



Book Review

Mediating with Families by Linda Fisher and Mieke Brandon, 3rd ed, Law Book Company, Sydney, 2012, \$88.00 ISBN 9780455229775.

Mediation can be conceptualised as being a journey for the mediator as for the parties. In that sense the mediator is the driver of the process, steering the car in which the parties are seated. Making assessments or decisions on how to proceed is like turning the steering wheel to keep the car on the road. Sometimes the mediator turns the wheel to the right, sometimes to the left, sometimes a little more to the left, and so on. The mediator's job as driver is to continually monitor the progress of the car, making adjustments as needed. The final destination of course, is where the parties decide where they need to be.¹

Linda Fisher and Mieke Brandon first jointly embarked on the project of educating those interested in mediating with families over 10 years ago, releasing the first edition of *Mediating with Families* in 2001.

As noted by Hilary Astor in her preface of the third edition of *Mediating with Families*, since 2002 family mediation in Australia has 'moved and matured' at a 'cracking pace'.² Many practitioners working in the family law sphere are aware, the 2006 amendments to the Family Law Act 1975 (Cth) (the Act) has mandated, in the majority of cases, that separating parties dealing with a dispute relating to children engage in family dispute resolution prior to commencing litigation.³

Fisher and Brandon have rightly identified their audience to be a growing wide one, including 'counsellors, therapists, managers of Family Relationships Centres, lawyers, professional bodies, policy makers, academics authors . . . together with less experienced mediators looking for a professional text to enhance their practice'.⁴

Fisher and Brandon as co-authors come to the table with a wealth of experience and continue to work in the system about which they seek to share their deep seated knowledge. Both are registered family dispute resolution practitioners pursuant to the Family Law Act.⁵ Fisher continues to benefit families working as a guardian at litem to the NSW Children's Court and the Administrative Decisions Tribunal. Brandon has been practising as a community mediator since 1998, and teaches, assesses and coaches mediation students at a range of universities. Both Fisher and Brandon are accredited under the National Mediator Standards.

Together Fisher and Brandon take readers on an educative journey about approaching mediating with families in Australian society. Mediating with families is set out in an orderly logical manner.

1 L Fisher and M Brandon, *Mediating With Families*, 3rd ed, Lawbook Co, 2012, Sydney, p 270.

2 Ibid, p vi.

3 Section 60I of the Family Law Act 1975 (Cth).

4 Fisher and Brandon, above n 1, p xvii.

5 Family Law Act.

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The authors are keen to establish the very wide but important context in which the reader might start to consider the subject of the family, drawing the reader's attention to a wide range of written resources including journal articles, texts and web resources about the family dynamics, conflict and the history of family mediation. Helpfully, early on in Ch 1, the authors inform the reader as to the current Federal legislative framework within which family dispute resolution is currently practiced in Australia. In this third edition, the authors discuss the recent and extensive 2011 amendments to the Family Law Act 1975 relating to the determination of the best interests of children and in particular, the need to protect children from harm.

At Ch 2 Fisher and Brandon take the reader through a range of different types of mediation approaches, including but not limited to the problem solving facilitative approach, the transformative approach and therapeutic approach. Fisher and Brandon provide assistance to the reader in a number of ways, discussing as the role of the mediator in each approach, providing case studies as to the practical operation of each method and providing diagrams breaking down the physical framework for each technique Fisher and Brandon informatively compare and contrast other family dispute resolution tools available to separating couples including counselling, conferencing (such as round table dispute management), conciliation and collaborative law.

At an early stage, Fisher and Brandon ask their reader as would be mediators to undertake an exercise of self reflection. This is a strong theme revisited throughout the book. At Ch 2 readers are asked to question their own beliefs, and to ask themselves why they have chosen a certain approach to mediation.

