MEETING IN THE MIDDLE:

A STUDY OF SOLICITORS’ AND MEDIATORS DIVORCE PRACTICE

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Chapter one. Policy, Practice and Research Context

The study aims to compare how solicitors, solicitor-mediators and family mediators conduct disputes between separating and divorcing couples, evaluating the objectives, strengths and limitations of the approaches of each of these groups. It provides evidence about informal processes in law surrounding relationship breakdown, particularly as they affect children. The policy, practice and research context for the study is traced. In particular the main provisions of the Family Law (Scotland) Act 1985 and the Children (Scotland) Act 1995 are outlined. The development and importance of private ordering on marriage breakdown and other recent trends in family law in Scotland are discussed. Some recent research on the work of solicitors and mediators with divorce clients is reviewed.

Chapter two. Methodology

Background

The study follows on from research undertaken by Social and Community Planning Research on the role of mediation in family disputes in Scotland. Using a different methodology, the current study develops and explores in detail some of the themes identified in the SCPR study.

Research Method

The research method used for the study comprised a modified form of the simulated client approach. This involved the development of three fictional case studies of couples seeking a divorce or separation. Supplemented by a series of questions, respondents were asked to describe the sort of process they would envisage going through with the case study couple, having been given an outline of the ‘case’ prior to the research interview.

The Sample

To maximise the opportunities for comparability the focus of the study was on mediation which included both child-related and financial issues. In Family Mediation Scotland (FMS) terminology this comprises All-Issues mediation, for Comprehensive Accredited Lawyer Mediators (CALM) this is termed Comprehensive mediation.

Four criteria informed sample selection. Firstly, practical experience in Comprehensive (CALM) or All-Issues (FMS) mediation, or family law work (solicitors). Secondly, location: the sample was selected from practitioners working in the central belt of Scotland, primarily Glasgow, Edinburgh and Stirling/Falkirk, and Dundee and Perth. For the sample of solicitors, size of practice was a further sampling criteria. Lawyers were selected from practices ranging in size from sole-partner to 20-partner firms. Inclusion in the study was voluntary (travel expenses were available for FMS mediators), a willingness to take part was the fourth selection criteria.

The final sample comprised 48 practitioners: 19 CALM mediators, 13 FMS mediators and 16 solicitors.

The sample of solicitors had been practising, on average, for 12 years. On the basis of self-report, the proportion of the lawyers’ workload which comprised matrimonial or family work ranged from around 30% to over 90%.

The sample of 13 FMS mediators came from a variety of professional backgrounds. Practitioners’ prior experience in child-related mediation ranged from 3 – 14 years, as all-issues mediators length of experience extended from under one year to between 2 – 3 years. On the basis of self-report, the number of all-issues mediations commenced in the previous 12 months ranged from 1 – 8 cases.

Where information was obtained, the CALM sample had been practising as solicitors for an average of just over 14 years. The number of years of experience as CALM mediators ranged from 1 – 2 years to 4 – 5 years. The number of mediation cases practitioners reported handling over the previous 12 months varied from 2 to between 15 – 20 cases.

The reasons given by FMS practitioners for undertaking All-Issues mediation training to add to their training in child-related mediation, included “interest”, perceived demand for the service and the value it would add to their child-related work. Among CALM mediators the reasons for pursuing
mediation training included interest, an additional service to offer practice clients, a better way of resolving family disputes, and a way of honing or adding to their existing skills as solicitors.

**Research Instrument Design**

The fictional cases studies and the topic guide were developed through consultation with key individuals and organisations with relevant expertise, a review of literature and piloting. The issues discussed and the case studies remained the same across the sample, the wording of the topic guides was, however, slightly modified to reflect the different terms and procedures used by the three professional groups. The three fictional cases were developed to reflect what the three professional groups would regard as typical. The distribution of cases to individuals was by rotation. As a result some of the sample received cases which they perceived as atypical in some respects. For CALM and FMS mediators experience of Rule of Court referrals, domestic abuse and the value of the assets involved influenced perceptions of typicality. Among solicitors, typicality tended to be defined in terms of ability, or otherwise, of the case study ‘client’ to pay legal fees.

**Data Collection and Analysis**

The interviews which lasted around one-and-a-half hours were transcribed, and the data categorised using the Nud*ist software package. The design and analysis of the data was qualitative, and concerned with identifying themes and patterns across and within the three professional groups.

**Chapter three. Process Issues**

**Referral Sources**

Referral routes to solicitors may be influenced by fee scales and the preparedness of a practice to take on legal aid work. Word of mouth and familiarity with the firm may also be influential. For CALM and FMS mediators, Rule of Court referrals were a comparative rarity. Referrals to the sample solicitor-mediators tended to come from other solicitors and in particular from other CALM members.

**Establishing Appropriateness**

Among solicitors, a client’s source of funding, i.e. whether or not they are eligible for legal aid may be the main ‘screening’ criteria. For both CALM and FMS mediation there is some form of filtering of couples to establish their appropriateness for the service. From the accounts of sample practitioners appropriateness hinges on three criteria. Firstly, the issues in dispute. FMS mediators indicated that they would only deal with cases involving children. Secondly, the relationship between the couple, in particular their ability to co-operate and negotiate with each other. Thirdly, each individual’s preparedness to following the rules of engagement formally set out in the Agreement to Mediate (FMS) or Conditions of Mediation (CALM).

The responses to issues of domestic abuse, built into one of the case studies, was different between the professional groups. For both CALM and FMS mediators, information on domestic abuse was used to assess a couple’s appropriateness for mediation. Evidence of domestic abuse would not in itself exclude a couple from trying mediation, this would, though, depend on the recency and severity of the violence, and the effect on the vulnerable partner’s ability to negotiate freely. For the solicitors the same information on domestic abuse was a trigger to action, for example advising a client of the protections available through interdicts.

The majority of sample solicitors saw a role for mediation in disputes over contact and residence of children. They were less convinced of the value of mediation for resolving financial disputes. Concerns were expressed in terms of the ability of non-legally qualified mediators to deal with the perceived complexities of the law in relation to financial matters, and whether, in the mediation process, people were made fully aware of their rights and entitlements. Different filtering mechanisms were used by FMS and CALM mediators prior to beginning mediation with a couple. FMS mediators described how, prior to a first joint session, people would be seen individually by an intake worker whose role was both to inform the person about mediation, and
assess the likely appropriateness of the couple for mediation. CALM mediators would not necessarily have direct contact with either partner before the first joint session. Each individual would, however, be asked to complete and return a referral form before the first meeting. In part this may reflect the referral route to CALM mediation, and the assumption on the part of the mediators that referrers would pre-screen out people not felt to be suitable.

Initial Information Gathering
Preparatory background information collected by FMS intake workers, or via the CALM referral form, or in the course of first meeting between solicitor and client, appeared to be broadly similar. The one exception is a question asking couples to mediation what they hoped to get out of the process. No equivalent question was noted by sample solicitors.

For mediators this background information informed the filtering process and assisted the mediators to prepare for the first session. FMS mediators described how some of this information would be collected anew at the first session, partly to pick up any changes, and partly as a way of encouraging ‘joint ownership’ of the information by the couple. For solicitors, the collection of basic factual details was specifically geared to identifying courses of action.

Preparing the Users
FMS intake meetings would include an explanation about the process of mediation. In addition, at the first joint session, mediators would discuss with the couple the formal Agreement to Mediate which sets out what is required, including norms of conduct in the sessions. This is signed by each party. The equivalent in CALM mediation is the Conditions of Mediation letter, which covers similar issues, but does not include a comparable set of conduct norms. Establishing the framework for the couple is therefore formal and bureaucratic. Nothing of a similar nature was described by the sample solicitors.

Co-mediation
Whether mediators practice alone or co-mediate varies across the sample. For FMS mediators this depends on the Region in which they work. Among CALM members, personal choice, training requirements and the specific features of a case appear to influence practice. For both groups, however, the financial implications of having two mediators is felt to act as a disincentive to what practitioners feel to be good practice.

Setting Agendas, Identifying Priorities
In the context of the solicitor-client relationship, priorities appeared, to a great extent, to be determined by the lawyers. Over half the sample of solicitors suggested that their first consideration would be the children. The divorce action would take a low priority. Where a client was suggesting that they had been subject to unreasonable behaviour by their partner solicitors would establish the need for interdicts, high priority would also be given to resolving immediate accommodation and financial needs.

Both CALM and FMS mediators regard the identification of issues and the setting of priorities as the parties’ responsibility. The majority of mediators would, however, anticipate looking initially at arrangements for the children. The responses of the FMS mediators in particular suggest this reflects the values base of the service.

Option Identification
Both CALM and FMS mediators described a process by which each individual’s aims and objectives were made explicit, the purpose being to establish a baseline against which options could be measured. This might involve the mediator ‘translating’ stated aims into terms perceived to be less confrontational or more appropriate to the process.

In general solicitors took as read the information on individuals ‘preferences’ stated on the research information sheet provided.
The accounts of both CALM and FMS mediators suggest a difference in emphasis between those describing the option generation process as primarily couple-led, and those who describe a more proactive approach on the part of the mediator. In practice, mediators’ accounts suggest options are generated by both the couple and the mediator.

For solicitors, the identification of options is accompanied by an indication of the preferred course of action, although the final decision rests with the client. Mediators seek to distance themselves from identifying preferred solutions, this is intended to be the couple’s joint decisions.

For solicitors, the approach to option appraisal is a transparent process of outlining, on the basis of their knowledge and experience, the pros and cons, of different approaches. In the mediation context the process is both transparent and opaque. The transparency of the process lies in the openness of information sharing, the identification of aims, objectives and issues, and the joint discussion of possible options. The opacity of the process emerges from the way in which practitioners, also drawing on their expertise, appear, from their accounts, to subtly lead people in particular directions. This strategy is more indirect than is evident from solicitors’ accounts. While a sophisticated approach, it may be at odds with the rhetoric of mediation which suggests neutrality, impartiality and couple control.

In evaluating different options with, or on behalf of parties, both solicitors and mediators appear to draw on four benchmarks against which to measure the appropriateness of a particular option: whether proposed options are fair or reflect rights and entitlements; whether options are in the child’s best interests; whether what is proposed is ‘practical’ or ‘realistic’; whether the solutions are within the law or what a court would recognise as appropriate.

For FMS mediators the ‘Principles of Fairness’ appears to relate to norms of conduct as well as reflecting an outcome objective. Insofar as CALM mediators and solicitors refer to ‘fairness’ as a benchmark, it is in the legal sense of a ‘fair and equitable’ division of assets.

Mediators appear to specifically avoid using the legal language of ‘rights and entitlements’. For solicitors, however, these terms are used to describe the normative measures around which negotiations take place.

All three professional groups use the phrase ‘the child’s (or children’s) best interests’ to indicate the benchmark for resolving child-related disputes. Although reflecting the principles embedded in the Children (Scotland) Act 1995, it was rarely defined specifically in these terms. All three groups, however, made the assumption that the child’s interests would be served by continued involvement of both parents. For solicitors this could mean their advice may be contrary to a client’s stated preference.

Solicitors and mediators would draw a couple’s or client’s attention to the ‘practicalities’ of the proposed options, or encourage them to consider how ‘realistic’ they were. These terms enable practitioners to share their professional understandings and assumptions with couples, and may also serve to guide people towards particular solutions.

Reference to the law and the interpretation of the law by the courts as a benchmark was used differently by the three professional groups. For example, from their accounts, it appears that solicitors and solicitor-mediators were more likely to anticipate making explicit reference to the Children (Scotland) Act, than FMS mediators. For solicitors this may serve the purpose of reining in the expectations of a client. Solicitor-mediators described a more positive usage as a means of reassuring both parties of their continued involvement with their children.

FMS and CALM mediators as well as solicitors would anticipate referring couples and clients to the Family Law (Scotland) Act in the context of discussions of finance. The Act was seen as setting the parameters within which options could be developed.

**Documenting Proposals**

For solicitors, the anticipated documentary outcome from the process was a legally binding Minute of Agreement. For couples using FMS mediation any proposals would be documented in a Memorandum of Understanding. CALM mediators produced a Summary of Mediation. Neither the Memorandum or the Summary are legally binding, but serve to narrate what the couple propose and the reasons behind these proposals. The requirement for these to be taken to the parties’ solicitors to be made into a legally binding document was regarded by solicitor-mediators as a legitimate check and balance. For FMS mediators, however, there appeared to be a tension between seeing the role of the advising solicitor as a valuable check, but also as potentially subverting the mediation process.
Chapter four. Strategies for Problem Solving

In mediation, negotiation is face to face and joint between parties, facilitated by the mediator. The primary means of communication and expression throughout the process is visual, through the display of information, and verbal between the participants. A key strategy is information sharing, including the sharing of emotional concerns. The solicitor-client route is characterised by its particularity, negotiation is by proxy, between solicitors acting on behalf of parties. The character of communication places greater emphasis on the written format. Solicitors place less emphasis on responding to their client’s emotional concerns as a formal strategy.

In disputes over children, solicitors accounts reflect the principle of non-intervention embedded in the Children (Scotland) Act. Unless there was a point of law at issue they would encourage their client to resolve child-related issues informally, possibly by attending mediation.

In financial matters, solicitors described the strategies they would employ in negotiations with the other party’s lawyer. The touchstone was ‘achieveability’, in terms of the law, the interpretation of the law by the local courts, and the resources available to the couple. Solicitors’ roles included both advising and moulding expectations.

CALM and FMS mediators described similar strategies when dealing with financial issues, including information sharing, exploring and assessing options. In the context of finances mediators would also be involved in reducing people’s expectations.

In response to child-related matters the strategies CALM and FMS mediators described are not dissimilar including: emphasising the positive, discussion of past and current arrangements, exploration of the practicalities of possible future arrangements. Both practitioner groups would explore possible interim arrangements for the children while discussions were in progress. Where the two groups differ is in the assumptions, values and expectations they bring to the process. FMS mediators appear to draw on a discourse which stresses social and moral responsibility, and a service value system which places the child at the centre. CALM mediators stress the importance of achieving the best for the children, but appear to draw more heavily on legal norms as a formal benchmark of rights and obligations.

A strategy used by all three professional groups was reference to the law, specifically the Children (Scotland) Act 1995 and Family Law (Scotland) Act, 1985, and to the authority of the courts. Reference to the law was used in a positive way to set the parameters for options, as well as more negatively to rein in expectations.

Reference to the likely action of the courts could similarly be used both positively and negatively. On the one hand, the authority of the courts was used by all three groups as a benchmark to support or discourage a proposed court of action. On the other hand there was an element of ‘demonisation’ of the court. For CALM and FMS mediators recourse to the courts to resolve a dispute was represented as a loss of control over the process by the couple, opening up uncertainty and increasing conflict. For solicitors too, the court was presented as a potentially costly and conflictual forum, but one they would invoke as a strategic device in negotiations, or to which they would have recourse if these negotiations broke down.

Accounts of the processes and strategies reveal the difficulties of defining the boundaries between partiality and impartiality. For solicitors this was reflected in the tension between advising and taking instructions. For mediators, it is expressed in terms of the distinction between passing on information and giving advice. Arguably, while mediators do not explicitly indicate a preferred course of action, their role in generating options, and the use of references to the law and the authority of the courts, although described as ‘information-giving’, from the parties’ point of view may function in a similar way to solicitors ‘advice’.

Chapter five. Specific Legal and Policy Issues

Children (Scotland) Act 1995 – The Practitioners’ View

All three professional groups, when describing the key features of the Children (Scotland) Act referred to the emphasis on joint parental rights and responsibilities, obtaining children’s views and the shift from custody and access to residence and contact. In their general comments on the Act, solicitors and solicitor-mediators, but not FMS mediators, made specific reference to the principle of non-intervention.
CALM and FMS practitioners felt that the principles of the Act reinforced the philosophy and process of mediation. FMS mediators placed the stress on the value of the Act to the child. CALM mediators also referred to the joint rights it conferred on parents. Although the sample of solicitors acknowledged some of the benefits of the move away from custody, some were concerned that the principle of non-intervention introduced an element of uncertainty for clients. Discussions around the case studies suggest that insofar as mediators anticipated making reference to the Act it was to inform, clarify and reassure. It may also serve as an indirect way of encouraging people to reconsider their stated preferences. Lawyers made similar use of the Act, but in a more direct way to lower or modify people’s expectations.

**Obtaining Children’s Views**
Across the three groups there was an acceptance, in principle, of the need for children’s views to be acknowledged. The differences, within and across groups, centred on how this could be achieved. The majority of CALM and FMS mediators expressed a reluctance for direct contact with even older children: seeing it as part of the mediation process to enable parents to identify and respond to their children’s specific wishes and needs. Solicitors, too, would, in general, be reluctant to speak to children, not least because of the potential conflict of interests which may arise. Practitioners would look to the parents or other agencies or professionals to assist children to articulate their preferences. For solicitors the formal route of a court action, for which children over a certain age could obtain their own legal advice was an option.

**Child Support Agency**
As part of the information-giving process, CALM and FMS mediators would include a discussion of the role of the Child Support Agency (CSA), and the implications of CSA involvement. Mediators would suggest people contact the CSA helpline to obtain a ‘ball-park’ figure to assist the discussion. The emphasis was on encouraging couples to agree a suitable level of financial support for the children. FMS mediators’ comments did not extend to the operation of the Agency. Legal practitioners, whether interviewed in their capacity as solicitors or lawyer-mediators, were uniformly critical of the CSA. The three main criticisms were: the perceived inefficiency of the agency, specifically the length of time before assessments were made; the apparent incomprehensibility of the formulae for determining child support; and the uncertainty this created both for solicitors seeking to negotiate a settlement and for couples in mediation. To obtain financial support for children while waiting the outcome of a CSA assessment, solicitors would seek to negotiate an agreement on the understanding that it could be overturned once the assessment was made. Alternatively, lawyers acting for the parent with care of the child may seek a ‘back door’ route, by making an order for interim aliment for the spouse, under the Family Law (Scotland) Act.

