here the alarm bells start to ring). They operate a business together. The intend to continue operating that business together. Oh and they had overseas travel plans and it needed to be done urgently….

The critical factor in this matter was that the parties and the accountant were already on the same page. They needed to stay on the same page if there was ever a chance of this agreement working.

In a traditional approach, we would have each contacted a client – or asked the accountant to send one to each of us – and taken instructions and then worked through it.

Instead, we had a meeting with the parties, both lawyers and the accountants as the first step.

We settled on trying something new. We had no idea if it would work. We had used it together in a collaborative matter with very high conflict parties, but never in 'traditional' negotiation.

We went to the meeting without assigning who would be the lawyer for which party.

We explored their history and interests at length. It was critical to understand each party's perspective of why they wanted to remain in business and how they foresaw that working.

We gave the parties an indication of what we thought the legal range of their entitlements would be, and what a Court would do if they were unable to agree (including the severing of their financial relationship, which was apposite to their goals). That advice was given in the meeting, by both lawyers in the presence of the clients and the accountants. Differences of opinion were acknowledged and explained. Where the advice had no client attached to it, the genuine neutrality of it was without question and more valued by the clients – and their accountants.

The final stage was to appoint a lawyer for each party. Throughout the meeting, Kay and Jennifer had acted as neutral advisers. Neither knew who they would ultimately represent and nor did the clients. The parties trusted both lawyers and were happy for either to act.

The choice then became simply a pragmatic one: Both parties and one of the lawyers were travelling overseas at different times. Whose travel plans aligned the best, to expedite finalising the matter? And so, at the conclusion of the meeting the parties decided Jennifer would act for the Husband and Kay for the Wife.

How did the (non-traditional approach of) allocation of the lawyers at the **end** of the meeting impact on the process?

- We had the full story of the history from both parties' perspectives. Parties tell a history reflected through their own prism. Advice from one perspective is not always sound advice
- The parties heard unbiased advice about the outcome. Neither lawyer needed to impress their client by pushing an agenda or advocating for them more strongly

[9] In our experience – the accountant wants to make sure they can act for both parties when it is finished, so don't mess it up and lose them one or both clients!

- The accountant saw the lawyers truly working together to problem solve. Accountants hate lawyers ripping apart agreements they have brokered, especially when they have a longstanding relationship with the clients
- The parties saw the lawyers modelling behaviour
- Both parties trusted both lawyers and both lawyers trusted each other. This is, of course, to us, the most important outcome
- The relationship with the other party and sense of responsibility never abated

All of the above created an environment of trust such that when we came to 'sticky' or 'tricky' issues, they were more surmountable and dealt with respectfully and with understanding of the other party's perspective.

One of the lessons we have learned from our work in Collaborative Practice is that we have the most success breaking through a difficult issue and building trust in the room, when one lawyer expresses empathy for the client of the other. This is similar to Kay's experience where she corrected her client in front of the husband.

Our model takes this a step further – both lawyers expressing empathy for both clients builds exponentially more trust. We don't have to come up against a problem to try to express it – it just occurs naturally in the flow of the conversation. It doesn't sound forced or false – because neither lawyer has an agenda.

Strategy two: the Round Table Pre-nuptial Agreement

Pre-nuptial agreements are tricky beasts. We lawyers must transform from helping a couple un-couple (hopefully more consciously than unconsciously) to instead helping them become a married couple. Our obligations here are not unlike that of the medical profession to 'first do no harm'.[10] If the ultimate result is that the parties decide not to be married, it should not be as a result of the lawyers having created conflict where none was justified.

There will be times when pre-nuptial agreement negotiations get difficult. Sometimes a party's dignity can be violated. Hearing something that causes them to believe their intended spouse does not place value on what they bring to the marriage or the other party being secretive, can be fatal to the start of a life together.

It is our role as lawyers to navigate the parties through those rough seas. As you will see from the example we provide below, sometimes it is better for the lawyers to step in and take control of the ship where it might otherwise cause irreparable damage.

Kay and Jennifer have developed a model for negotiating and drafting pre-nuptial agreements via round table conference and co-operative discussion between the lawyers.

One of the important parts of that process, is to drill down to the interests of each party around not just the proposed agreement, but the marriage itself. You will see why this becomes important.

So, here we have set out some questions we might ask the happy couple together during a round table meeting between the parties and lawyers.[11]

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[10] Widely believed to be part of the Hippocractic Oath but this is not actually the case. However, it's not a bad philosophy when dealing with trauma – as both doctors and family lawyers and mediators commonly are.

[11] Credit for these questions to Kenneth Cloke 'The Art of Asking Questions'. Whilst designed by him in relation to mediating pre-nuptial agreements, they work also in this context

These are designed to build understanding and trust between the parties themselves, and with the lawyers. They are also an icebreaker to remove the otherwise clinical aspects of a prenuptial agreement and ensure the parties are focussed on the relationship, not just the money – so we have a place to bring them back to if things get difficult.