At Ch 3 Fisher and Brandon ask readers in asking themselves as to what could be appropriate and inappropriate roles for a mediator to take during the mediation process. The authors take readers through a step by step approach to managing the mediation process and offer case studies as to situations which prospective mediators may find themselves confronted with in and out of the room while conducting mediation. Importantly, this includes a prompt for would be mediators to continue to reflect on their own conduct, beliefs and to gain an understanding of the impact of those thoughts on the practice of mediation.

Fisher and Brandon focus their initial attentions on upon separating couples subject to family breakdown. The authors take care to inform prospective mediators as the nature and extent of issues faced by separating couples. Helpfully for would be practitioners not from a psychology or social work background, the authors discuss Emery's theory as to the possible emotional stages experienced by separating couples being the cycle of 'love, anger and sadness'.⁶ Fisher and Brandon examine the impact of the different emotional stages mediating parties might find themselves at and how would be mediators might manage strong emotions still present at the time of mediation. The authors name specific child related family law issues which mediators may have to address including relocation, grandparents' time with children,

6 Fisher and Brandon, above n 1, p 79, referencing Emery's work *Renegotiating Family Relationships, Divorce, child custody and mediation*, 2nd ed, The Guildford Press, New York, 2011, Ch 3.

younger children's issues and adolescent issues. The authors take care to discuss recent prominent research of the benefits of child focused mediation practice as discussed by Dr Jennifer MacIntosh relating to shared parenting.⁷ Fisher and Brandon deliver a very extensive list of additional resources readers could utilise to educate themselves and mediating parties about issues faced by separating couples, parents and children and same sex couples.

Interestingly at Ch 5 Fisher and Brandon discuss the use of mediation as a tool for parties to establish ground rules for future relationships. The authors challenge readers to offer mediation as an opportunity for parties to agree upon future financial arrangements and parenting of their children and discuss the legal options available for parties to document any agreement reached. The authors provide a number of interesting case studies as to agreements which may have been reached by couples in same sex relationships, some of which may not necessarily be legally binding in the current Australian family law sphere.

Fisher and Brandon devote a significant chapter of *Mediating with Families* to discussion of the mediation of financial and property disputes. The authors provide background information as to the legislative framework within which family law disputes may be determined and offer some practical suggestions by way of case study as to how to progress through a financial mediation. Fisher and Brandon provide some insights as to what psychological issues separated parties may bring to the financial mediation table. This aspect of the book may provide assistance not only to would be mediators but also lawyers looking to improve their negotiation skill set in family law practice. Fisher and Brandon highlight the interconnectedness separated parties may experience between property negotiations and parenting disputes and proffer up examples of agreements which would be mediators may assist parties to draw at the conclusion of a mediation. It is noted that some of the agreements suggested may not, be strictly speaking, compliant with legislative requirements as to secure for parties a legally binding agreement.

The authors invite readers to consider the use of mediation to negotiate not only the breakdown of marriages or de facto relations, but also for succession planning purposes. The authors acknowledge that the legal issues facing mediating parties in testamentary disputes are likely to vary from state to state however helpfully raise questions mediators might wish to ask in preparing the conduct of such mediations.

Fisher and Brandon dedicate a chapter of *Mediating with Families* to discussion of parent/child disputes and mediation of them. A real strength of this text, the authors spend significant time discuss parenting styles and underlying issues which parents and children may need assistance from a mediator about. The writers focus attention on the dynamic of adolescent/parent disputes and take would be mediators step by step through a suggested process of adolescent/parent disputes. They invite prospective mediators to consider the unique differences in power and the purposes and goals of such mediations. Helpfully the authors provide a case study as to a would be parent/adolescent mediation and suggest an example of an agreement which may be drawn up from such a mediation. The writers inform

⁷ Fisher and Brandon, above n 1, p 940.

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readers as to issues with confidentiality that impact on mediation with children under 18.