**Matrimonial Property**
Mediators and solicitors would draw on the principles of the Family Law (Scotland) Act, 1985, when seeking to assist couples and clients to define matrimonial property. For CALM and FMS mediators collection of detailed financial information is via forms completed by each party: the substance and the relevant date for division of assets would be discussed as part of the mediation process. For solicitors, the process is one of questioning the client and obtaining the other party’s financial information from their lawyer. For solicitors the collection of this information is preparatory to the negotiation process. In their approaches to the Section 9 principles of the Family Law (Scotland) Act, specifically issues of economic disadvantage and the economic burden of child care, which might influence the division of the matrimonial property, CALM and FMS mediators displayed a degree of reticence. The discretionary nature of the principles, the problems of quantifying the potential disadvantage, and the difficulties of realising any financial losses when resources are limited, appeared to discourage mediators from addressing these issues with couples in a direct way. For the solicitors, perceived economic disadvantage suffered by their client could be used as ‘levers’ in the negotiation process, but this had to be tempered by the financial resources available, and the likely interpretation by the courts.
All the practitioners dealing with the two case studies which included details of occupational pensions would draw the couples’ or clients’ attention to the inclusion of the pension as a matrimonial asset. Although informing people of the legal principles, mediators were wary of appearing to give advice about the division of the pension. From the accounts of solicitors and mediators, the division of the value of the pension accrued during the period of the marriage was open to a degree of interpretation. It was an area where FMS mediators would consult with their Services’ legal advisers. Across the professional groups the potential for earmarking a pension was recognised. Solicitors were, however, equivocal as to the value of this as an option. Mediators, too, were ambivalent about this as an option for a couple to pursue, and would recommend a couple sought legal advice. For mediators, the future of the business partnership described in one case study would be included as part of the discussion. For solicitors the approach was more strategic and involved weighing up the implications if their client relinquished their stake in the business. Solicitors, more than CALM and FMS mediators, made reference to the distinction between the division of the business as a partnership or as matrimonial property. For all three groups self-employment created a degree of wariness. FMS mediators, for example, may seek out advice from legal advisers attached to their service. Solicitors noted the difficulties of agreeing a level of disposable income and of enforcing payment of child support when the other party was self-employed.

In response to a dispute over items of property gifted by a third party prior to the marriage of one of the case study couples, CALM and FMS mediators, as well as several solicitors alluded to the ‘tricky’ definitional issues relating to gifts and inheritances, especially if items were subsequently used in the matrimonial home. All three professional groups would be looking for couples to arrive at a compromise solution and avoid litigation.

Ensuring Financial Disclosure
Both CALM and FMS mediation requires couples to give an undertaking to provide full disclosure of their assets. The mediators do not, however, have power of enforcement. The safety nets available to them include: information-sharing in the mediation sessions; verification of incomes, assets and liabilities through vouching; the scrutiny of proposals by each party’s advising solicitor; and termination of the mediation. Solicitors would obtain financial information from their client and from the other party’s lawyer. For corroboration, solicitors would seek vouching of both parties assets. Additionally, lawyers would seek formal warranting of disclosure. If disclosure was not forthcoming the ultimate sanction was recourse to the courts. But neither solicitors nor mediators felt they could be entirely sure that there had been disclosure, especially if one party was unsure of the other party’s resources.

Divorce
From the accounts of CALM and FMS mediators, neither divorce itself, nor the grounds for divorce, was identified as a significant issue for discussion within the context of mediation. Solicitors regard divorce actions as part of their brief. Their approach was to actively discourage a fault based divorce. Their preferred approach was a negotiated settlement and a divorce based on consent, on the basis that this was less expensive for the client than a court based action, and avoided additional acrimony.

Costs, Charges and Legal Aid
CALM mediators and two of the FMS Regions included in the study, charge for mediation. Both groups felt that mediation was a cheaper way for a couple to resolve their disputes. Some solicitors were less sure of the relative financial advantages of mediation, for example if a non-legally aided client was paying both mediation and legal fees. Establishing legal aid eligibility, whether for mediation or for legal services did not appear relevant to FMS mediators. For CALM mediators, insofar as legal aid was of salience this tended to be in the context of charges for mediation. Among solicitors, assessing for legal aid eligibility and weighing up the implications for any subsequent financial settlement, appeared to be a routine element of their procedures.

Chapter six. Issues for discussion
The chapter compares mediators’ and solicitors’ practice in relation to selected issues that have been discussed in recent research literature on private ordering, including the extent to which lawyers and mediators act in a partisan or impartial manner, and foster a sense of empowerment for clients. It considers power imbalances between the parties in a mediation context, and how each group perceives other professionals doing divorce work and the law and the courts. It concludes that while there are important differences in the working practices amongst the three groups, there is in practice more common ground than one might expect from commonly made claims, for example, in relation to partisanship and impartiality. Rather than a strictly neutral stance, mediators show a departure from that norm in subtly advancing implicitly preferred options more compatible with the core values of mediation. Similarly, rather than a formally partisan position, solicitors operate in a more impartial manner between the parties, in order to secure a reasonable negotiated agreement. Although all groups try to establish what are the needs of the parties and their children, and al work within a common legal framework, mediators tend to speak more in terms of the ‘needs and responsibility’ of the parties, while solicitors tend to refer more to parties’ ‘rights and entitlements’. While all professionals stress parents’ continuing responsibilities towards their children, there is a difference in emphasis. Mediators are more likely than solicitors to refer to clients as parents with child-related issues to resolve than as individuals dealing with the consequences for them of the breakdown in their relationships. Rather than arguing that either mediation or lawyer-assisted dispute resolution provides greater client empowerment, we suggest that each approach embodies a different model of empowerment: a participation model for mediation and professional representation model for lawyer-assisted dispute resolution. Mediators place greater emphasis on fairness of the process; solicitors on the fairness of the outcome. Each approach may have particular strengths to offer to different couples with different disputes, and different histories of power imbalances. Each groups’ perceptions of other the professional groups divorcing assisting parties were mixed; other groups were seen as providing a valuable service, particularly for certain types of issue or at particular stages of the process, but important reservations were also voiced. Perceptions of the law and the courts were also mixed. Negative representations of court processes were used by all as a caution of the risks and costs inherent in failing to reach a negotiated settlement.

Chapter seven. Conclusions

The report concludes that there are both important differences distinguishing the activities of each group and significant similarities in values, priorities and objectives. The relationship between mediator-assisted and lawyer-assisted divorce forms a complementary framework, rather than defining mutually exclusive or alternative approaches. One could say that all of the divorce professionals aim to produce, by different routes, broadly similar outcomes: namely mutually agreed and enduring settlements consistent the Family Law Scotland) Act 1985 and the Children (Scotland) Act 1995, in which parental responsibilities can continue to performed by both parents and where the basis for the transition of the adult relationship is agreed. Areas for further research are identified.
CHAPTER ONE  POLICY, PRACTICE AND RESEARCH CONTEXT

1.1 THE RESEARCH STUDY AND AIMS
There is a widespread trend in family law towards greater informality in dispute resolution, that is, out-of-court processes, not only in Scotland but in other comparable jurisdictions. This trend is accompanied by a growing policy interest in mediation. This may be based in part on a belief that mediatory approaches and negotiated outcomes are less costly in economic and emotional terms than court-assisted outcomes, particularly where children are involved, and provide a better basis for continuing parental responsibility following divorce. The concomitant growth of mediation services, the emergence of qualified solicitors as mediators, together with changes in divorce procedure, and changes in civil legal aid in matrimonial cases, have also contributed to changing the context in which parties negotiate the consequences of the breakdown of their relationships, who is available to assist them and with what level of public support. These shifts in public policy should be informed by evidence about both formal and informal processes in law surrounding relationship breakdown particularly as they affect children, but also to assist the resource allocation decisions.

This in-depth qualitative descriptive study was commissioned by the Legal Studies Research Branch of the Central Research Unit of the Scottish Office (now the Scottish Executive). It was carried out from 1 October 1997 to 31 December 1998 by Fiona Myers, Research Fellow and Fran Wasoff, Senior Lecturer in the Department of Social Policy, University of Edinburgh. It is based on interviews with 48 solicitors, (all-issues) family mediators and solicitor-mediators, and uses a modified ‘simulated client’ approach developed in an earlier study of Scottish solicitors (Wasoff, Dobash and Harcus 1990; Wasoff and Dobash 1992; Wasoff and Dobash 1996).

The research aims to develop a picture of the procedures and processes solicitors, solicitor-mediators and family mediators employ and the goals they aim to achieve when working with people who are seeking or obtaining a divorce or separation. The term divorce here is used in its broad social meaning as the breakdown of a relationship specifically involving children, rather than focussed on the legal procedures of divorce. Thus, the aims of the research are three-fold:

• To explore the gains, but also the potential losses, arising from a move away from more formal approaches to dispute resolution following marital breakdown;
• To provide evidence about informal processes in law surrounding relationship breakdown, particularly as they affect children;
• To compare how solicitors, solicitor-mediators and family mediators conduct disputes between separating and divorcing couples, evaluating the objectives, strengths and limitations of the approaches of each of these groups.

The emphasis of the research is on the objectives and processes pursued by each group, rather than an analysis or comparison of outcomes.

1.2 POLICY AND LEGISLATIVE CONTEXT
It could be said that the current legislative context in family law for negotiating divorce agreements or as it is sometimes called, for private ordering, rests on the twin pillars of two major statutes: the Children (Scotland) Act 1995 and the Family Law (Scotland) Act 1985. Both set out a framework of principles and values which guides their detailed provision, but which leaves the courts substantial discretion in their interpretation. Below we summarise some of the key principles and provisions of each that are most relevant to this study.

1.2.1 Children (Scotland) Act 1995
The Children (Scotland) Act 1995 is a major, comprehensive and unifying statute concerned with the needs of children and their families across public and private law. It includes adoption procedures and the public childcare system in which local authority child care provisions together with the

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1 The term 'solicitors' is used throughout the report to indicate lawyers who are not practising as mediators. SOLICITOR-mediators are identified by their organisation (CALM) and function within the study, but are of course also solicitors.
Children’s Hearing system provide services, support, protection and substitute care to children. Within private law, the Act consolidates family law relating to children. The Act was the outcome of lengthy public debate and a review of public and private law relating to children. This included the 1992 Scottish Law Commission Report on Family Law and the 1993 White Paper, Scotland’s Children (Cm 2286). The provisions of the Children (Scotland) Act 1995 meet the requirements of the UN Convention on the Rights of the Child and the obligations to children in the European Convention on Human Rights. It is broadly equivalent to the Children Act 1989 for England and Wales in its scope and broad aims, although the two statutes differ in significant respects (Daniel & Ivatts 1998). In particular, the 1995 Act provides in statute for the first time a statement of parental rights and responsibilities, for which there is no equivalent in the 1989 Act.

The general principles and values permeating the legislation (some of which are long-standing in Scots law and therefore precede the 1995 Act) include:

- When parents, courts or Children’s Hearings consider a child’s needs, they are to regard the child’s welfare as paramount.
- Any decisions about a child’s future must take account of his or her views, in the light of the child’s age and maturity. This is presumed to apply to all children over the age of 12 and others who are thought to be capable of forming their own views. The views of children must be actively sought in court proceedings. The Act is clear that giving children a voice in proceedings that affect them is not the same as allowing the child’s wishes to dictate the decision, or saying that the child will always know what is in its best interests.

Non-intervention in family life by the state is preferred. The courts and Children’s Hearings should not take action unless intervention is clearly better for the child than no intervention. The part of the 1995 Act of most relevance to this study is Part I, which is concerned with family law and with parents’ (and guardians’) responsibilities. It came into force in November 1996. (Parts II (on the public childcare system) and III (on adoption) came into force in April 1997.)

**Parental responsibility.** Section 1 of the Act defines parental responsibility as parents’ particular duties and authority. A parent must safeguard and promote a child’s health, development and welfare until the child is 16. They must give the child appropriate direction until it is 16, and guidance until it is 18. They are normally the child’s legal representative until the child is 16, and have responsibility for a child’s property. Of particular importance for this study is that a parent who does not live with a child is expected to maintain personal relations and regular contact with him or her until the child is 16.

**Parental rights** flow from their responsibilities and mirror them (Section 2 (1)). Thus, parental rights are not absolute, but exist only to give parents the means to fulfill their parental responsibilities and to act in the child’s best interests (Edwards and Griffiths 1997: 85). So, in principle, parental rights cannot conflict with children’s needs or interests. However, in practice, parents’ and children’s (or indeed the courts and children’s hearings) assessments of what is in a child’s best interests can conflict, and the question remains as to whose interpretation should prevail.

Parental responsibility is seen as highly important, consistent with the value that children are cared for best within the family, without outside intervention in the form of legal proceedings. Parents are presumed to be responsible for bringing up their children. Parental responsibilities and rights are automatic and shared equally by both parents, if they are married. If parents are unmarried, only the mother has automatic responsibilities and rights. The unmarried father can acquire them on application to the court for an award of parental responsibilities and rights (under section 11(2)(b)) or by making an agreement with the mother (a Parental Responsibilities and Parental Rights Agreement) which is kept by the Keeper of the Registers of Scotland. An unmarried father without parental responsibilities or rights nonetheless has a child support obligation. Parental responsibilities and rights are not lost if a parent stops living with a child or is divorced or separated from the other parent.

Parental responsibility is embodied in the principle of non-intervention. However if it is in the best interests of the child, the court can make an order to remove some or all parental responsibilities and rights (Edwards and Griffiths 1997, 102).

If parents live apart the court may make a residence order (section 11(2)(c)) regulating where the child lives, and a contact order (section 11(2)(d)) regulating contact between a child and a non-resident parent. A residence order can instruct that a child lives with each parent for part of the time, and not only with one parent all of the time. Even if a child resides with one parent all the time after
divorce or separation, both parents have a continuing responsibility for the child’s upbringing. These orders replace the previous family law concepts of custody and access, which have ceased to have legal meaning in Scotland. Under the 1995 Act, parental responsibility is uncoupled from the post-divorce place of residence of a child. It is no longer the case that the courts will normally award custody on divorce to one parent which effectively removes the other parent’s parental responsibilities.

Although the 1995 Act is not about children’s rights, it does give children independent capacity to take legal action. A child can instruct a lawyer, apply for legal aid and sue its parents if one or both fail to meet their parental responsibilities.

The Act marks a shift in thinking about the status of children when their parents separate or divorce. Rather than children being treated almost as objects in the proceedings, part of the assets of the marriage which remain to be divided by the parties to the proceedings (the parents), children are conceived more as active participants themselves whose own views must be sought and considered. This does not mean that the courts will normally receive independent direct evidence from children. It is more likely that the courts will look for indirect evidence that parents’ arrangements regarding the children have been made after appropriate consultation with them, since the courts will be loathe to disturb agreements made by divorcing couples. The courts can even encourage divorcing parents to reach agreement about their children, by referring them to mediation (Ordinary Cause Rules 1993 33.22; see Edwards and Griffiths 1997; 104 n.). One of the issues for this research is the extent to which children’s voices and interests are taken into account in mediation and by solicitors acting on behalf of divorcing clients (See Edwards and Griffiths 1997; 15.22, p. 407).

1.2.2 Family Law (Scotland) Act 1985

This major statute sets out the legal rules that govern financial obligations from parent to child generally and between spouses on divorce.

Financial obligations of parents to children

All parents (biological and adoptive) owe an obligation of support to their children. This obligation (aliment) is not altered by whether or not a parent is married to the other parent, stops being married to the other parent, or by whether or not the parent lives with the child. The rules governing parental support of children in the 1985 Act remain the background legal framework, although they have been fundamental changes to that system since 1993 brought about by the Child Support Act 1991 and subsequent child support legislation (Wasoff and Morris 1993). See Edwards and Griffiths (1997) for a discussion of this legislation in relation to family law.

Financial provision on divorce

The Family Law (Scotland) Act 1985 is the main statute governing financial and property settlements between spouses when marriages end. It replaced the mainly discretionary framework with a set of explicitly articulated principles upon which financial provision on divorce is justified. Thus it is a framework of rules modified by discretion, for example, shown by section 8(2) which states that where an application for financial provision on divorce is made the court can make such an order as is:

‘(a) justified by the principles set out in section 9 and
(b) reasonable, having regard to the resources of the parties.’

Thus, both one principle and a test of reasonableness must be satisfied before financial provision can be made. The broadly stated test of reasonableness allows the court a wide discretion within the
constraints of the section 9 principles. There are five principles in all that may justify an award of financial provision, at least one of which must be satisfied. These principles are as follows:

9(1)(a) ‘the net value of the matrimonial property should be shared fairly between the parties to the marriage’ (fair sharing is defined in s. 10 (1) as equal sharing except in ‘special circumstances’ where a non-equal division would be fair).

9(1)(b) ‘fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family.’

9(1)(c) ‘any economic burden of caring, after divorce, for a child of the marriage under the age of 16 should be shared fairly between the parties.’

9(1)(d) ‘a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce; adjustment to economic independence’,

9(1)(e) ‘a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period’.

So, financial provision on divorce is only justified if there is a need for a ‘fair’ division of assets, or ‘fair’ re-balancing for economic disadvantages suffered in the marriage, or ‘fair’ sharing of the economic burden of childcare after divorce, or ‘reasonable’ award for up to a three year period of adjustment to economic independence after divorce, or ‘reasonable’ award for the relief of serious financial hardship,

and if to do so would be reasonable in view of the parties’ resources. There is in addition to the reasonableness test of section 8(2)(b) discretion required in the application of the principle to the particular case as to what would be ‘fair’ or ‘reasonable’.