> *Does this feel strange you, discussing your divorce before you are even married?*
>
> *How did you meet? What attracted you to each other? What do you love about each other? What made you decide to get married?*
>
> *Why are you interested in signing a prenuptial agreement?*
>
> *What does the word 'wife' mean to you? The word 'husband'?*
>
> *Why do you think it is important to clarify your intentions and agreements regarding the legal or property issues in your marriage?*
>
> *What does money or property mean to you? Why do you want it? What are you afraid will happen if you don't reach an agreement about it?*
>
> *How will you pay for your joint living expenses?*
>
> *How would you like to handle illness, old age, and retirement?*
>
> *What would you like to happen if you decide to separate or divorce? What would you most like to avoid? How would you like to feel about each other in the process?*
>
> *What questions would you most like to ask each other that you haven't yet had a chance to ask?*
>
> *What questions would you most like to be asked right now by the other person?*
>
> *What would you like to say to each other as reassurance that, in spite of having separate interests in negotiating the difficult issues, you really do love each other and want to be married?*

The questions *"Why do you think it is important to clarify your intentions and agreements regarding the legal or property issues in your marriage?" and "What does the word 'wife' mean to you? The word 'husband'?"* became critically important in the following example.

The parties were engaged to be married. The wife was in her late 40s and the intended husband in his late 50s. The husband had 3 adult children and the wife had an adult daughter.

Before we asked the first question, we have assumed that the intended husband, who had first contacted Kay inquiring about a prenuptial agreement, was the protagonist. Well, we were wrong. The answer to the question was actually given by Jennifer's client, the female fiancé. And it came out as a story.

It transpired that the intended husband was a widower.

It became quickly apparent that:

- The husband and the wife had very different views of what they each considered to be the role of wife and husband
- They had never previously discussed their differing views of what their marriage would be
- There were 3 adult children who were highly invested in their father's finances and less so in his relationship happiness. We had 4 relationships to protect.
- The wife was very concerned not to be seen as a gold-digger and was originally content to accept an agreement both lawyers considered vastly detrimental to her.

So that was the true context of this prenuptial agreement.

It was for Kay and Jennifer to walk the parties through both together and in individual meetings to come up with something that would be reasonable for each party and ensure that their looming marriage proceeded.

The question was then, how to approach this.

The relationship that had been developed from the first meeting between the parties and the lawyers where interests had been explored and both lawyers had heard each parties' perspective, was crucial. Jennifer and Kay were able to agree that Kay, rather than the wife, would take this issue back to the husband, and explain to him, from her perspective the predicament his fiancé faced. This provided a safe space for the husband to express his concerns without damage to the wife and Kay was then able to workshop some solutions with the husband The solution needed to be something that met both parties' interests. The husband then talked with the wife, putting forward options that Kay was confident would meet the wife's interests, so there was no fear of insult. A solution was developed which was able to reach all of these goals.

At each stage where a problem was encountered, our response was thoughtful and discussed, before being implemented. There is no room for knee-jerk reactions in negotiating a pre-nuptial agreement. We were fully engaged in thoughtful, purposeful communication.

Strategy three: Collaborative Practice with a high conflict couple, commenced as a without prejudice meeting, without lawyers assigned

As expressed earlier, much of the model we have developed derives from working and training together in Collaborative Practice and mediation.

However, our model of Collaborative Practice is also evolving. Just because we were trained a certain way, doesn't mean we always have to do it that way.

Here is an example of how we have successfully used our model and techniques in Collaborative matters:

An accountant contacted Jennifer to discuss a client who was separating and had a business. Jennifer had previously discussed Collaborative Practice with her and floated the idea. A meeting was arranged at Jennifer's office, with Kay attending. Neither Kay nor Jennifer had met the clients. Neither of us was aware that the wife had been given very little information about the meeting by the accountant or the husband.

When the wife arrived, she was defensive. Jennifer and Kay did not, at that point, know why.

As we often do, in the model we have developed together, the first meeting was conducted as a without prejudice meeting. There was no initial commitment to engage in a collaborative process. This was deliberate. Before the parties – and we – can make a

decision about best process, we need to first see the dynamic in the room, how they interact and most importantly, build trust.

There was also no allocation or selection of lawyers at the beginning of that meeting.

Kay and Jennifer engaged the model – much as described in Strategy one – asking questions, exploring interests, expressing empathy and explaining the parties' options to progress to an agreement.

During this piece, the wife disclosed that she had come to the meeting expecting an ambush. However, she was reassured by the manner in which the meeting had been conducted that this was not the case. Kay and Jennifer being neutral advisers and their behaviour and communication during the meeting, was critical to creating the environment that reassured her.

Advice was given by both lawyers, from a neutral perspective. It did not need to be from the perspective of acting for one party because the advice is the advice, regardless.

At the end of the meeting, the parties spoke about which process they preferred to utilise.

Both expressed a preference for Collaborative Practice.

It was then time to select their lawyers. Both parties expressed they were happy to work with either lawyer.

The matter then proceeded as a collaborative matter, with joint meetings and offline meetings convened.

During the course of the matter, Jennifer's client had a very high level of trust in Kay. More trust than he had in the wife. He had an unwavering belief that Kay understood him and what he was trying to achieve. When things got difficult, and he wanted to start making ultimatums, Jennifer was able to get him to allow her to address the issue with Kay, to take to the wife. Every time, he believed that Kay would do the right thing by both he and the wife.

Conclusion

These are just three ways in which we have used our model. We are continually applying and evolving it to fit the different situations in which we find ourselves.

We encourage you to try it and to share with us your successes and how you have adapted it to work for you. Let us know the different situations in which you have applied it.

We also welcome all of you to visit us in Australia and share a coffee, wine or meal, or attend one of our Collaborative Practice group meetings, a seminar, conference or training.

We are always open to contact via email, Linked in or Facebook and would love to hear from you.

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