Fisher and Brandon touch on the challenges of mediating child protection matters including the facilitation of a mediation with anywhere between 12 and 20 parties and suggest some practical tips for approaching such mediations including using a co-mediator.⁸ The authors also provide information about 'whole of family mediation'⁹ a model which they acknowledge evolved from a child inclusive practice at *Positive Solutions* in Hobart. The authors express the view that the benefits of the Whole of Family Mediation Model are numerous including enabling the children to see their parents communicate effectively and to participate in such communications. The authors express the view that while not appropriate for all families, Whole of Family Mediation, after careful assessment and utilised properly with the right family, may present an opportunity for families to 'reduce levels of conflict'¹⁰ and 'build a more supportive family network for high risk children'.¹¹

Chapter 8 contains a wealth of information about less typical family circumstances in which mediation could be a useful tool. Fisher and Brandon identify step families and blended families as groups which may be prone to experience a range of issues and which may benefit from mediation.¹² The authors discuss the internal family dynamics which may be at play in step families and the challenges for all members of such families. Otherwise the authors discuss mediating between children and their elderly parents including disputes about heirlooms, caring and nursing home and accommodation issues. Fisher and Brandon acknowledge that issues pertaining to guardianship authority and powers of attorney are delicate ones which may create conflict between parent and child, or indeed siblings. Most beneficially the authors take the reader through case studies and practical issues for consideration for families in these situations. The case studies on this topic provide would be mediators with some things to think about and questions for thought.

At Ch 8, the authors also touch upon issues relating to mediating families who have been in some way party to adoption. Fisher and Brandon identify at least four situations where family mediation might be helpful including unplanned pregnancy¹³ issues surrounding adopted children and adoptive parents, birth parents and the adopted child. In detailed case studies the authors open discussion about ethical dilemmas faced by mediators in these more atypical mediation and sensitive settings. For example, how to treat sensitive information about fears and concerns of adopted persons shared in private session on one on one with mediating parties. Can the mediator withhold key sensitive information from all mediating parties? Where do the mediator's and the mediating parties' obligations to fully disclose fit into this difficult circumstance? Should and can the mediator actively encourage one or both parties to disclose what he or she might consider to be key information?

8 Ibid, p 207.

9 Ibid, p 209.

10 Ibid, p 210.

11 Ibid, p 210.

12 Ibid, p 213.

13 Ibid, p 236.

The authors provide readers with some insight into possible cultural challenges facing families who have adopted internationally or inter-racially. Would be mediators are encouraged to consider specifically researching cultural issues and also to be prepared for what may be a gravely sad situation for all concerned.¹⁴

In concluding Ch 8 Fisher and Brandon touch upon possible issues faced by families formed through surrogacy and assisted reproduction. The authors inform readers as to the complexities surrounding the legalities of assisted reproduction in Australia and give a case study relating to an overseas altruistic carrier. The authors acknowledge there are no easy answers for these evolving family arrangements and invite readers to understand that mediation may not be suitable to all in such situations. The readers provide a wealth of additional resources including articles and websites on topic.

In the final 3 chapters of the book Fisher and Brandon turn to practical, procedural and skills based considerations which mediators must confront in conducting all mediations whatever the issue.

Mediators must undertake a process of intake and assessment of possible mediations. The authors ask mediators to form a practice of asking if mediation will be suitable for prospective parties and present a long checklist of factors mediators might wish to consider as to mediation suitability such as risk of violence, allegations of abuse, mental illness, potential power imbalances and costs v benefits of engaging in dispute resolution.¹⁵ Family Dispute Resolution practitioners must consider suitability with specific reference to the Family Law (Family Dispute Resolution Practitioners) Requirements 2006.¹⁶ The authors set out to educate mediators about the purpose of intake being twofold, first, to inform prospective parties, and secondly for the mediator to discover the issues which might form the mediation agenda. Fisher and Brandon highlight the skills of assessment the mediator must possess in determining challenges such as levels of trust between parties and their ability to resolve conflict. Also, the skill of asking questions to realistically assess and form a view about allegations of family violence in reviewing the behaviour of all parties and responses to mediator questioning.¹⁷