The courts are given a wide range of powers in order to implement these principles and are directed to show a preference for a meeting claims for financial provision with a ‘clean break’ if possible. These powers include making a capital (lump) sum award, property transfer orders, payments of a lump sum by installments and deferred lump sum payments. If the claim for financial provision cannot be fully satisfied by a clean break award, only then should the courts consider periodic payments to an ex-spouse (known as periodical allowance). It is not commonly appreciated that there is no a priori maximum time limit for an award of periodical allowance, except for a limit of three years if the making of the award is based on section 9(1)(d) which justifies an award in terms of a period of adjustment to economic independence after divorce.

As far as the division of matrimonial property (which includes pensions) is concerned, it is presumed by Section 10(1) that a fair division will be an equal division unless ‘special circumstances’ apply. Thus ‘special circumstances’ allow for fairness to depart from the presumption of equal division. The Act give some guidance in section 10(6) of ‘special circumstances’, and the courts are directed to ignore all conduct apart from economic misconduct, but the list is not exhaustive, leaving a further domain for difficult questions and the exercise of discretion in decision-making.

It is important to appreciate that the 1985 Act deals with financial provision between divorcing spouses, rather than ex-spouses. Family law in Scotland terminates ex-spouses’ financial obligations to each other, except for those commitments made on divorce. Divorce represents the severing of a financial relationship between partners, even though continuing financial dealings as parents may remain. Thus divorce is the final opportunity for a spouse to compel a legally binding financial transfer of resources on their own behalf from the other spouse.

1.2.3 Further changes in family law

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2 Matrimonial property is defined in section 10(4) of the 1985 Act as ‘all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by gift or succession from a third party)

- before the marriage for use by them as a family home or as furniture and plenishings for such a home; or
- during the marriage but before the relevant date.’
Family law continues to develop as family structures and relationships evolve. On 24 March 1999, a consultative document, *Improving Scottish Family Law*, was published, suggesting the future direction of family law in Scotland. It proposes to implement recommendations made by the Scottish Law Commission, for example, in its *Discussion Paper No. 85 (1990) (on marriage and divorce)* and its 1992 *Report on Family Law*. The objective of the 1992 report was a coherent approach to ‘a comprehensive Scottish code of child and family law’ (1992; p. 1), some of which has already been enacted in the Children (Scotland) Act 1995. The 1999 consultative document proposes, *inter alia*, reform of the grounds for divorce to reduce the period of separation for divorces based on separation with the consent of both spouses from two to one year. The document suggests this change will reduce acrimony in divorces (perhaps by reducing the incentive to divorce on so-called ‘fault’ based grounds), but still leave enough time for couples to make arrangements for the future. The green paper also proposes to improve existing government support for family mediation and other family support services, and asks if support should be made statutory.

As stated by the Scottish Office Home Affairs Minister (p. 1):

“When a relationship breaks down, couples often need help to settle matters and mediation can make the whole process of divorce or parting less painful, particularly where children are involved. Sadly marriages do often end. We want to make sure that when a marriage does come to an end, the couple can get a divorce without the accusations or acrimony which would make it more difficult to make the best arrangements for the children. One possible way to take the heat out of divorce might be to reduce the period which couples have to wait to qualify for divorce purely on the grounds of separation from two years to one if they both agree to divorce.”

In May 1999, responsibility for legislation on Scottish family law passed to the Scottish Parliament.

1.2.4 Alternative dispute resolution and private ordering

Alternative dispute resolution (ADR) has assumed increasing policy importance, particularly in the area of matrimonial disputes. As the name implies, ADR is usually conceived of as a set of methods of resolving disputes that are an alternative to dispute resolution in the courts or via formal legal processes and litigation. It encompasses both criminal and civil law and developed in part as a critique of those processes, in part as a means to expand access to justice, participation by the parties in the resolution of their disputes, and to provide an alternative to what was seen as excessively costly and time consuming formal means of resolving disputes. It consisted of mediation, arbitration, conciliation and reparation. It began to develop more extensively in the 1970s and it has come to be used for the resolution of neighbour disputes, small claims and consumer disputes and most notably, family disputes. Associated with this development has been the growth in the range of professionals involved in assisting parties whose relationships have broken down (see below).

However, as ADR has developed, the boundaries between formal and informal processes have blurred and they have flowed into each other. For example, since 1990, sheriffs have had the power to refer divorcing couples to mediation at any stage of proceedings, originally under the Rule of Court 33.22, if appropriate (Garwood 1992), and since 1996, under OCR 33.22. There has been a clear policy preference in the 1990s favouring dispute resolution on divorce by informal (out of court) approaches to what is termed adversarial approaches (Mnookin 1984; Clive 1984). As one particularly influential Scots family law reformer has commented,

‘It is now generally seen to be a good thing if the parties settle the financial consequences of their divorce by private arrangement. A private settlement is likely to be less bitter and destructive, and certainly less expensive, than a court battle. On the other hand, there is a conflicting policy objective – the desire to protect the weaker party from exploitation. The law reformer who looks at this question today is,
therefore, likely to see private financial arrangements on divorce as a good thing provided they are fair, or at least not manifestly unfair. And the law’s basic response to private ordering in this sphere is likely to be the according of very considerable freedom subject to certain safeguards and controls. The debate is likely to be just how extensive, or how minimal, these safeguards and control should be.’ (Clive 1984; 347)

The encouragement of private ordering in public policy and the interpenetration of formal and informal processes is likely to continue in the light of the points made in the Green Paper, Improving Scottish Family Law, as above.

The Family Law Act 1996 in England and Wales gives positive encouragement to greater use of mediation in divorce. This policy response is intended to reduce the input of lawyers in the divorce process and to contain the growth in public expenditure on civil legal aid in matrimonial matters. In particular section 29 requires all divorcing couples in receipt of legal aid to have a mandatory mediation information session. It is the information session, and not mediation itself, that is mandatory, in contrast to some American jurisdictions; see Maclean and Edwards (1996). The consultative paper on civil legal aid Access to Justice Beyond the Year 2000 (Scottish Office 1998) considers whether a similar requirement should be introduced in Scotland. Out of court practices of solicitors have been researched in a baseline study of professional legal services in England and Wales before the implementation of the Family Law Act 1996, by Maclean and Eekelaar of the Centre for Socio-Legal Studies, Oxford and funded by the Nuffield Foundation. Solicitors were interviewed in-depth about the trajectory of cases begun 18 months before the interview, and examined the relationship between solicitors and mediators. The Legal Aid Board (for England and Wales) has funded mediation services under section 29 on a pilot basis. Research by Davis et al. is monitoring the operation of these pilot mediation sessions with a view to producing a cost benefit analysis, and an analysis of settlements in terms of time taken and quality. In June 1999, it was announced by the Lord Chancellor’s Department that the implementation of Part II of the Family Law Act 1996 is being deferred. In particular, this means delaying implementation of the requirement for divorcing couples to attend compulsory mediation information meetings, until a full assessment is available. Interim results of research monitoring pilot projects showed that only 7% of couples attending were diverted into mediation (Lord Chancellor’s Department 1999).

1.3 PRACTICE CONTEXT

Divorce has become a well-established ‘normal’ feature of social life in Scotland, with relatively high divorce rates compared to other European countries, but with levels similar to most other Anglo-American jurisdictions. Recently divorce rates have fallen slightly, but there remains a consistent broad trend since 1985 of more than 12,000 divorces a year in Scotland (Table 1.1), ending marriages whose median duration is 11 to 12 years. The proportion of divorces to marriages increased from 4% in 1961 to 37% in 1991 (Morris et al. 1993).

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<td>All divorces</td>
<td>498</td>
<td>1,776</td>
<td>8,319</td>
<td>13,373</td>
<td>12,399</td>
<td>12,787</td>
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<td>Median (years)</td>
<td>11</td>
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Source: The Scottish Abstract of Statistics No 26,1998, derived from Table 1C4

With divorce so commonplace, the formal legal component ‘has become less like a trial and more like an application for a change in status’ (Maclean and Eekelaar 1998). Nevertheless divorce and other civil legal actions arising from relationship breakdown make a considerable impact on the civil legal aid budget. Government has shown concern about containing the growth in public expenditure on legal aid, and this has been one force driving the development of alternative dispute resolution (Lord Chancellor’s Department 1996; Scottish Office Home Department 1998). However, increases in the total cost of civil legal aid in Scotland have not matched increases in England and Wales, since volumes are lower, although the costs per case have also increased sharply. There has been considerable debate as to whether civil legal aid ought to be extended to meet the some or all of costs of other methods of dispute resolution, especially mediation. The Scottish Legal Aid Board initiated in 1995 a pilot scheme, which is continuing, to make civil legal aid available for all-issues mediation.
by Family Mediation Scotland (FMS) or Comprehensive Accredited Lawyer Mediators (CALM) (Lancaster 1998).
The role of the legal profession is central to achieving both formal and private ordering. But research in a number of jurisdictions has found that family lawyers have a clear orientation towards compromise and negotiation (preferably with other lawyers) in preference to adversarial approaches. They also share a preference for settling disputes by private ordering to involving the courts in decision-making (Wasoff, Dobash and Harcus 1990; Ingleby 1992; Sarat and Felstiner 1995; Griffiths 1986). As Mnookin has observed in his discussion of the importance of ‘bargaining in the shadow of the law’:

‘The primary impact of the legal system is not on the small number of court contested cases, but instead on the far greater number of divorcing couples outside the courtroom who bargain in the shadow of the law: . . . A primary function of law at the time of divorce is to provide a framework within which divorcing couples are allowed great freedom to determine themselves their postdissolution rights and responsibilities [by setting appropriate limits on private ordering].’ (1984; 364).

The settlement and non-adversarial orientation of solicitors can also be seen in the low level of defended divorce actions (Morris, Pegg and Warner 1997).

It is against the backdrop of alternative dispute resolution and a norm of private ordering in solicitors’ practice of family law that we have seen the emergence of two other occupational groups to assist people whose marriages have broken down: mediators and solicitor-mediators. Mediation, or conciliation – as it was originally known –, first appeared in Scotland in 1984, with part-funding from the Scottish Office, and is now organised under its national umbrella organisation, Family Mediation Scotland (FMS). It has grown from the original Lothian service to 11 autonomous affiliated local services throughout Scotland. FMS and a number of its local services continue to receive support from the Scottish Executive; in 1998/99 this came to a total of £310,620 (Scottish Office 1999, Annex C). Its original scope of dealing with child-related matters only has now been extended in several services to encompass all-issues mediation (AIM) that can deal more comprehensively with child-related, financial and property matters. Since the early 1990s, mediation services have also been provided by solicitor-mediators, or Comprehensive Accredited Lawyer Mediators (CALM) who are qualified solicitors who have completed additional training and are accredited by the Law Society of Scotland (Macleod and Edwards 1996; Edwards and Griffiths 1997).

Thus there are now three distinct professions available to assist divorcing couples with all of the issues that they must resolve. Parties have a choice (and not only either/or) of who they call upon to assist in their discussions surrounding marriage breakdown, and many people will use both solicitors and mediators at different stages. There is not a simple equation of solicitors and courts = adversarial and formal; and of mediators = mediatory and informal. Rather, there is a ‘mixed economy’ of divorce professionals and practices involving a more complex interaction between out of court and formal processes of law, a more complex mix of professionals assisting parties on relationship breakdown and the potential for inter-professional relationships and tensions.

1.4 RESEARCH CONTEXT

These policies and developments prompt a concern that despite often implicit assumptions that informal processes are in some ways preferable, they are nonetheless poorly understood and under-researched. It has been observed that empirical studies of lawyers working with clients are scarce in comparison with the volume of research about other professional groups (Sarat and Felstiner 1995; Ingleby 1988, 1992; Griffiths 1986; Cain 1979).

Melli, Erlanger and Chambliss (1988; p. 987) comment: ‘In view of the critical role of lawyers and the disparate function they may perform, it is startling how little we know about how lawyers actually behave’. Ingleby (1992) adds that this is particularly true for out of court processes, which his exploratory study addresses by tracing the trajectories of actual divorce cases using solicitors’ case files.

Research on mediation is even less well developed. In the United States, where mediation has been in widespread use for much longer than in Scotland, it has been observed by Joan Kelly in her review of a decade of divorce mediation research (primarily of US jurisdictions) that while research to date has
focused on outcomes of mediation using a variety of measures, ‘research on the mediation process and mediator behaviours has received very little attention, and should be the focus of the next decade of research’ (1996; p. 373). In addition, Dingwall and Greatbach (1994:391) maintain, mediation practice is also a lacking in accountability and regulation. Mediation originated and has continued to be seen as an alternative to what is usually portrayed as an adversarial divorce process. The idea of an adversarial divorce process seems central to the discourse of mediation. According to Kelly, much of the outcome research has compared mediated outcomes with litigated outcomes or settlements achieved with the input of lawyers. Indeed, in Kelly’s discussion of the outcomes of mediation, these are compared with litigated outcomes, as if the latter was the primary and most appropriate comparator. A more realistic comparison of like with like would compare mediated outcomes achieved with the input of mediators with informally negotiated agreements achieved with the input of lawyers, since these not only predominate by a substantial margin over litigated outcomes (and therefore are what divorcing couples are most likely to experience), but are also the outcome preferred by solicitors, as shown in what empirical research there is (see below).

As noted earlier, the adversarial lawyer seeking litigation may well be another modern myth. Adversarial divorce is viewed negatively not only by mediators but also by practising solicitors who tend to view a court appearance or an outcome that resorts to litigation as a sign of the failure in the preferred informal process (Wasoff 1990). The research literature concludes that lawyers adopt an approach whose object is achieving an out of court mutual agreement. Even in those cases which do reach the courts, the role of the court may be more bureaucratic than adjudicative in litigious/adversarial proceedings. Courts are much more likely to be asked to interpose their authority to an agreement (even those achieved just outside the courtroom) than to adjudicate in a dispute. Thus research which aims to compare mediators with lawyers ought to compare the informal processes adopted by both.

The model of mediation as an alternative to lawyer-assisted divorce, with the implication that there is no significant overlap in approach or process is not supported by the available evidence. As mediation has developed, and as lawyers have arguably become more mediatory in their approach, it appears as if the two coincide and interact in a much more complex fashion. In addition a sub-specialism of lawyer mediators now exists, straddling the boundary between the two occupational groups. Thus the extent to which the client-solicitor route and mediation can be said to be alternatives, complementary, or even overlapping has not been fully addressed. In particular what is lacking is any close comparison of how mediators and solicitors deal with similar cases. However, if the activities of each of the two groups is under-researched, the relationship between legal practice and mediation is even less well understood. In their empirical study of how divorce lawyers in Maine and New Hampshire view mediation, McEwen, Mather and Maiman (1994: 149) observe that the realities of legal practice are a more complex and dynamic interplay of lawyers and mediation than the commonly polarised ‘either/or’ formulation of lawyers vs mediators.

There have been several Scottish studies in recent years commissioned by the Central Research Unit that have examined out of court processes and their outcomes in family law. These include: a study of minutes of agreement (Wasoff, McGuckin and Edwards 1997), a study of solicitors’ divorce practice (Wasoff, Dobash and Harcus 1990); of family lawyers and civil legal aid (Wasoff 1992) and of divorce outcomes generally (Morris, Gibson and Platts 1993). Formal processes in family law were surveyed in 1992 (MVA 1997; Morris, Pegg and Warner 1997).

The first study of mediation evaluated a Scottish Office funded pilot project in Lothian (Matheson and Gentleman 1986). This was followed in 1990 by a Central Research Unit study of family conciliation in Scotland that surveyed clients of conciliation services in the late 1980s and the funding of these services (then at a much earlier stage of development) (Jones 1990). Garwood conducted a small study of the involvement of children in one mediation service (1989). Pieda (1993) carried out a feasibility study for a Scottish mediation service but was not able to reach a conclusion about its cost effectiveness. Most recently research has been carried out by Social and Community Planning Research (Lewis, 1999) on the role of mediation and more formal measures for the resolution of matrimonial disputes (see chapter 2) in the context of which Maclean and Edwards reviewed the recent literature relating to mediation (1996) in Scotland, as well as in England and the United States.

1.5 ORGANISATION OF THE REPORT
The report is organised into 7 chapters. Chapter 2 discusses the methodology for the research. Chapter 3 considers a range of issues that emerge in the process of working with clients, for example, referral sources, establishing appropriateness for the particular service, initial information gathering, preparing clients, setting agendas, identifying options and priorities and documenting proposals. Chapter 4 examines the various strategies employed by each professional group for problem solving. Chapter 5 considers specific legal and policy issues, such as the significance of the Children (Scotland) Act 1995 in working with parents, and in particular how children’s views are incorporated into the process, the impact of child support legislation, and the influence of the matrimonial property provisions of the Family Law (Scotland) Act 1985. Chapter 6 discusses thematically some of the issues that arise in the literature commenting upon private ordering such as partisanship and impartiality, power imbalances between the parties in a mediation context, and perceptions of other professionals doing divorce work and of the law and court. Chapter 7 concludes with some reflections on the different discourses of each group, and whether mediation and advocacy are most usefully seen as complementary or alternatives to each other.
CHAPTER TWO RESEARCH CONTEXT AND METHODOLOGY

2.1 SCPR STUDY: COMPLEMENTARITY WITH PRESENT STUDY
The current study follows research undertaken by Social and Community Planning Research (Lewis, 1999), which, from interviews with mediators, solicitors sheriffs and parties/couples, provides a descriptive account of the process of mediation and more formal routes for resolving family disputes in Scotland.

While there are some overlaps between the two studies in terms of the broad themes, there are also differences in respect of the issues explored and the methods employed. The current study was narrower in terms of its focus on mediators and solicitors, but was also able to explore in greater detail dispute resolution processes in respect of both child-related and financial issues. The current study, which included a larger total sample of mediators also allowed a systematic comparison of the practice of CALM and FMS mediators.

Despite the differences in methods and objectives the findings in areas where the two studies overlap are very broadly consistent, reinforcing the reliability of the research designs.

2.2 RESEARCH DESIGN
The research method used in this study is a modified form of the 'simulated client' design developed by Wasoff, Dobash & Harcus (1990) to explore the impact of the Family Law (Scotland) Act 1985 on solicitors’ normal divorce practice. Like the vignette method employed by Finch (1989), the simulated client technique uses a constructed story to examine a set of issues. As summarised in the study by Wasoff and Dobash (1996), "the researcher in the guise of a hypothetical person seeks professional advice, and the professional is asked to deal with the case as if it were genuine" (p.14).

The simulated client method designed for the earlier (1990) study of solicitors’ divorce practice involving one client consulting one solicitor, was modified to take account of the different professions and approaches under examination in the current study. What emerged from an intensive iterative process of consultation, piloting and re-drafting was a ‘hybrid’ form of the simulated client method. At its heart remained the use of three fictional case studies of couples seeking a divorce or separation, to which practitioners responded. Where the method diverged from the earlier approach was that the interviewer was not the client or couple, but the storyteller, elaborating on the couples’ histories as required. It also proved necessary to build in a series of questions to move the story forward and to cover specific issues.

In designing the study a number of data collection methods were considered, all of which were felt to offer different advantages and disadvantages. Given the core aim of the study, the modified form of the simulated client method was felt to offer the greatest scope for exploring the differences and similarities between different professionals dealing with the issues which arise on matrimonial breakdown.

As with all methods, there are, however a number of acknowledged limitations. Firstly, the lack of a dynamic or interactional quality. This was of particular concern to mediators for whom the absence of the parties themselves, other than in the third person, made practitioners uncomfortable about making suggestions about possible responses or solutions, for fear that these would be misunderstood or misinterpreted as an imposition of their own solutions. While a method such as observation may have overcome this, it would have lost the element of comparability which was central to the study. As a corollary of this, the modified simulated client method is acknowledged to be a less effective means of studying mediators since it is less ‘natural’, i.e. less well-matched to actual working patterns. However, given the core aim of the study was to compare practice across different professional groups, no one approach would have been appropriate for all three groups. While, arguably, a form of role play may have been more responsive to different working practices, this would have been costly in research resource terms, given the requirement for two actors in a mediation context. More substantively it would have required prior knowledge of the process issues which it was one of the aims of the study to identify.

Thirdly, across the professions, the responses may reflect, to some extent, idealised accounts. This, however, is no greater than would have been the case using interview techniques.

Finally, what emerged from the research design stage was the difficulty associated with measuring and comparing outcomes across the three professional groups. It is argued that this is not a research
design issue per se, but a finding: given the different objectives of each group, it is not apparent what method would successfully measure and compare ‘outcomes’ in a way each professional group would recognise as reflecting their own aims and objectives.

The strength of the simulated client method is that it allows comparability of the process across different professional groups. By controlling for the different characteristics of cases it becomes possible to isolate those elements of process and practice which are related to profession, rather than case specific.

As suggested above, it is also a method which, by controlling for case characteristics, draws out those aspects of practice which, by their nature are non-comparable, for example, the point in the process at which different professionals become involved. Mediators address a particular stage of negotiation/discussion. Solicitors, however, may be involved prior to the negotiation process, in later stages which of necessity require a legal input, or throughout the whole process.

In practical terms, the fictional nature of the cases overcomes some the difficulties of access, representativeness and confidentiality which can be associated with approaches based on real cases. As a qualitative method, based on a contained sample size, the method facilitates detailed exploration of themes, drawing attention to differences in the meanings and interpretations practitioners bring to the work they do. As a result, the administration of the method has yielded valuable data, enabling comparison of the processes, objectives and rationales employed by different practitioners and professional groups.

2.3 SAMPLING

Sample Size and Composition

The initial aim had been to identify a sample of 45 practitioners comprising 15 people from each of the three professional groups. Each case was to be discussed with five people from each profession. To ensure that any locality as well as professional differences were identified, each case was discussed at least once with one person from each of the three professions in each region. Where, for example, there were four FMS mediators in a Region, then the cycle would commence again with Case One.

To maximise the opportunities for comparability the focus was on mediation which included both child-related and financial issues. In FMS terminology this comprised All-Issues Mediation (AIM), for which practitioners with experience in child-related mediation would undertake additional training. For CALM mediators this is termed Comprehensive Mediation, for which solicitors undertake training and accreditation by the Law Society of Scotland.

The three main criteria informing selection were practical experience, geography and preparedness to take part. For solicitors, size of practice also informed the selection process.

To obtain a large enough sample within the research resources available, the aim, initially, was to select the sample of mediators and solicitors from the central belt, primarily Glasgow, Edinburgh and Stirling/Falkirk. To ensure an adequate sample of FMS mediators with all-issues experience this was extended for all three professional groups to include Dundee and Perth. The greater pool of CALM mediators in the same geographical areas (approx. 50 people) required a degree of selection. This was based on selecting alternate names from a list of CALM members believed to be actively involved in mediation. Mediators who had contributed to the pilot stage or who were members of the project Advisory Group were excluded.

Solicitors’ practices in the study areas were selected from among those indicating in the Scots Law Directory that the firm undertook children and family law work. From this a range of practices was selected to include firms of different sizes, from sole-partner to 20 plus partners.

No claim is made for the representativeness of the samples, nonetheless those taking part are felt to reflect the range of practitioners with experience in the field.

The procedure for making contact with respondents was modified to suit the organisational structures and requirements of the three different professional groups (See Appendices 1 and 2).

Table 2.1 indicates the number of initial contacts and agreements to participate, by type of practitioner and region/area. Where information was obtained the majority of ‘refusals’ by FMS and CALM mediators was on the grounds that they had not undertaken any all-issues/comprehensive mediation in the recent past. Several CALM members, for example, indicated that they no longer practised as mediators. However, because of the larger pool of CALM members it was still possible to identify a
sufficient number of practitioners prepared to participate. An initial trawl of solicitors’ firms revealed that not all the practices contacted were as active in matrimonial work as assumed and a number of those approached asked not to be included for this reason. In several further instances solicitors did not feel they had the time to devote to the interview and declined to take part. Additional practices of comparable size were subsequently contacted to supplement the sample.

The final sample comprised 48 practitioners: 13 FMS mediators; 19 CALM mediators; and 16 solicitors.

**Table 2.1 Interviews by Profession**

<table>
<thead>
<tr>
<th>Region/Area</th>
<th>FMS All-Issues</th>
<th>CALM Mediators</th>
<th>Solicitors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mediators</td>
<td>(numbers of people)</td>
<td>(numbers of people)</td>
</tr>
<tr>
<td>West of Scotland</td>
<td>4</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Edinburgh</td>
<td>6(^{(1)})</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Central</td>
<td>4(^{(2)})</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Tayside</td>
<td>6(^{(3)})</td>
<td>3</td>
<td>4(^{(4)})</td>
</tr>
<tr>
<td>Total</td>
<td>20</td>
<td>13</td>
<td>24</td>
</tr>
</tbody>
</table>

**Notes**

(1) Excludes one FMS mediator who is a member of the project Advisory Group
(2) Excludes one FMS mediator who took part in the pilot
(3) Excludes one FMS mediator who took part in the pilot
(4) Excludes one CALM mediator who is a member of the project Advisory Group and two who took part in the pilot

Information was not collected on the personal characteristics of participants, however the gender distribution by professional group is illustrated in Table 2.2.

**Table 2.2 Sample by Profession and Gender**

<table>
<thead>
<tr>
<th>Gender</th>
<th>FMS mediators</th>
<th>CALM mediators</th>
<th>Solicitors</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>3</td>
<td>11</td>
<td>8</td>
<td>22</td>
</tr>
<tr>
<td>Female</td>
<td>10</td>
<td>8</td>
<td>8</td>
<td>26</td>
</tr>
</tbody>
</table>

**Sample Backgrounds and Practice Experience**

In the course of the interviews, where time allowed, information was collected on sample members’ length of experience in their particular profession and their relevant workload. In addition FMS and CALM mediators were invited to indicate why they chose to undertake (all-issues) mediation training.

**Solicitors**

The sample of solicitors had been practising for an average of 12 years (n=15), ranging from two to 30 years. Practice sizes ranged from single partner firms (three practices), to one practice of 40 partners.

Of the solicitors, eight were partners (including one consultant), four were associates and three were assistants (in one case position in the practice was not obtained).

The sample lawyers were asked to indicate the proportion of their workload which comprised matrimonial or family work. On this self-report basis the range varied from around 30%, to over 90% in four cases. Two solicitors undertook only matrimonial work.

**FMS Mediators**
The sample of 13 FMS mediators came from a variety of professional backgrounds, including social work, youth work, the probation service and teaching. Two people in the sample had had legal training but were not practising as lawyers.

As practitioners in child-related mediation, the length of experience of the sample ranged from three to 14 years. Their years experience as all-issues mediators reflects the comparatively recent introduction of all-issues mediation training. Across the sample, six people had been trained as all-issues mediators for between two to three years, four had been practising for between one to two years, and two for under one year (no information was available for one person). Perhaps of greater significance than years of service as all-issues mediators, is the degree of practice experience acquired. Drawing from information provided by participants on their consent forms for the research, and on self-report in the interview, the number of all-issues mediations commenced in the previous 12 months varied from one to eight cases. One practitioner was still undertaking their first all-issues mediation at the time of the study interview.

**CALM Mediators**
Where information was obtained, the CALM sample appeared to have been practising as solicitors for an average of just over 14 years, ranging from eight to 33 years (n=16). Background information on their position in the firm, or the proportion of matrimonial work they undertook as solicitors, was not obtained from the lawyer-mediators, however, one practitioner described himself as having been a specialist in family law for over 20 years, four others did nothing but, or principally family law. Lawyer-mediation has only been available since the beginning of the 1990s. This determines the maximum length of mediation practice experience. Across the CALM sample this ranged from between 1-2 years to 4-5 years. One person had had 10 years mediation experience, but this included practise as an FMS trained mediator in child-related issues.

Again, of significance in terms of exploring practise strategies, is the degree of hands-on experience of the practitioners. On the basis of self-report, the number of cases handled over a 12 month period appeared highly variable across the sample, between 15-20 cases reported by three solicitor-mediators, to two reported by one practitioner. Among those commencing fewer cases there was a degree of disappointment that, in some areas at least, “it’s not taken off...in a big way”. One practitioner summarised the possible reasons:

*Not much mediation in Area, maybe 3-4 in past 12 months. Don’t get court referrals and other solicitors are reluctant to refer, and the public still don’t know much about mediation (CALM 39)*

**2.3.3 FMS mediators and CALM mediators: Why Undergo Training?**
As background information, CALM mediators were asked to indicate their reasons, as solicitors, for undertaking training in comprehensive (i.e. child and finance related) mediation. In relation to FMS mediators the interest was in their decision to undertake all-issues mediation training additional to their training in child-focused mediation.

**FMS Mediators**
For the FMS mediators “interest” or “curiosity” was a spur to all-issues mediation training, referred to by six of the 10 people responding to this question. Two people, however, expressed a degree of ambivalence about this extension of their role, as one commented:

*I have a big commitment to the process of mediation, but I would prefer someone else did the all-issues part (FMS 45)*

A second reason, given by three people, was a perception that demand for an all-issues service was increasing.

For three mediators the key impetus was the value focusing on all-issues would add to their child-focused work. There was a sense that financial matters, if not addressed, could “get in the way of talking about children because of the acrimony and tension” (FMS 49), and that it was “unrealistic” to separate discussion of the arrangements for the children from the discussion of matrimonial assets and child support. One practitioner felt that by being able to address both elements it was possible to “get a more durable and realistic agreement about the arrangements for the children” (FMS 51).
CALM Mediators

Among the reasons why solicitors undertook training to become CALM mediators, “interest” was a contributory factor for two of the practitioners (out of 16 responding). Three also cited a commercial motive, seeing mediation as an additional service to offer clients:

*We did believe that mediation was another tool that solicitors needed to have to help clients resolve disputes* (CALM 28)

A more frequently cited reason was the feeling that mediation offered not just another “string to their bow”, but was a better way of resolving disputes than formal routes. Of the 16 solicitor-mediators responding, 10 cited this reason in one form or another. For example, one described:

*A feeling that it was better to agree on a separation than to spend two or three years slugging it out through lawyers and courts.* (CALM 61)

The fourth motivating factor was the belief, expressed by seven people (n=16) that it would either “hone” existing skills or add to their abilities as solicitors. Several felt mediation was an extension of the way they were already working, citing, as evidence, the infrequency with which family cases went to a proof stage in court. Others described how mediation was “the sort of practice that, as a solicitor, I wanted to develop” (CALM 34).

In effect it appears that, to some extent, the spurs to training reflect the contexts within which the different groups of mediators operate. For FMS mediators it is, perhaps, an extension of their pre-existing mediation practice in child-related issues, as well as a reflection of personal interests. For the CALM sample, issues of professional practice as solicitors, direct experience of the effects of more adversarial, and specifically court based approaches to resolving matrimonial disputes, as well as, for some, commercial considerations, informed the decision to seek accreditation as comprehensive mediators.

2.4  THE THREE CASE STUDIES

2.4.1 Instrument Development

To assist in the development of the structure and content of the stories, consultations took place on a number of occasions with key individuals in Family Mediation Scotland and CALM. SCPR, Stepfamily Scotland and a family lawyer with extensive experience of child and family law practice were also consulted. In addition, discussions were held with members of the project advisory group, both collectively and individually. Literature in the fields of mediation and lawyers practice in divorce was also consulted. The case studies were piloted through interviews with two lawyers, and two CALM and FMS mediators. Throughout this consultation and piloting process the case studies underwent a number of modifications.

A ‘finding’ which emerged from the developmental process itself was the necessity to slightly modify the topic guide to reflect the reality of the different *modus operandi* of solicitors and mediators. The substantive issues and the case studies remained the same, enabling comparability. However, to ensure the design was sensitive to the different terms and procedures employed by the different professional groups, the wording of questions on, for example, routes into the service, assessments of appropriateness of the service, as well as the language used to describe the service users e.g. as couples or clients, underwent minor modification.

Prior to the interview, respondents received a summary of the case to be discussed. This detailed the names and ages of the family members; the context of the divorce; the issues to be discussed; and the financial context and main financial assets and liabilities. This was perhaps more than would be available from a referral form, but less than the detailed financial information forms required of parties to mediation.

The lack of more detailed financial information on income and expenditure was felt by the mediators to be limiting in terms of anticipating the direction the discussion with the couple might go and the sort of options that might emerge from the process. Solicitors too, would anticipate obtaining a schedule of assets and liabilities preparatory to negotiation. To contain the time demands on research participants it was not felt practicable to include this level of detail in the case studies. The questioning therefore focused on establishing and comparing across all three professional groups why they felt this financial information was important and the use to which it would be put. Further, the
The interviewer provided the same additional information on the cases where this was appropriate or specifically requested. Summaries of the three case studies are provided in Figure 2.1.

**Figure 2.1 Summary Descriptions of the Three Case Studies**

*Case One - Jenny and Ian Hamilton*

| Mrs Jenny Hamilton is aged 38 years, Mr Ian Hamilton is 40 years. They have three children: Carrie aged 8, Morag aged 11 and Jamie aged 17. The relationship between Jenny and Ian Hamilton, who have been married for 19 years, has deteriorated to the point where they wish to separate. At this stage they are hoping to negotiate an amicable settlement, but with a view to obtaining a divorce based on consent in two years time. They are having difficulties agreeing on financial aspects as well as disputing what is best for the children. According to the parents, two of their three children would like to live with their mother, but the third wants to live with her father. Jenny Hamilton does not feel this is appropriate. Jenny Hamilton will qualify for legal aid or legal advice and assistance. Ian Hamilton does not have a solicitor. |
| Financial Details: | The family live on a housing scheme just outside the city in a council built property they purchased with a mortgage under the right to buy scheme nine years ago. They have a repayment mortgage spread over 25 years. Ian Hamilton works full time for the local authority as a manual worker. In addition to his basic income he has the opportunity to work overtime and contributes to an occupational pension scheme. Jenny Hamilton left school at 16 years and worked full time as a nursing assistant until the birth of Jamie. About 18 months ago she obtained a part time job, just three hours per day, on weekdays at lunchtimes in a local cafe. She would like to work a few hours more, but would prefer to wait till the eight year old started at secondary school. They have a car which they purchased on credit, with twenty four monthly payments of £253.00 to be paid. Ian Hamilton would like to retain the car and is prepared to continue the payments. They have a joint bank account and a joint building society savings account. Their total capital amounts to around £1750. |
| Issues | • Residence of the children • On-going financial support for all the children • Distribution of the matrimonial property • On-going financial support for Jenny Hamilton |
Case Two - Vicky and Jonathon Macintosh

Mrs Victoria (Vicky) Macintosh is aged 34 years; Mr Jonathon Mackintosh is aged 35 years. They have two children: Theo aged 3 and Joshua aged 8.

The Context:
Vicky and Jonathon Mackintosh have been married for nine years, having previously cohabited for three years. Vicky is wanting to leave Jonathon because of his unreasonable behaviour. Jonathon is very unhappy both about the fact that Vicky is leaving him, and that she is proposing to take the children with her. They have two young children, the eldest of whom is causing concern. Jonathon has moved back temporarily to stay with his parents. Jonathon and Vicky have been advised to attend an introductory mediation session by Rule of Court. Jonathon makes it clear that he is only prepared to continue because the sheriff has recommended they try mediation. He has agreed to continue with the mediation sessions as long as he can leave at any time. Vicky is more positive about the possible benefits of mediation, but seems anxious about being with Jonathon.

Financial Details:
Jonathon is self-employed: he and Vicky lease a shop selling imported textiles. The family live above the shop. Both the flat and shop are leased via a private lettings agency. The income from the shop is variable and there are some outstanding debts to suppliers. Both the lease and the debts are in their joint names. Vicky is nominally a partner in the business. But this was primarily for tax purposes, her role in the running of the shop has been minimal: it is very much Jonathon’s baby. They have an estate car which serves both as the family car and for the business. This belongs nominally to Jonathon, but is also used by Vicky to ferry the children around. Neither Jonathon nor Vicky contribute to a private pension scheme. They do however have a life insurance policy.