While some bodies providing family dispute resolution have a blanket rule, allegations of family violence result in lack of suitability to mediate, Fisher and Brandon test readers during Ch 9 by stating it might be too simplistic to 'say that mediation is not suitable where there has been violence in a relationship'.¹⁸ The authors express the view that any decision to mediate in cases of family violence should be based on whether the alleged victim is capable of 'dealing with the alleged perpetrator in mediation'.¹⁹ The authors challenge readers to consider the possibility that mediation might present perpetrators with an opportunity to demonstrate reformed behaviour, or for victims to show they are no longer frightened. The authors attempt to educate

14 Ibid, p 244.

15 Ibid, p 252.

16 Family Law (Family Dispute Resolution Practitioners) Requirements 2006 Pt 7 reg 25.

17 Fisher and Brandon, above n 1, p 258.

18 Ibid, p 259.

19 Ibid, p 259.

readers by sharing studies by Kelly and Johnson about the four different types of violence in the intimate partner relationships.²⁰

Fisher and Brandon invite prospective mediators to, at the conclusion of the intake process, to consider the suitability of mediation and in doing so, if mediation could still be achievable under special conditions such as with the benefit of legal representation, with support persons present, or with a co-mediator.²¹ The authors guide prospective mediators about the sensitivity required when informing parties that mediation is not suitable for them.

In discussing the challenges of intake sessions for mediators, Fisher and Brandon ask mediators to continue the exercise of self reflection and caution would be mediators about forming hypotheses about family circumstances during intake, forming a bias toward one party incapable of flexibility or succumbing to pressure to mediate in circumstances where it is not suitable.

Importantly the authors extrapolate on the duty of care issues faced by family mediators. Helpfully Fisher and Brandon draw the reader's attention to a sample code of conduct for mediators. The authors reinforce that mediators have a duty to safeguard parties to mediation, and related family members from harm. Would be mediators are reminded of their obligations to explore issues of substance abuse, mental health concerns or addiction before making assessments of suitability for mediation.

Mediators require the skills to terminate mediations safely and effectively. Fisher and Brandon suggest a step by step technique of would be mediators explaining to parties why the mediation is to be terminated based on 'their observations, the legislative requirements and the perspective of their own practice'.²²

Fisher and Brandon inform mediators that they must develop 'ongoing critical awareness'²³ for the purposes of assessing mediations. The authors challenge mediators to continually self reflect during the mediation process and question their own thoughts and beliefs, and hypotheses about the mediation and parties participating.

One of the key skills encouraged by the authors is that of 'walking in the shoes of the parties'.²⁴ Another, awareness of self, is to examine what preconceived ideas, thoughts and notions you as the mediator might bring to the table. Questions to ask include: Are you being triggered with a negative reaction? Are you making assumptions? Are you pushing the parties in a certain direction? How are you feeling during the conduct of the mediation? Are you frustrated about how things are progressing?²⁵

At Ch 9 Fisher and Brandon discuss the concept of power balance between parties during mediation. It is acknowledged that ultimately, the mediator is the most powerful person in the mediation room.²⁶ Possibly one of the most helpful tools in this text, the authors provide a list of techniques which may be employed by mediators from beginning to end of the mediation process to

20 Ibid, p 261.

21 Ibid, p 264.

22 Ibid, p 268.

23 Ibid, p 270.

24 Ibid, p 273.

25 Ibid, p 274.

26 Ibid, p 283.

keep power as balanced as possible in the particular circumstances. These include enforcing ground rules, controlling communication between the parties, the use of private sessions and using a shuttle mediation process.²⁷

One of the new additions to this third edition is a discussion of working with same sex couples. The authors suggest, with reference to recent studies undertaken about mediating with same sex couples, that same sex couples consider a range of qualities important in a mediator, 'sensitivity, open mindedness and a non judgmental attitude, appropriate language and body language'.²⁸ Fisher and Brandon explore these concepts specific to same sex couples and discuss them at length.