Some of the furnishings within the marital home, given to them by Jonathon’s grandmother shortly before they married may be of financial value.

Vicky was working as a freelance graphic designer, but stopped working following the birth of their first child, Joshua. Very occasionally she does small pieces of freelance work.

In addition to the debts outstanding to suppliers, around £1000 is owing on their joint visa card. They have a joint bank account.

Issues:
- Residence and contact of the children
- On-going financial support of the children
- Distribution of matrimonial property
- On-going financial support for Vicky Macintosh
Case Three – Charles and Emma Andrews

Mr Charles Andrews is aged 55 years; Mrs Emma Andrews is aged 47 years. They have two children: Abigail aged 12 years, Zoë aged 14 years, Charles Andrews’ son by his previous marriage: Toby aged 19 years. Prior to going to university Toby had lived with Charles and Emma since they married. Emma Andrews’ new partner, has two boys aged 8 years and 10 years, by a previous marriage who stay with him at weekends and during school holidays.

The Context:
Charles Andrews is the pursuer. Charles Andrews is seeking a divorce from Emma Andrews on the ground of her adultery with a colleague at work. Charles and Emma have been married for 16 years and have two children aged 12 years and 14 years. Additionally, Charles has sole responsibility for one child from a previous marriage who is currently studying at a University in England. Emma moved out to rented accommodation nine months ago, she and her new partner now want to set up home together in Emma’s marital home to provide a settled environment for themselves and their children. Emma’s new partner has two children from a previous marriage, with whom he has frequent contact. The case is marked by acrimony between Emma and Charles who are at loggerheads, but who also want to find a ‘civilised’ solution.

Financial Details:
The family live in a fairly large property, located in a popular area. The house is valued at around £200,000. This was purchased jointly by the couple when they got married for £165,000, £115,000 being met from the sale of properties both partners had prior to their marriage. Emma contributed £46,000; Charles contributed £69,000. Charles was working full time as a Director of Human Resources for a finance company prior to his marriage to Emma. Shortly after the birth of their second child Charles was offered early retirement, receiving a lump sum payment and a protected occupational pension. For the past 11 years he has cared full time for the children. Emma works full time as head of service support in a large insurance company, a high income post which includes a company car and private health insurance which currently covers all members of the family. Additionally, Emma has a life insurance policy and occupational pension. Both singly and in joint names the Andrews’ have a portfolio of stocks and shares. They have a joint bank account and several high interest savings accounts. The two girls both attend a fee paying day school. Charles has his own car.

Issues:
- Residence of the children
- On-going support for the children of the marriage and Charles Andrews’ son
- Support of eldest child
- Distribution of matrimonial property
- On-going financial support for Charles Andrews.

2.4.2 Typicality of the Case Studies

Table 2.3 indicates the distribution of interviews by professional group and case study.

<table>
<thead>
<tr>
<th>Profession</th>
<th>Case One Hamilton</th>
<th>Case Two Macintosh</th>
<th>Case Three Andrews</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>FMS Mediators</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>13</td>
</tr>
<tr>
<td>CALM Mediators</td>
<td>7</td>
<td>6</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td>Solicitors</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>17</td>
<td>16</td>
<td>15</td>
<td>48</td>
</tr>
</tbody>
</table>

The three cases were developed to reflect issues that the three professional groups would regard as typical. In distributing the cases no attempt was made to match the case study to the ‘typical’ practice of individual practitioners: allocation was by rotation. As a result some mediators and solicitors received cases which were, in some respects, perceived by them to be ‘atypical’ of the couples or clients with whom they normally worked. None, however, suggested that they felt they did not have the expertise to respond.
To establish just how typical of their usual practice the cases were mediators and solicitors were asked whether the case study under discussion was similar to the sorts of couples or clients they usually dealt with. For both FMS and CALM mediators, Case Two, Mr and Mrs Macintosh, had least in common with their normal caseload. For the CALM mediators responding to this case the infrequency with which they received court referrals was felt to make it relatively unusual. The issue of domestic abuse as a significant element was also felt by the CALM mediators to make this case atypical. Two of the FMS mediators dealing with Case Two suggested that rule of court referral would be unusual for them, as would the overall lack of initial agreement between the couple:

..in the all-issues situations which I’ve dealt with so far, there has been much more basic agreement between them...they wouldn’t have been referred by the court and they wouldn’t have already started legal proceedings of any kind..this one would just have crept in to being accepted as an all-issues mediation. (FMS 49)

In terms of specific issues, the nature of the business partnership and Mr Macintosh’s self-employment were felt by one CALM and one FMS mediator to be different from their usual experience.

The case of the Hamiltons’ (Case One) tended to be seen as ‘typical’ for CALM mediators. For FMS mediators it was similar, or presented “standard issues”, but with the caveat that each case had “a fairly unique element”. Both an FMS and CALM mediator felt that the limited financial resources of the Hamiltons was noteworthy.

Two CALM mediators (from different areas) felt that Case Three was unusual insofar as the mediators concerned had not dealt with such high value cases. The obverse was the experience of another CALM mediator in a third area who suggested that Case Three was typical of the kind of case that comes to mediation on a voluntary basis, but not of their matrimonial work in general:

You tend to find people who come into mediation on a voluntary basis are people who have an interest in resolving things without spending all their money arguing about it in court...a quite middle-class way of resolving disputes. (CALM 30)

For the solicitors the ‘client’ was identified in the case studies as Mrs Hamilton (Case One), Mrs Macintosh (Case Two) and Mr Andrews (Case Three). Across the sample typicality, or otherwise, was related primarily to the value of the assets involved. In two instances the case of the Andrews’ (Case Three) which involved quite substantial assets, was perceived as unusual in that the practice or practitioner dealt primarily with legal aid cases. For a third solicitor it was typical specifically because it was a high value case. For one solicitor Jenny Hamilton’s case would not have been handled by the practice which did not take on legal aid work.

Insofar as any case can be defined as ‘typical’, for both the CALM and FMS mediators in the sample, it would be defined in terms of the source of the referral and the specific characteristics of the case. For at least some of the solicitors the policy and character of the firm within which they practice will influence the sort of matrimonial cases they deal with on a day to day basis. In these instances ‘typicality’ is defined in terms of the ability, or otherwise, to pay legal fees.

2.5 DATA COLLECTION AND ANALYSIS
Each respondent was requested to discuss one case, having been sent the background details in advance.

The qualitative design of the study enabled respondents, as far as possible, to give an account of the process and their approach in their own terms and in their own order. The interviewer, however, provided additional information on the cases and interjected questions where appropriate.

The interviews, which lasted, on average, one-and-a-half hours, were transcribed and the data categorised using the Nud*ist software package. From the responses, grouped under a particular category or group of categories, it was possible to identify themes and patterns, enabling comparison across and within professional groups. It was not intended to quantify particular responses, although, where appropriate, the numbers of practitioners making similar comments is noted.
CHAPTER THREE  PROCESS ISSUES

3.1 REFERRAL ROUTES

3.1.1 Introduction
As the discussion in Section 2.4.2 suggests, the types of cases practitioners regard as ‘typical’, are influenced by routes to the service and a notion of ‘appropriateness’. The SCPR study (Lewis 1999) explores in more detail both these issues. Nonetheless, it is useful to examine, briefly, the comments of practitioners in the current study on these routes into the service to compare the practices and perceptions of mediators and solicitors.

3.1.2 Referral Routes
Access to solicitors, as discussed in Section 2.4.2, is at least partly a function of ability to pay: people may self-select to, or be channelled away from, certain firms depending on fee scales and the preparedness of the firm to take on legal aid work. Some solicitors would not take on Jenny Hamilton or Vicky Mackintosh as clients, both of whom were on low incomes, others would regard the comparatively well off Charles Andrews as ‘atypical’. But other, less specific influences may also be at work. One solicitor, for example, described how “many people come because they start as clients of the firm when they buy their house. If they then have marital problems they come to me”. Another described how she worked closely with Women’s Aid, and, as a result, picked up work from near where the refuges were based, commenting “I think I’ve got a reputation for doing this sort of law”. Word of mouth, familiarity, and money, would, it seems, be factors involved in the routes to the sample solicitors.

Where comments on sources of referral were made by FMS mediators it was, as suggested earlier, in reference to the comparative atypicality of court referrals in the case of the Macintoshes. Similarly, among CALM mediators, with the exception of those from Central Region, referrals from the courts were a comparative rarity. For the solicitor-mediators most referrals came from other solicitors, and specifically other CALM members.

One requirement which appeared particularly pertinent to CALM mediators was to ensure there were no conflicts of interest arising from their role as solicitors. Three of the CALM mediators indicated that when referred cases there had to be some checking to ensure they were not already involved in the case in some way.

3.2 ESTABLISHING APPROPRIATENESS FOR THE SERVICE

3.2.1 Making Contact with the Service
Insofar as assessing the appropriateness for the service is an issue, the comments of the solicitors in the sample suggest that sources of funding may be the main screening criteria.

On the basis of the responses to the case studies the first contact between solicitor and client is concerned with an exchange of information directly relevant to the pursuit of the case:

Normally I would begin by asking the client to explain, in brief and very broad terms, what the present position was. I would then get a rough indication as to how we would approach matters. (Sol 14)

In respect of the mediation services, the structure and content of the initial contact with the service is influenced by the need to filter, as far as is practicable, the suitability of those referred to, or seeking to use, the service. As many of the mediators in the study pointed out, the mediation process “isn’t necessarily going to work for everybody”. Without wishing to duplicate the SCPR (Lewis 1999) research it is valuable to discuss from the responses to the case studies, what characteristics suggest that a couple, and the issues that they present, may be appropriate or otherwise for mediation.

Secondly, to describe the mechanisms which are in place to assess suitability.

3.2.2 Defining Appropriateness for Mediation
As discussed below, the different mediation organisations use different methods for assessing appropriateness at the initial point of contact. Filtering also occurs throughout the mediation process.
A number of both FMS and CALM mediators suggested that it could be a number of sessions before it became apparent that it was not going to work. Appropriateness for mediation appears to hinge on four interlocking criteria: the issues presented by the couple; the relationship between the couple; evidence of domestic abuse; and the preparedness of the couple, as individuals to follow the rules of engagement of mediation i.e. the criteria formally set out in the FMS Agreement to Mediate or CALM Conditions of Mediation.

**Issues**
In terms of issues, the artificial nature of the three case studies perhaps limits the exploration of specific issues which would be considered to be outwith the boundaries of All-Issues or comprehensive mediation. The point was made by two FMS mediators that, as an organisation, they would only deal with cases involving children, and to this extent, all three cases studies met this criteria. In one region, however, one FMS mediator indicated that they had a cut-off point in respect of children aged over 16 years. The Hamiltons (Case One), for example, would be advised that because Jamie is over 16 years old ‘we don’t have funding to talk about older children’. He would, though, be relevant, insofar as he is likely to influence the two younger children. One FMS mediator indicated that, as part of the screening procedure they would establish whether there was any social work department involvement “to clarify that both parents are free to make decisions about the children”.

**Relationships**
In terms of the relationship between the couples, evidence of the ability to co-operate and negotiate with each other in the mediation sessions was central. For example, in respect of Case Two, one FMS mediator consistently questioned whether, on the basis of their history and stated preferences, the Macintoshes were appropriate for mediation:

*Because I’m not getting a sense at the moment that they are actually here because they want to do anything jointly at all, even make the arrangements, even reach agreement.* (FMS 49)

The preparedness to negotiate implies a degree of commitment to the process, a commitment which may be in short supply where a referral to mediation is made by the court, a feature also of Case Two. A number of mediators felt that a court referral potentially compromised the voluntary nature of the process, and with it people’s willingness to fully engage in the process:

Even if not referred via the courts, couples referred at a point in the process where they have become “entrenched” may also preclude being able to mediate.

In respect of the Andrews (Case Three), the extent to which the level of acrimony, highlighted in the case study, got in the way of their ability to negotiate may be influential on whether the process could be pursued:

*You can have acrimony there that people can actually negotiate. You can have acrimony there where people can’t negotiate, and I think it then becomes the mediator’s judgement call.* (FMS 54)

In terms of their relationship, the Hamiltons (Case One) perhaps come nearest to the ‘ideal’ mediation couple, in terms of the issues to be resolved and their commitment to attempting to negotiate an amicable settlement. As summarised by one CALM mediator:

*They appear on the surface to be fairly sensible people. They are said to be hopeful of negotiating an amicable settlement, and they are the kind of people who are ideally suited to mediation.* (CALM 31)

The one area of concern was Ian Hamilton’s feelings about the marriage breakdown, a point raised by two FMS mediators:

*And watch out for Ian being able to mediate, because sometimes people are still so upset about it.* (FMS 46)
Domestic abuse
Perhaps the most problematic area is where there is evidence of domestic abuse, as in the case of the Macintoshes (Case Two). The consensus of opinion, across both FMS and CALM mediators, was that evidence of domestic abuse per se would not exclude a couple from attempting mediation. Only one solicitor-mediator indicated that for her it would be an absolute bar. For mediators prepared to consider a couple where there had been a history of abuse, the key indicators appeared to be the recency and severity of the abuse. Serious domestic abuse occurring in the recent past would raise questions concerning the appropriateness of mediation:

*I don’t think domestic violence in itself would preclude mediation, I think it’s a question of degree...there may be on-going domestic violence which culminates in a separation...which may well preclude mediation...because of the security risk in itself and, secondly, because she [Vicky] may have great difficulty facing her abusive partner in the same room.* (CALM 23)

Specifically in relation to Mrs Macintosh, what mediators would be looking for is Vicky’s stated preparedness to be in the same room as Jonathon, evidence, in the course of mediation that she felt able to express her opinions freely, and indications of potential intimidation.

The decision whether to proceed with mediation appeared to be a function both of Vicky’s preparedness to go ahead and the mediator’s own judgement. As one FMS mediator commented:

“I don’t think necessarily the abused person only who is going to make that decision, we make the assessment as to whether it should go ahead or not”. (FMS 44)

CALM mediators appeared to rely on their scope to terminate a mediation if, for example, they felt, in the course of mediation, that one party was being intimidated.

As discussed in the SCPR (Lewis 1999) report, both FMS and CALM mediators described the organisational arrangements they routinely employ, irrespective of whether domestic abuse is an issue, for example arranging for people to arrive and leave the sessions separately, and wait in separate areas.

When the responses of the solicitors to evidence of violence are compared with that of mediators a key difference emerges. As the above illustrates, for FMS and CALM mediators, information on domestic abuse was used to assess appropriateness (or otherwise) of the Macintoshes to undertake the mediation process, which, by definition is a joint process. For solicitors it was a trigger to action. Several solicitors suggested that where domestic abuse was an issue they would advise the client of the protections available through interdicts:

*I’d explore with her [Vicky] whether it is required...how the courts would react to her suggestions, what tests are important, why, what protections it actually gives...it’s part of the armour she can use.* (Sol 04)

Only one solicitor-mediator indicated that, where domestic abuse was involved they would raise, with the couple, the options available for dealing with it:

*We have to alert them to the fact that there are remedies available to someone, but we are not in a position to deal with those remedies.* (CALM 35)

It may well be that other CALM mediators and FMS intake workers also draw people’s attention to these “remedies”. The data do, however, suggest that in comparing processes, solicitors will not only be involved earlier (Lewis 1999), but the range of their activities may be more extensive, including, for example, obtaining interdicts.

Rules of engagement
The third indicator of appropriateness for mediation, and one which underpins that of the couple’s relationship in the mediation context, is the preparedness of each partner to follow the rules of engagement formally set out in the Agreement to Mediate (FMS) or Conditions of Mediation (CALM). For example, given the importance placed by both FMS and CALM mediators on each
party obtaining independent legal advice. Ian Hamilton’s continued reluctance to obtain a solicitor, may be grounds for halting the mediation. The failure of one party to disclose all their financial resources may similarly suggest to both FMS and CALM mediators that no further progress can be made:

*If someone deliberately withheld [assets] that makes mediation very difficult after that because they’re going against the ethos of the thing.*  
(FMS 54)

A perception on the part of the mediator that one of the parties is being deliberately obstructive, or blocking or manipulating the process would also be grounds for stopping the process:

*It can take one or two meetings to ascertain whether or not someone is specifically blocking, and part of the mediation process allows us as mediators to actually terminate mediation if we feel the process is being abused by being prolonged unnecessarily to maintain contact, or if we’re making no meaningful progress.*  
(CALM 25)

**Solicitors’ views on appropriateness for mediation**

Criteria such as a willingness to engage with each other, and with the process are therefore key indicators of appropriateness for mediation absent from the client-solicitor relationship. Solicitors do, however, have a view of the sorts of issues they regarded as appropriately dealt with by referral to mediation.

In respect of disputes over contact and residence of the children, the majority of solicitors in the sample would see a role for mediation, and would be prepared to suggest to clients that they consider it as an option. There appeared to be less enthusiasm for using mediation for resolving financial difficulties.

The several solicitors who suggested that they might refer to mediation for financial matters indicated that this would only arise if they were unable to reach a negotiated settlement. For example, one solicitor discussing the case of Charles Andrews remarked:

*It’s something I would have discussed with Charles at our initial meeting...the situation here would appear to be fairly ‘ripe’ for mediation, but it’s not something I would suggest without exploring the possibility of coming to a negotiated settlement with Emma’s solicitor in the first instance.*  
(Sol 10)

A number of reasons were given by the solicitors to account for this hesitancy. On the one hand, the comparatively unambiguous principles informing the distribution of matrimonial property, were felt to reduce the need to resort to mediation. On the other hand, the complexity of these principles discouraged solicitors from referring clients to non-legally qualified mediators. One lawyer, for example, who was an advocate for mediation as a means for resolving child-related issues, nonetheless commented:

*The law on matrimonial property is extremely complicated, and, frankly, I don’t think it’s an area for enthusiastic amateurs.*  
(Sol 09)

Underlying a number of the comments made by solicitors was a concern with ensuring that people were informed about their rights and entitlements, and a disquiet that mediation may result in people arriving at solutions without being aware of their full entitlement.

This seemed to stem from a tension between an awareness on the part of the solicitors of the need for mediators to appear neutral, to be duty bound, as one solicitor described it “to explain both points of view”, and their own role of seeking their client’s due:

*I’m not so keen on Family Mediation dealing with financial matters because my experience of that is they don’t often fully appreciate what’s involved. They’re looking for agreement which may involve one party*
giving up their rights, without fully appreciating that they’ve got rights...because they’re trying to act for two people at the same time, whereas solicitors can say ‘you’re entitled to this, you’re entitled to that’.

(Sol 03)

While expressions such as “act for” suggest a misunderstanding of the mediation process, such terms draw attention to the perceptions of the different professional groups, both in terms of how they see their own roles and that of the other professionals. As in the case of referral practices, these perceptions can have practical consequences. More pragmatically, several solicitors suggested that mediation was contra-indicated where domestic abuse was an issue, or where one partner was felt to be ‘dominant’. But, as with mediators, it was not regarded as an absolute bar.

3.2.3 Procedures for Establishing Appropriateness for Mediation

As discussed in the SCPR (Lewis 1999) study, FMS mediators and CALM mediators describe different approaches to the initial contact. The sample of FMS mediators in the current study described how the case study couples would be seen individually by a service intake worker whose role was threefold: to pass on information about mediation; to collect case details; and to establish the appropriateness of the couple for mediation. Where a case went forward this information would be available to the mediator(s) who would be working with the couple. As summarised by one FMS mediator responding to Case One:

“If Jenny makes contact we’d invite her to come along for an interview...Explain how mediation works, what it is, what it isn’t...We check out re violence, if there has been domestic violence that might be a reason why we might not mediate..we would then go through with them the reasons for the separation and the issues that they want to discuss in mediation. If, at the end of that interview Jenny says ‘yes, I want to try mediation’, we would then contact Ian, and ask him to come in for an interview. Go through the same process with him. (FMS 43)

CALM practitioners do not have a formal intake procedure in the FMS sense. There may be some telephone contact prior to the first session, but face to face contact is at the first mediation session at which the mediator(s) and both partners are present. It was argued that not only would a preliminary filtering stage potentially test the patience of those couples anxious to make progress, but seeing people individually may serve to undermine the image of even-handedness which CALM mediators sought to put across.

In a case such as that of the Andrews’ or Hamiltons’ where one of the couple may telephone the mediator’s office, the CALM practitioners described how they, or a member of their staff trained for the task, would pass on information about the mediation process. The mediator may then telephone or contact the other partner to again pass on information about the process, and to establish their willingness to pursue mediation. This would be followed up by a letter sent to each partner setting out the terms and conditions of mediation, and a referral form for return prior to the first session. Where there was direct telephone contact prior to sending out the letters several solicitor-mediators described how they would “avoid discussing anything with either of them about the specific facts of the case”. This, and the fact that neither partner would be seen beforehand, was felt to ensure even-handedness, “we don’t discuss anything with one without the other being there”.

Where a case was referred by a solicitor all initial contact may be by correspondence or through secretarial staff:

“..if it comes through a solicitor you wouldn’t have spoken to their client at all. I tend to get my secretary to set up the meetings..if it’s through a solicitor I will assume that their solicitor will have explained to them how mediation works. (CALM 29)

In part the differences in approach between the two mediation services may have developed from the referral routes into the services. As discussed above, for a number of the CALM mediators in the sample the main sources of referrals were not self-referrals, but solicitors or other solicitor-mediators.
As a result it was assumed that the referrers would have effectively pre-screened out people felt to be inappropriate for mediation, an assumption the current study was not designed to assess. One solicitor-mediator also suggested that he had never had a case referred to mediation involving domestic abuse and assumed that parties, solicitors, and the court had effectively screened out these cases. Another practitioner, however, was less sure:

*The problem comes in when you do court referrals...where it’s been imposed on the parties, that’s when you really have to assess, because the Sheriffs very rarely assess whether they are suitable.* (CALM 30)

In respect of court referrals, or cases referred by solicitors, CALM mediators may have access to the initial writ, but several suggested that they were reluctant to look at this because it may compromise their objectivity.

Reliance on referral forms completed individually may also be less than foolproof as a method for eliciting information on domestic abuse:

*The referral forms may not have told me an awful lot and it may therefore not have been crystal clear that there was a difficulty, it depends what the couple say.* (CALM 24)

Where solicitor-mediators use secretarial staff to make initial arrangements they expected them to be alert to potential issues of domestic abuse. One practitioner, for example, described an occasion where the secretary passed on to the mediator the wife’s request to be able to park in a different car park from her husband.

If these pre-meeting filters prove more permeable than anticipated, then the only other option is for the issue of domestic abuse to emerge in the context of the first (joint) meeting:

*Sometimes in a referral form they might say they’re intimidated and a bit reluctant. If that was the case then I think we would have to address the issue right away, but if it’s not flagged up too much right away then I would tend to leave it...You can’t really talk to them individually...if it was quite obvious that she was getting tearful or looked distressed or very uncomfortable, then we would have to take it head on and say ‘Vicky, you seem a little bit unhappy..do you want to go on with it?’ And I wouldn’t want to carry on with it...*(CALM 24)

The direct, single client focus employed by solicitors renders irrelevant issues of selection criteria and appropriateness, outwith capacity to pay. The initial contact is, to all intents and purposes, the commencement of the dispute resolution process itself. The very nature of the mediation, specifically its joint character, and the implications of this for capacity to negotiate and personal safety, necessitate some degree of filtering. The FMS procedure of a separate intake worker seeing each partner individually provides a forum for issues such as domestic abuse to be discussed without risk, and to refer people to other resources or services if appropriate. Arguably, however, it potentially compromises the perceived neutrality of the service. The procedure also places an administrative hurdle to be jumped on the part of those seeking to resolve their disputes. The CALM procedure combines elements of both processes, the first face-to-face meeting also being being the first mediation session, but still with a step toward prior screening. Although, as both FMS and CALM mediators concurred, no screening method is foolproof, nonetheless, a reliance, in the CALM context, of screening by others, or self-completion forms prior to a joint meeting may potentially leave people like Vicky Macintosh (Case Two) feeling very exposed.

### 3.3 WORKING PRACTICES

#### 3.3.1 Initial Information Gathering

Understanding the type of information exchanged in the early stages gives a sense of how practitioners position themselves within the larger process. The information passed on to clients or couples also serves to position the client/couple within that process.
For the purposes of the research interview, details of the case studies were sent to study participants in advance. Although both FMS and CALM mediators would have some background information beforehand, the view expressed was that the information supplied by the study was more detailed than they would normally have at a first session. Solicitors too, would not expect to be able to collect so much information from a first meeting. The respondents were, however, invited to describe the sort of preparatory information they would collect before or at a first meeting.

**FMS mediators**

For FMS mediators preparatory information was collected by intake workers as part of the screening process described above (Section 3.2.3). This would include background details on family members, dates of marriage and separation, the stage they were at in the legal process, current arrangements for the children. Potential problems arising from allegations of domestic abuse would be identified and assessed. Additionally, at intake individuals would be asked to say what issues they wished to discuss, and what they hoped to get out of mediation.

This information would be passed on to the mediators, but part of the first joint session would involve checking the background information with the couple and re-establishing the issues they wished to discuss. This degree of duplication was because, according to one mediator, it may have been “months” since the intake interview.

The individual interviews are confidential between the individual and the service. The mediation process, however, is intended to be a joint one characterised by openness. “Checking out” information therefore is seen as an opportunity for information to emerge and be owned jointly.

**CALM mediators**

For CALM mediators the main source of preparatory information is the referral form sent out prior to the first meeting to each partner. The information collected is similar to that collected via the FMS intake: family details, dates of marriage and separation etc. Information on the ownership of the family home, occupation and salary details was also collected at this early stage. The form includes a section enabling people to identify potential problems such as domestic abuse. Again, people were asked to indicate what they were looking for from mediation.

In addition to the self-completion forms, CALM mediators might be sent copies of writs or pleadings by referrers. As suggested above, there was some debate as to how appropriate it was to consult these since it may “set you off on the wrong foot”. In fact one solicitor-mediator made it a practice to explain to a couple at the first session that:

> I have deliberately not found out anything about their case because I wanted to hear it from them. (CALM 61)

The CALM mediators would ask for referral forms to be returned prior to the first meeting to assist their own preparation. The mediator might use this information to consider how they would approach things, either specifically where domestic abuse is intimated, or more generally. Nonetheless, as several mediators suggested, the written details may be misleading:

> Before any mediation you sit and look and see what you’ve got…You sit and think how you might approach things. Often it doesn’t work out as you imagined, simply because the parties are all quite different. (CALM 61)

Being familiar with case details may assist in the stage management of the process. One CALM mediator described writing the names of the couple and their children on a summary sheet, to avoid “stumbling for somebody’s name…the overall objective is to build confidence in my role as their mediator”.

**Solicitors**

In terms of basic details, the information solicitors collect at a first meeting is not dissimilar to that described by the mediators, described by one practitioner as a “20-questions type scenario”:

> I generally allow the client, until they settle down, to tell me a little bit about the background…then say to them could I go through…I don’t take
out a proforma, but I very much have in my own mind what I need to know. That starts off with very basic information. (Sol 18)

However, as the same solicitor goes on to illustrate, the focus is undoubtedly very different from that described by CALM and FMS mediators:

My thinking for the first part of the session is that...if at some point in the future...because we couldn’t resolve the property and had to raise a divorce action, or if we got matters sorted out and a separation agreement and divorce follows that would be the basic information from which I would frame a divorce writ, so I think it’s handy to have that right at the beginning. (Sol 18)

As suggested in the context of establishing appropriateness, the information collected is specifically geared to identifying courses of action. There is no real equivalent in the solicitor-client relationship to the “what do you hope to get out of mediation question”. The information solicitors would be attempting to glean would be more along the lines of:

Factually you’re separated now, do you really want to proceed to divorce? Do you consider that the marriage had broken down irretrievably? (Sol 04)

Solicitors appear, at this stage to be more outcome, rather than specifically process or service orientated.

3.3.2 Preparing the Users

As in the context of initial information collection, solicitors did not describe a format for explaining how they or their firm operates, or what a client could expect from their solicitor. This is not to say that some sort of explanation is not provided at a first meeting, but that it was not so formalised or structured that solicitors felt it relevant to a discussion of how they would progress a case.

The FMS mediators described how an explanation of the mediation process and its aims and objectives comprised part of the intake procedure. At the first joint session this would be reiterated and the formal ‘Agreement to Mediate’ discussed. This comprises a standard form signed by each party. In addition to issues relating to full financial disclosure, confidentiality, fees for the service (where applicable), and the requirement for each party to obtain independent legal advice, the Agreement also sets out what are in effect, norms of conduct, for example, to “be fair to each other throughout the process”, and to “be co-operative in resolving disagreement”. As a way of impressing upon people the importance of the Agreement they were discouraged from signing it at the session, but encouraged to take it away to reflect on before making a commitment:

The requirement, stated in the Agreement to Mediate for couples to endeavour to be “fair with each other”, serves both a statement of value, and an implied norm of conduct, to assist mediators to manage the session:

Part of that first session would include a lot of talking about what was involved in mediation. And that would be talking about a commitment from them to be leaving fault and blame out of the negotiations, and an attempt to be fair to each other in the process. (FMS 49)

The CALM mediators described a similar combination of formal and informal preparation of the couple. Prior to the first session individuals would be sent a ‘pack’ comprising the referral form and Conditions of Mediation. Set out in the form of letter from the lawyer-mediator to each of the parties, the Conditions of Mediation, like the FMS Agreement to Mediate, covers issues of disclosure, fees, confidentiality and the importance of obtaining independent legal advice. The letter includes a statement describing the role of the mediator, but does not include a comparable set of conduct norms noted on the FMS form.

At the first session CALM mediators would go over the basis of mediation and the Conditions of Mediation letter which would be signed and counter-signed.
In the context of both FMS and CALM mediation, therefore, establishing the framework of the process for a couple is both formalised and bureaucratic, including as it does the requirement to satisfy a set of institutional norms. Further, it is not only informative, but serves as a filtering and couple-management mechanism.

The informative elements referred to by both FMS and CALM mediators included, where appropriate, the fee structures and the length and possible number of sessions. More substantively, the voluntary nature of the process was stressed, particularly where people had been referred through the courts:

*I usually find that if a couple have been at the Options Hearing they don’t really feel they’ve been given a lot of choice about coming, and they’re usually quite reassured to know that it is a voluntary process, and that if they don’t come back I won’t be writing to the Sheriff to say that Mrs Macintosh won’t come back. (CALM 27)*

The necessity for people to retain their own solicitors was also stressed and went hand in hand with an explanation that, as mediators, they were not in a position to provide legal advice.

The objectives of mediation as a process by which couples are assisted to reach their own decisions, was a central component of information-giving. Additionally, a number of FMS mediators were keen to make explicit the values base informing their approach:

*What I’d be looking at would be stating in the initial introduction that the primary aim of the mediation service is to do with children and planning for their future while their parents are living separately. (FMS 56)*

As a filtering mechanism, information-giving in mediation enables people to make a decision whether to opt in or drop out, for example where there is a question of domestic abuse:

*..if somebody has been involved in a domestic abuse situation, provided that they feel it is right for them, based on information that they have got, then that’s their decision. And it’s highlighted that at any time they can withdraw. (FMS 54)*

Indicating as part of the preparatory information-giving, the degree of commitment and “hard work” required, specifically in connection with the collection and completion of financial information, may also serve to filter out people unwilling to take on this task.

In the solicitor-client context there appears to be a more direct route from first contact to information exchange to action. In the context of mediation the requirement for filtering to establish appropriateness necessitates structures of information gathering and exchange.

### 3.3.3 Co-mediation

Mediators vary in their practice in terms of whether they mediate alone or co-mediate. This is discussed in more detail in the SCPR (Lewis 1999) study. From the comments of the sample of practitioners interviewed for the current study the variation in practice among FMS mediators is dependent on Region: in two of the study Regions it was rare for practitioners to co-mediate.

Resource implications were cited as the reason:

*On our own..there are times when I wish we did [co-mediate]. But I think it’s a question of cost, because we’re actually paid £8.50 per hour. (FMS 47)*

Among the CALM mediators personal choice, training requirements and the specifics of the case appeared to determine practice. CALM requires Accredited mediators to undertake three cases with a co-mediator initially before they can practice on their own, and one case with a co-mediator per year as part of in-service training. A number of the sample of CALM mediators suggested they co-mediated because of these training requirements or to assist other mediators, rather than by choice, citing logistical and financial reasons as disincentives.
It’s part of our business, we’re paid an hourly rate for these mediations. If you sit with a co-mediator with whom you share the fee you’re getting half the fee. It wouldn’t make financial sense for us to do that very often. (CALM 28)

FMS mediators and those in CALM who were pro-joint working suggested that co-mediation had advantages in terms both of managing the amount of information, and managing the sessions. If, for example, one person was writing on the flipchart, the other mediator could keep an eye on what was happening between the couple. It also helped to ensure a balance: neither party could feel that the mediator was taking sides. Having two heads also helped if there was an impasse, one might suggest a way forward that the other had not considered. Following a mediation session co-mediators could also debrief, both in terms of the substance of the session, and emotionally, as one FMS mediator commented:

*It can also be quite a stressful thing to be doing and I do find it helpful to have someone else, just to debrief together..rather than taking it home with you.* (FMS 50)

A CALM mediator referred not only to the opportunity to de-brief, but also to de-role, to switch hats from mediator to solicitor:

*From a solicitor’s point of view, once you’re into mediation you’re doing very much a facilitation role. I find that once I’ve been doing that I find it very difficult immediately to step back and get into the advising scenario...And that’s where a co-mediator comes in brilliantly because we’ll sometimes sit and have a coffee and discuss the case and look at aspects of it which we felt went well and generally discuss it, and that helps you to de-role.* (CALM 25)

Several CALM mediators suggested that whether they co-mediated or not might be case specific, if it was “incredibly complex” or “messy”. For example, one CALM mediator felt that the case of Vicky and Jonathon Macintosh might be one where they would prefer to co-mediate:

*Certainly this is the sort of case where there’s a lot of issues, a whole range of issues here, you’d want, preferably, a co-mediator.* (CALM 24)

In cases such as this where there were concerns around potential imbalances, both FMS and CALM mediators indicated that consideration had to be given to the gender of the two mediators so that one or other party didn’t feel “ganged up on”, or intimidated. One CALM mediator felt that the background to Case Two might have a bearing on the number and sex of the mediators:

*I think that would be especially the case..of Vicky if she had a male mediator. She might feel that since she has been intimidated that she would feel more intimidated if she was on her own with two men.* (CALM 39)

It goes without saying that the solicitor-client contact is essentially dyadic, raising none of these specific management issues.

The current study was not designed specifically to identify benchmarks for good mediation practice generally, nor the specific benefits, for couples, of co-mediation. Nonetheless, what emerges from the comments of both FMS and CALM mediators is a sense that co-mediation, in many respects, reflects what practitioners feel to be best practice. That this is not always achieved is due primarily to resource considerations. Arguably, in policy terms, an increase in the number of referrals of more complex cases may heighten this implicit tension between quality and cost.