In concluding ch 9 Fisher and Brandon remind mediators of the need to maintain confidentiality. The authors do highlight ethical dilemmas which might arise from the need to protect confidentiality on one hand, and safety of parties, as an example on the other. The authors acknowledge that in some cases, statute dictates the limits of confidentiality. A number of case studies are provided together with some thought provoking questions. The authors acknowledge however there are no clear answers to some of the more complex dilemmas.

At Ch 10 Fisher and Brandon share more skills with prospective mediators. They open the chapter with detailed discussion about the benefits and elements of co-mediation, the practice of conducting a mediation with at least two mediators. The authors also discuss the use of private sessions including the possible purposes and use of those sessions. The authors discuss varying points of view relating to the extent of confidentiality of such private sessions. At Ch 10 the authors also delve into the practice of shuttle mediation, a technique commonly encountered by family law solicitors and family law clients in court settings. Often utilised in circumstances where parties have difficulties communicating directly,²⁹ the authors suggest that shuttle mediation presents numerous challenges for parties and mediators alike.³⁰ Helpfully the authors provide a thought provoking mediators 'checklist'³¹ for preparing and conducting shuttle mediations. They also discuss conducting telephone mediations and online family mediation.

The remainder of Ch 10 is devoted to detailed discussion about negotiation styles and techniques. Here Fisher and Brandon return to analysis of the theory of how people manage conflict and then proceed to discuss the role of the mediator in negotiations. The authors highlight that the role of the mediator can be one of educator to 'provide parties with the information and understanding about how to negotiate more effectively'.³² Again, using the checklist format, the authors talk readers through the ways in which mediators can help parties to prepare for and participate in mediations in particular by fostering 'interest based negotiations'.³³ Mediators are asked again to meaningfully reflect upon their own approach, whether it be 'competitive,

27 Ibid, p 282.

28 Ibid, p 285.

29 Ibid, p 310.

30 Ibid, p 311.

31 Ibid, p 315.

32 Ibid, p 330.

33 Ibid, p 331.

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compromising, accommodating or collaborative' and retain a consistent awareness of their own influence during the process.³⁴ In concluding Ch 10 the authors spend some time dealing with impasses, how to recognise them, and what techniques might be used to move parties to pass them.³⁵

At Chs 11 and 12 Fisher and Brandon take readers on a useful journey of the language and culture of mediation. Both chapters are rich with diagrams, including those demonstrating communication in dispute resolution processes including mediation. In Ch 11 the authors inform the reader that in their view 'mediator communication involves a special way of speaking, special words and special body language' otherwise known to them as 'mediator speak'.³⁶ They delve into discussions as to the different style of questioning which would be mediators might employ and also discuss metacommunication including building rapport and matching speech. The authors finalise Ch 11 by discussing the art of summarising, paraphrasing, metaphrasing and reframing, all essential skills for a prospective mediator.³⁷ At Ch 12 the authors conclude the text by specific discussion as to cultural issues and mediation.

Conclusion

In the third edition of *Mediating with Families* Fisher and Brandon successfully take the reader on a journey of continued self reflection while educating about the finer points of family mediation along the way. The text is comprised of a balanced mix of mediation related theory on one hand, and practical information including checklists and case studies on the other. The authors generously share an extensive range of references and resources inviting readers to delve further into any subject if desired. This is a text which is indeed a 'must have' for the library of any student mediator, family dispute resolution practitioner and/or lawyer. It offers opportunities for seasoned practitioners to brush up on the law and skills in a condensed but easy to read format. Highly recommended.

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³⁴ Ibid, pp 334–5.

³⁵ Ibid, pp 340–8.

³⁶ Ibid, p 355.

³⁷ Ibid, pp 360–72.