### 3.4 SETTING AGENDAS, IDENTIFYING PRIORITIES

The ordering of issues for discussion is illustrative of the approaches, objectives and values of the practitioners.
In the context of the solicitor-client relationship, priorities appeared to be, to a great extent, lawyer-led, if only because, as one solicitor commented:

*Most people come to see you without really knowing what the starting point is. They don’t know whether they should be starting off in terms of talking about divorce or by dealing with financial matters.* (Sol 14)

Two solicitors did, however, regard the order as being dependent on the client. Over one-half of the solicitors responding suggested that their first consideration would be the children. This focus on the child comprises a mixture of values, client choice and pragmatism:

*At this first meeting I would only have a vague idea what the picture was, so I can only give general advice, whereas I know what’s happening with the children and I can give proper advice. From a professional viewpoint and from the viewpoint of most of my clients, the children are most important.* (Sol 06)

Only two solicitors suggested that they would begin with financial matters first, but primarily as a way of ensuring that basic information was obtained before dealing with the more emotional child-related issues:

*I would always focus on finance first. The reason for that is to get that information down. It’s not a question of concentrating on finance because that’s of primary importance, but I think it’s easier to get that information down.* (Sol 16)

A number of solicitors would seek to establish early on whether the marriage had irretrievably broken down, while also advising the client that “divorce would be the last thing we would tackle”. Only in respect of Case Two would the divorce element potentially take a higher profile. This may be for purposes of obtaining corroborative information to support a divorce action on the grounds of unreasonable behaviour, or if Mrs Macintosh required the protection of an interdict. The ‘unreasonable behaviour’ element of Case Two also distinguished it from Cases One and Three insofar as higher priority was given to the immediate accommodation and income needs of Vicky and the children:

*My immediate concern would be her accommodation needs and finance needs for herself and the children to be addressed as a matter of urgency. And if need be getting court orders, if required.* (Sol 12)

In the mediation context a key phrase is “It’s their agenda”. Both FMS and CALM mediators regarded the identification of issues and the setting of priorities as being the responsibility of the parties. Nonetheless, the majority of the mediators in the sample would anticipate focusing initially on arrangements for the children. Arguably this may also reflect the ‘agenda’ of the couple, nonetheless the responses to the case studies suggest an element of directionality. This emerges most clearly in the responses of the FMS mediators, nine of whom, out of 13, appeared to specifically identify their own “number one issue” as being a focus on the children:

*I would mention the all-issues service, but before we get into this I would want to know what’s going to happen to the children? My (sic) first priority would be what’s going to happen to the children?* (FMS 47)

*The number one issue I would say was children’s issues...Once that problem’s solved we can then deal with the financial problems...after we’ve decided where the child is going..Surely it’s right that either the child is here or there and there’s a socially acceptable decision for the wee girl before you talk about who gets what money.* (FMS 52)

In the case of a further four FMS mediators while their accounts appear less prescriptive in terms of the ordering of issues, their expectation, or hope, was that children would take priority.
What this suggests is that, potentially, the values base of the service to which the comments of the FMS practitioners allude, may be at odds with the objective of couple self-determination:

We only deal with families who have children...So our starting point is really to see what arrangements they have for children...And then we can go on to the financial side...So that agenda is theirs. So they prioritise what they want, they keep the process going. (FMS 54)
The majority of the 16 CALM mediators would also anticipate that child-related issues would be the first topic of discussion. From their accounts, however, this appeared to be less values or service-led, than evident from the responses of the FMS mediators. Only two of the CALM mediators stated a personal preference for encouraging couples to focus on the children. One of these commented:

So what I try to do first of all is to get an agenda and see what people want to talk about first. But...mostly [what] I would encourage them to talk about first is the children...it’s just the way I deal with my clients and have always dealt with it...I say to them...’obviously what we all want here is what’s best for the children’, and neither of them can disagree with that, because everyone does want that. (CALM 32)

More frequently, across the CALM sample this was expressed in terms of being a response to a couple’s own stated concerns. One lawyer-mediator, for example, describing the first session with Charles and Emma Andrews explained:

Because mediation is all about them setting their own agenda...Identify from them whether it was the children they wanted to deal with first, or whether it was the aspect of who’s living in the house. Sometimes you find that very quickly they will go to the children. (CALM 25)

It was, though, another CALM mediator who suggested the potential for the mediator to influence the direction of the discussion:

Find out from them...what is their priority..It tends to usually be the children. Whether that’s actually their priority or you feel that they’re saying the priority is, it tends to work out that way. (CALM 36)

There does, however, appear to be a greater preparedness among the CALM sample to accept, and respond to, parties’ own agenda.

As with the solicitors, for both FMS and CALM mediators, practical issues relating to the flow of information may also influence the order of discussion. Financial information would not necessarily be available until later sessions.

Neither FMS nor CALM mediators appeared to anticipate that divorce or the grounds for divorce would be high priority, although some would discuss this within sessions (See Section 5.6). Only one CALM mediator raised this as an issue in the context of identifying issues and priorities, but more for background than central to the discussions.

The role of solicitors in obtaining interdicts, court orders or identifying a place of safety for Vicky Macintosh (Case Three), by definition has no parallel in the mediation context. What mediators may, however, be involved in is assisting couples to develop interim arrangements whether for contact or maintenance, to resolve short term problems, and give time to come to longer term solutions:

If there’s some pressing matter, most frequently it’s to do with contact...and they’re anxious to sort that out at the start, I would try to, subject to their willingness, come to some kind of interim contact arrangement within the first meeting, so that it would take the pressure off a bit as we move toward the second meeting. (CALM 31)

Subsequent sessions would include discussions of how arrangements were working, as well as identify any new issues which had arisen in the intervening period.
The identification and ordering of issues for discussion and resolution therefore takes on a different
coloration across professional groups. Solicitors tend to identify the key issues within the purview of
their professional responsibilities, and the order within which they will be dealt. In mediation, while
it is said that the setting of priorities is couple-led, it is only to the extent of being consistent with the
service orientation and values of the provider organisations. The explicitly child-oriented service
culture of FMS mediation, for example, appears to influence the ordering of the issues couples
present. CALM mediators, perhaps drawing on a legal service culture, appeared, from their accounts,
to be more open and less clearly directional in their approach to establishing priorities.

3.5 OPTION IDENTIFICATION

3.5.1 Introduction
The outcome of the dispute resolution process may be both intangible, such as improved
communication between couples as parents, and/or more concrete in the form of a document outlining
proposals. The focus in this section is on the process through which proposals may emerge: by whom
and how options are generated and the criteria upon which they are based.
A fundamental tenet of both CALM and FMS mediation is that the mediator facilitates the process,
the couple control the outcome and determine the solutions. A concern expressed about the
methodology employed by the research was that it appeared to assume that mediators would be
expected to develop options in respect of the case study couples, something which ran contrary to their
working norms. However, by enabling practitioners to describe the process, their role in shaping the
character of the outcomes emerges.
If, in terms of how they described their role, mediators were process focused and reticent about
outcomes, solicitors were, in their accounts, to a great extent outcomes oriented, the process was less
often a matter for reflection and perhaps more taken for granted. Again, however, the data suggest
that while solicitors may be more directional, the client is not necessarily expected to be a passive
receptacle of professional advice.
The process from presentation of issues to resolution can be divided into four elements:
• Identification of the client/couple’s areas of agreement and disagreement, their objectives and
  their goals;
• Identification of possible ways of resolving areas of dispute and meeting objectives and goals;
• Option appraisal, the weighing up of the pros and cons of different options;
• Decision-making.
The following two sections explore the first three elements. As far as decision-making is concerned
the research was not designed to establish what a couple participating in mediation, or a solicitor’s
client would decide.

3.5.2 Clarifying the problem: identifying areas of disagreement, goals and
objectives
For the FMS mediators, the starting point is a structured process by which each partner identifies their
own aims and objectives and their aims for their children. By formal is meant that these aims and
objectives are made explicit and written up on to a flipchart for reference throughout the process.
CALM members appear to take a less structured approach, asking parties to identify the issues and the
order in which they want these issues discussed. For example, one solicitor-mediator described how
they would approach the child-related issues raised by Case One:

What I would do there is to obtain from each of them a brief résumé of
what they propose and how they would like to see things develop. If the
children, for example, were to move home or there was some other change
in their lives that was substantial, I think we’d clarify the effect that might
have on them…I think you then go back to the proposals each of them had
and clarify, in view of what’s been discussed, that the proposals are still
the same ones as we started with at the outset. (CALM 23)

While perhaps less formal, the process described is the same in effect: a statement of what each
person is seeking, which provides a baseline against which options can be measured.
Even at this early stage, the process of identifying issues, or aims and objectives, can be used to position the parties, to take the individual’s own account and “re-frame” it to promote the process. In other words, mediators themselves describe a process of translation by which a couple’s original formulations are re-cast in what is perceived to be less confrontational language. One FMS mediator, for example, in response to Jenny Hamilton’s (Case One) stated preferences, commented:

\[\text{I might do a wee bit of re-framing of some of that. I’m wary of demands appearing as aims.....I might re-frame the thing about staying in the house and wanting help with the mortgage...it actually means that she wants to know that the children and she have a roof over their heads and a degree of financial security. I think if we put it in those terms it’s much easier for the person on the other side to see it as a joint goal rather than a demand.} \ (FMS 48)\]

A CALM mediator, also referring to Case One, described this process of translation of the issues:

\[\text{Because the issues that you’ve focused on this sheet could be seen as slightly unbalanced. The ‘residence of the children’ tends to suggest that they’re going to decide where the children are going to live as the most important thing, as opposed to their contact with both parents. ‘Distribution of matrimonial property’, this language seems to me more the language of a lawyer, so I thought about this, and I would use ‘assets, because that’s what we tend to use on our sheets, but even that could be improved..} \ (CALM 34)\]

To promote a joint enterprise and take the conflict out of conflict resolution individuals’ own words are transformed and re-presented back to them.

For the solicitors the identification of the issues and their expression appeared relatively straightforward. In general solicitors took as read the information on individual ‘preferences’ stated on the research information sheet. This may be because there was not the same pressure to share this information between both parties. Nonetheless, one solicitor, considering financial options in the case of Vicky Macintosh (Case Two), commented:

\[\text{But I would need to know what her aims were before I could suggest ways of her getting to that.} \ (Sol 06)\]

3.5.3 Source of Possibilities
Clearly the solicitors in the sample saw it as their professional role to propose options to the client:

\[\text{Once you’ve discussed all of these possibilities then I think you want to look at options, what are the options here? And you have to identify them because the client’s not going to be able to identify them. And they want to know ‘what am I going to do?’}. \ (Sol 10)\]

As a result, when presenting possibilities the flow of information is from solicitor to client:

\[\text{I would be saying that the best way of trying to move this forward...is to try and agree with Emma that he retain the house with some form of capital payment to Emma}...\ (Sol 05)\]

\[\text{I would be suggesting that she get the car,....the only liquid asset that there is is the life insurance policy and the money in the joint account. So I would suggest she get that}...\ (Sol 08)\]

Comments such as these suggest that in giving advice lawyers are leading clients in a particular direction, but the final decision rests with the party. As described by one lawyer in respect of Jenny Hamilton (Case One):
I’d never tell her what to do…it would be for her, at this stage, to say to me, this is what I want…and I would pursue that. And I would point out to her that to defer payment and to seek aliment..would probably net her more money at the end of the day. But I wouldn’t go as far as to say to her that was her best option. I would just point that out to her, because she might not want to do that. (Sol 06)

The comments of one solicitor, however, suggest that the process can be more overt, and for clients to be instructed more than instructing:

We do an awful lot of stuff without getting the client’s instructions, you more or less impose it on the client. They’re coming to you for advice, so you’re saying ‘I think you should do this’, and nine times out of ten they say ‘fair enough’. (Sol 15)

If the generation of options is envisaged as a continuum running from a predominantly client-led process at one pole, to a predominantly professional-led process at the other pole, then the sample of solicitors, unsurprisingly, are clustered towards the profession-led point. The comments of the sample of mediators suggest a scatter toward the client-led pole, but not a clustering. There are those, who in their accounts suggest they aim to be primarily client-led:

We can encourage them to find options of their own, just by making suggestions…our job is really to encourage them to produce their own options, not to give them to them on a plate. (FMS 50)

Further along the continuum would be those practitioners whose accounts suggest a more proactive approach to option-generation. For example, one FMS mediator considering the Hamiltons’ financial situation (Case One) anticipated saying to them:

‘This is going to be very difficult, it’s not an easy life for you, you haven’t got a lot of spare living in one home, you’re going to have to tighten your belts if you’re going to run two homes at the same time’. I will say ‘I will suggest some options, none of them you are going to like’. (FMS 47)

Speaking more generally, in an echo of the solicitor quoted earlier, one FMS mediator commented:

I think the mediator does need to generate options, I think people wouldn’t be here if they could generate them all themselves, they wouldn’t be stuck. So I think that is my job. I don’t see it as my job to select the options. (FMS 48)

Commonly, mediators described a combination of suggestions coming from both the couple and the mediator. For a number of CALM mediators this was typified as “brainstorming”.

You would look for everything to come from them initially..but if they didn’t suggest things you would offer.. ‘I wonder if you’ve thought about?’ (FMS 53)

[The options] They’re coming from the people. They don’t come from me…if they’re stuck..then I will put up some suggestions, and if they’ve only thought of a few I will say ‘Well I’ve known cases where this happens, and you might like to consider this as an alternative option’, to broaden it out, but I don’t indicate a preference. (CALM 26)
3.6 OPTION APPRAISAL

3.6.1 Strategies for Appraising Options
In some respects solicitors and mediators share a common aim: to assist people to identify possible courses of action. The responses of mediators and solicitors in the study suggest two ideal types in terms of how they see their role in the process of option identification and appraisal (Figure 3.1). For solicitors, working with one party, the identification of options is accompanied by an indication of the solicitor’s preferred course of action. This is the advice upon which an individual can choose to act or not. For CALM and FMS mediators the identification of an option is, to a greater or less degree a joint exercise, i.e. joint between mediator(s) and couple. But mediators distance themselves from the identification of preferred courses of action, or solutions, as this is intended to be solely the couple’s joint decision.

Fig 3.1 The Role of Practitioners in Option Appraisal and Identification – Ideal Types
Solicitor to client: You have options a, b, c based on x, y, z reasons. I advise you choose a, but it is your decision (singular)
Mediator(s) with couple: Possibilities 1,2,3, we explore implications of each one, you decide (plural)

One FMS mediator, for example, considering the financial options available to the Hamiltons (Case One) commented:

*I don’t immediately see an answer here but...it’s not for me, as a mediator, to see an answer to that, they have to go through it, and, very often you find that, by looking at the figures, and juggling them about and looking at possibilities an answer will arise.* (FMS 43)
The desire to avoid appearing to lead people, and the assumption that through discussion and visual display “an answer will arise”, can give rise to what appears to be a degree of circumlocution, not evident from the accounts of the solicitors. For example, in respect of Vicky Mackintosh (Case Two), one FMS mediator commented that somebody should be telling her to go and get council housing and draw income support, but: “I wouldn’t be saying that, I would be bringing her to terms with the reality of the financial situation” (FMS 51). This can be compared with the more direct response of one of the sample lawyers:

*With her finances just now she’s not going to be able to purchase a property, so she’s going to have to lease one, where is she going to lease it...So giving her advice on what she’s going to do... ‘I would go to X Council fill in a housing application and submit it’. I’d tell her also to go to Y Housing Association and submit an application to them...I’d tell her of certain people to avoid!* (Sol 04)

Similarly, in respect of the Hamiltons (Case One), a CALM mediator commented:

*I’m not going to say that Jenny could keep the proceeds of the house, but that’s obviously an option, that’s something we would expect them to recognise.* (CALM 31)

Which can be set alongside a solicitor who, looking at their assets noted:

*One of the possibilities would be that she [Jenny] could retain the home and Mr Hamilton would retain his pension rights. That may lead to Mr Hamilton receiving more of the matrimonial assets than a 50/50 share, but there is an attraction in it for both sides.* (Sol 03)

What is illustrated is the different approaches to option appraisal. For solicitors it is a transparent process of outlining to a client, on the basis of their experience, the pros and cons of different
approaches, for example the likely reaction of the courts if Vicky Macintosh (Case Two) seeks to restrict Jonathon’s contact with the two children, or the advantages and disadvantages of Mrs Hamilton (Case One) claiming aliment, as opposed to applying for benefits.

In the mediation context the process is both transparent and opaque. The transparency of the process lies in the sharing of information, in the joint identification of aims and objectives, and issues, and in the visual display of financial resources. In fact, in some respects, mediators’ accounts suggest that the most profound influence on decision-making is this presentation of financial circumstances on the flipchart:

Because when folk actually see the finances right in front of them, sometimes they see the solution. (FMS 56)

For both FMS and CALM mediators the process is one of going through the options with the couple to establish how they would work, a process described by CALM mediators as “reality testing”. In respect of the financial information, for example, one FMS mediator described how:

Once the information is up there on the flipchart they can actually see, when you come to look at the options, what’s possible. So you’ll have an option one…then you’ll get to a certain stage in that and they realise it isn’t going to work, then you try another option, or you send them away to think about something more creative. (FMS 44)

At one level, the sky is the limit. Having gone through the implications, parties arrive at their own solutions. For example, in respect of child-care arrangements, one CALM mediator commented:

The fact that I think the areas that they’ve worked out won’t work, are impractical, is neither here, nor there, it’s for me to explore with them whether they think it’s practical or they can work it. (CALM 37)

However, the approach may not be as open-ended and couple-led as these remarks suggest. One interpretation of the mediation process may be that, in the course of option identification and appraisal, information and options are presented neutrally, in a non-judgemental fashion, by the mediator, based on their knowledge and expertise. Another interpretation, suggested by an analysis of the accounts of both FMS and CALM mediators, would be that information and options are presented by mediators in a selective fashion. Again, drawing on the practitioners’ knowledge base as well as on the values of the service, this may have the effect of subtly leading people in a particular direction. Thus, through information-giving, in the concepts of ‘fairness’, in assumptions of good parenting arrangements, in the use of references to the law and the courts, which emerge in the option appraisal process, there is a sense of people being encouraged in particular directions, but in a less explicit manner than evident in the context of solicitors’ practice.

The ‘re-framing’ of individual’s statements can have the same effect of encouraging people in specific directions:

Part of our job is very much changing the language that’s used. So that if parents come in and say, ‘I want to have residence and he should have contact,’ then we don’t talk about ‘residence’ and ‘contact’, we talk about sets of arrangements about, you know, where the children spend what time and we would be trying to look at some form of shared parenting. (FMS 50)

The process of option appraisal is, therefore, not of necessity values free. The use of information, the options suggested, and the discarding of options are, to an extent informed by the practitioner’s own criteria of the relative value of particular solutions. This is not intended as a criticism of mediation, it in fact suggests a sophisticated strategy through which a couple can take advantage and learn from the expertise of the CALM and FMS mediators. It is, though, perhaps at odds with the rhetoric of mediation which stresses neutrality, impartiality and couple-control. The tensions this poses for mediators is perhaps summarised by one solicitor-mediator:
It can be difficult not to be too directional while still guiding. I do think that if you left it up to them 100% it would soon arrive at a bit of a mish mash…I think input is useful. (CALM 61)

3.6.2 Benchmarks for a Good Solution
In evaluating different options with, or on behalf of, parties, both solicitors and mediators appear to be employing benchmarks against which they measure the appropriateness or otherwise of a particular solution or option. As intimated, these benchmarks, or criteria, may not be made explicit, but may be implicit in the mode of questioning and information-giving in mediation, or in the courses of action proposed by solicitors. Whether expressly stated or implicit four benchmarks stand out: whether the proposed options are deemed fair or to be within someone’s rights; whether what is proposed is in the children’s best interests; whether it is practical or realistic; whether it is within the law and what a court would recognise as appropriate.

Fairness and Rights
In attempting to explore what these benchmarks are, a fundamental difference between FMS mediators and solicitors becomes apparent. For FMS practitioners the discourse is one of “Fairness”, for solicitors it is one of rights and entitlements.

For FMS mediators the starting point for the mediation includes identifying with the couple their ‘Principles of Fairness’. It has to be noted that several of the sample were not entirely comfortable with the concept, but from the comments of other FMS practitioners these principles and the way ‘fairness’ is employed in the context of the mediation has three uses. Firstly, it is a process objective:

\[
\text{Part of that first session would include a lot of talking about what was involved in mediation and that would be talking about a commitment from them to leaving fault and blame out of the negotiations, and an attempt to be fair to each other in the process.} \quad (\text{FMS 49})\]

As such, it is used as a means of managing parties, for example, one mediator discussing Jonathon Macintosh’s reaction to his son’s apparent reluctance to see him, commented:

\[
\text{Now he may still be blaming Vicky, but you can remind him that they promised to be fair to each other.} \quad (\text{FMS 53})\]

Secondly, in the specific context of financial option appraisal, ‘fairness’ is also an outcome objective, that both individuals regard the option as fair, to each other and to themselves. For example, as one FMS practitioner discussing Case Three explained:

\[
\text{Anybody else's sense of fairness is not really what’s the issue. It’s actually Charles' and Emma’s idea of what they feel is fairness and what they feel is being fair to the other person and to the children...and they don’t feel that they’re actually given away everything, or been robbed of everything.} \quad (\text{FMS 54})\]

Another mediator specifically drew attention to the distinction between the emphasis on a resolution based on this sort of approach to one they anticipated a solicitor would adopt:

\[
\text{The difference is that lawyers aim to fight their client’s own corner, whereas our aim is to get them to agree to something which seems to them to be fair to each other and fair to the children.} \quad (\text{FMS 47})\]

Where the FMS mediators overlap with solicitors (and lawyer-mediators) is in the third use of the term, in that financial solutions should be “fair and equitable” in the terms of the law:

\[
\text{We should be happy that it’s fair, and within the laws of things like the Children (Scotland) Act and the Family Law (Scotland) Act.} \quad (\text{FMS 46})\]
There is no formal equivalent in CALM mediation to the FMS Principles of Fairness. Insofar as the language of ‘fairness’ is employed it tends to draw on legal usage in respect of financial division: “a fair division of the assets is normally an equal one”. The moral dimension implicit in the FMS usage is missing. In relation to Vicky and Jonathon Macintosh (Case Two), for example, one CALM mediator described how they would approach the division of the assets:

*The net assets would appear to be £22,800. And if they were going to divide these equally it would mean £11,000 each. At that point you would ask for suggestions...how do they feel they could bring about a fair share of the assets.* (CALM 39)

However, like FMS mediators, CALM practitioners do appear to accept the possibility of a couple-defined ‘fairness’ which stretches the boundaries of the legally defined ‘fair and equitable’:

*We look on a fair settlement as one according to what the statute says, but obviously what is a fair settlement might be something quite different to the couple concerned.* (CALM 39)

Outwith reference to formal parental rights and responsibilities in the context of the Children (Scotland) Act, reference to rights and entitlements tends not to be a feature of the accounts of either FMS or CALM mediators. This may be a function of not wishing to be seen to give advice. Mediators may distinguish between giving information about the law, from giving information about rights and entitlements. Further, for FMS mediators it may stem from a specific intention of avoiding framing the issues between a couple in what is perceived to be legal language. There is evident here a tension, for both FMS and CALM mediators, between the couple-focused, non-legalistic philosophy of mediation and the need to work within broad legal parameters. Arguably this is resolved by reference to the likely response of their own solicitors to their proposals. For example, if a couple appeared to be moving toward a substantially unequal division of matrimonial property, mediators would ask them to consider how their respective solicitor’s may respond to the proposals. One CALM mediator described how they would say to couples:

*‘Remember your reality test, you're going to take this back to your solicitors, do you think your solicitors will like this distribution?’* (CALM 25)

For the solicitors there is no such apparent tension. For those in the sample ‘fair’, insofar as it was used, was in the legal sense of ‘fair and equitable’. Any deviation is justified in terms of economic disadvantage or the economic burden of childcare i.e. in terms of the Section 9 Principles of the Family Law (Scotland) Act 1985, rather than in terms of a personal assessment of ‘fairness’. ‘Fairness’, for solicitors is set within a discourse of rights and entitlements. The emphasis in the language of solicitors on rights and entitlements, while in practice perhaps not different from a benchmark of ‘fairness’, nonetheless carries with it a greater sense of a normative measure, around which negotiation can take place. This can be illustrated by the comments of one solicitor describing the sort of advice they would give to Jenny Hamilton (Case One):

*Her entitlement to her husband’s pensions would be somewhere just above £19,000. But the equity in the home is for the two of them, so she would be entitled not just to his equity, but also something else from him if she was getting a fair share.* (Sol 06, added emphasis)

Although, in practice, as solicitors themselves acknowledge, that which can be insisted upon is not of necessity realised, the language of rights and entitlements suggests an external, legal norm against which options can be appraised. A language of fairness carries a more subjective, moral connotation. A rights based approach suggests potentially greater commitment to consistency in the application of the law. Such an approach facilitates negotiation between solicitors on the basis of an assumed shared knowledge:
Generally speaking, experienced matrimonial solicitors know where there is going to be a settlement, and what sort of area it’s going to be. (Sol 14)

The different discourses may lead to conflict at the point where the mediation process meets the legal process i.e. when couples take their memorandum of understanding back to their respective lawyers to be made into legally binding document (See Section 3.7). Potentially, the discourse of ‘fairness’, as used in the mediation context, may not easily be translated into the language of rights, as understood in a legal context.

**Children’s Best Interests**

In the context of contact and residence, the phrase used by both solicitors and CALM and FMS mediators, to indicate the benchmark against which clients and couples should consider the options was the degree to which they were in the ‘children’s best interests’. While, arguably, drawing from the Children (Scotland) Act 1995, and the requirement for the courts to give paramount consideration to the welfare of the child, the way in which the phrase was used and the functions it performed were different.

As with fairness, for FMS mediators, reference to ‘the best interests of the children’ serves as both a strategy and a goal. It is, for example, used as a couple management technique:

*It’s very helpful, if things are going slightly difficult for them, to focus on the children, because both of them always have the children’s best interests at heart.* (FMS 53)

Parents are encouraged, in the context of FMS mediation, to identify what they feel would promote the welfare of the children, focusing specifically on the practical issues. Nonetheless, the assumption on the part of the mediators appears to be that this will be achieved by a joint parenting plan. One FMS mediator, for example, conjecturing, on what might be written into the Memorandum of Understanding for Vicky and Jonathon Macintosh (Case Two) is illustrative of what they perceived to be the preferred outcome:

*My Memorandum of Understanding as far as the children’s arrangements are concerned will start off with the headline ‘Needs of the Children’ and it will say ‘both Vicky and Jonathon are agreed that it is in the best interest of the children that they maintain a loving relationship with both their parents. They are further agreed that the following shared parenting plan will be put into force as from…*(FMS 51)

Solicitor-mediators similarly used discussion of the children’s best interests as a management technique. For example, in the face of Charles and Emma Andrews’ acrimony:

*I would..perhaps try and focus them on what they are agreed about, which is what that they both want what’s best for the children.* (CALM 36)

As with the FMS mediators, defining what was in the children’s best interests, was approached through discussion with parents of the practical implications of options, for example in the case of Vicky and Jonathon Macintosh:

*I would do the reality testing bit about if the residence was split what about schools, how are the children going to feel about having two different houses as their homes, what about doctors..etc. It would be trying to draw their attention to both the pluses and minuses and let them draw out their own pluses and minuses and then make..an educated decision in the best interests of the children.* (CALM 35)

Although not necessarily couched explicitly in terms of a joint parenting plan, solicitor-mediators too appear to start from the assumption that continued involvement of both parents is in the child’s best interests. Again, this is revealed in the comments of one practitioner suggesting what Charles and Emma Andrews (Case Three) would identify as being in their children’s best interests:
Hopefully they will be coming up with aspects such as stability, needing both parents involved with them, requiring them to have the confidence and knowledge that their parents will both be there for them. (CALM 25)

In exploring what is in the best interests of the children, both CALM and FMS mediators seek to encourage people to distinguish between what they want and what they perceive to be in their children’s best interests.

The same approach is adopted by the solicitors in the sample. This emerges most clearly in respect of Case Two, where, in the face of Vicky Macintosh’s reluctance to accept more than restricted contact, solicitors would advise her that:

Not only does she have to have good reason, in the sense that she has to believe it’s in their best interests, but it really has to be in the interests of the children, and it’s not what she wants, and it’s not what he wants, that counts, it’s what is best for the children. (Sol 06)

For the solicitors, the burden of proof for refusing contact, rests with the client. If the client can not justify why contact would not be in the children’s best interests, proposals for contact would be put forward. The anomalous situation this gives rise to, whereby solicitors may, in effect, be acting against a client’s instructions, was noted by two of the sample. For both of these practitioners, and for the other sample solicitors, the child’s best interests was defined in terms of the anticipated response of the courts. Again this appears to draw from the Children (Scotland) Act, although this was not made explicit. One solicitor, responding to Vicky Macintosh, for example:

Would take the view that Dad should have contact...In a situation such as this you can get into a very difficult position, because although you're acting on behalf of the wife, you probably are endeavouring to get contact up and running...How far you can push that with your client is pretty difficult because it may appear as though you're actually taking his side...Ultimately what you've got to try and impress upon her is that the courts will, in all probability, attempt to award contact in a situation such as this...Just because he's a violent husband doesn't mean he's not a good father. (Sol 16)

The attempt in mediation to enable couples to arrive at an agreed understanding of what is in the children’s best interests, as expressed through joint parental involvement, obviously avoids this tension.

The Practical and the Realistic

If the concepts of ‘fairness’, ‘rights and entitlements’ and the assumptions around what is in the child’s best interests provide the broad brush strokes of option appraisal, for the fine detail mediators and solicitors turn to the language of the ‘practical’ and the ‘realistic’.

Solicitor-mediators in particular, described how they encouraged people to look at the ‘practicalities’. For example, one practitioner described how he would draw Jonathon Macintosh’s attention the difficulties of a joint residence arrangement:

Say to him, ‘how is that going to work in practice?’...you would want to flag up with him the practicalities of his proposals. Are they really that practical and are they really in the best interests of the children. (CALM 24)

Solicitors, and to a lesser extent mediators, were concerned with what was ‘realistic’, for example, one solicitor discussing the options available to Vicky Macintosh:

The first thing that strikes me is that it is unrealistic of her to continue to live above the shop premises...the most realistic suggestion I would make to her...(Sol 08)
A superficial analysis suggests that the use of the language of practicality/impracticality, realistic/unrealistic by mediators reflects their assumptions of what is achievable. Given the financial constraints or logistics, it can also be a means for guiding people to re-think particular solutions. For example, one FMS mediator describing how they would approach the issue of the matrimonial home with Charles and Emma Andrews (Case Three), suggested that they would:

Get them to look at the size of the house, if it’s a large family house is it realistic for Charles to stay there on his own. (FMS 45)

For solicitors that which is ‘realistic’ is not just based on assumed achievability, but also acceptability in a court context:

We do have to be realistic about what the courts may say. (Sol 18)

In effect, words such as ‘practical’ and ‘realistic’, are a way for all three groups of practitioners to share their professional understandings and assumptions with clients or couples. Encouraging people to assess the options available to them in these terms, may explicitly or implicitly serve to encourage people toward particular solutions.

The Law and the Courts

As the above suggests, for the solicitors a ‘realistic’ option is one which the courts would accept. While, not surprisingly, solicitors look to the law and the courts as a benchmark, it is undoubtedly the case that mediators are also working in the shadow of the law.

Children (Scotland) Act 1995

In the context of child-related issues, the key piece of legislation is the Children (Scotland) Act 1995. The practitioners’ perceptions of the impact of the Act is discussed in more detail in Section 5.1. Specifically in the context of appraising different options, explicit reference to the Act was variable. Despite, or perhaps because of, the feeling among FMS mediators that the Act reinforced their existing practice and philosophy, only three people made overt reference to the Act when discussing the case studies (more, however referred to the Act in general terms, see Section 5.1). For example, one FMS mediator responding to Vicky Macintosh’s preference for ‘sole residence’, and Jonathon’s for ‘joint residence, suggested:

I think what we’d be doing in a general way is talking about the implications of the Children (Scotland) Act and what that means about parents’ rights and responsibilities and what that means for them. (FMS 44)

Among solicitors and solicitor-mediators, there appeared, from their accounts, to be a greater readiness to draw on the Act in the context of the cases. There is, however, a difference in emphasis. For solicitors referring to the Act could be used to restrain or rein in the expectations of a client seeking to limit the involvement of the other partner. For example, if Charles Andrews’ (Case Three) was wanting to raise an action for residence of the children, one solicitor described how they would ‘caution’ him:

..that the views in relation to children have changed since the 95 Act, and we now have a situation where we don’t look at it as one parent having custody and the other person doesn’t, and you wouldn’t get residence unless there was a concern that the children might be taken away. (Sol 05)

Reference to the law and the likely response of the courts shapes and justifies solicitors’ advice. Among the solicitor-mediators the emphasis is less on the stick and more on the carrot, explaining that residence with one parent does not mean loss of parental rights and responsibilities by the other parent. For example, one solicitor-mediator described how they would explain to the Hamiltons “how the law works as far as the children are concerned”:
Even if it’s agreed that the children will reside with one of them, it does not mean that all the other things that affect children will somehow be decided by the parent with residence, it continues to be a joint process, and joint consultation process. (CALM 23)

Family Law (Scotland) Act 1985
In the context of the division of matrimonial property the Family Law (Scotland) Act 1985 hovered explicitly or implicitly in the background in the accounts of all the practitioners.

The Family Law Act says that an agreement has to be 50/50 and we very much take notice of that. But it doesn’t always work out that way. (FMS 46)

I say the law presumes, and likes, a clean break, and the law suggests it should be 50/50 unless there’s some reason why we should deviate from that. (Sol 05)

The starting point is therefore the same. It is in the approach to the variation that perhaps the accounts differ. The law which casts a shadow over negotiations is open textured, leaving scope for interpretation. Into this vacuum may step the more moral concept of ‘fairness’ used in the FMS context, and the greater tendency on the part of solicitors and solicitor-mediators to draw on the actions of the courts or case law. For example, in respect of the Hamiltons (Case One), one FMS mediator described how they would point out that, given their limited assets they could be worse off:

But to try and get something that you both feel is a fair division, but it doesn’t have to be a 50/50 division, it’s what feels fair. (FMS 43)

A CALM mediator, described how they would spend some time discussing the ‘principles of fair division of assets and the ‘clean break’ idea that the courts apply’, but then go on to explain that the courts had quite a lot of discretion, adding “I think it would be useful to explain to the parties roughly how financial provision works in terms of court proceedings”.

But for both the FMS and CALM mediators, as discussed above, it is a case of making people aware of the parameters within which to develop their own solutions, as one CALM mediator remarked:

I can tell them that they’re entitled to a fair division, but I can’t tell them what a fair division is, precisely. (CALM 35)

Solicitors have no such qualms and are clearly taking the initiative, drawing on their experience and their interpretation of the law to propose an other than 50/50 division. One solicitor, for example, outlined the approach they would take in respect of Vicky Macintosh (Case Two):

I think there is merit in moving away from a 50/50 split. Vicky has a number of the criterion of the Section 9 principles of the Family Law (Scotland) Act, in that I would imagine that she has been largely financially dependent on Jonathon, and she is going to have the primary economic burden of caring for the children…I would start from the 50/50 principle and look at the assets that were available. (Sol 08)

For the solicitors it was a case of:

Looking at the facts, do they support a legal conclusion, that’s what my job is. (Sol 07)

As a professional-led process, solicitors drew on their legal knowledge and practical experience to present options. In the couple-oriented process of mediation, the practitioners use their knowledge to sketch out the general principles of the law, the particulars are the responsibility of the couple.

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1 An implied reference to Sections 9 (1)(a) and 10 (1) of the Family Law (Scotland) Act 1985.
3.7 DOCUMENTING PROPOSALS

As discussed in the SCPR Report (Lewis 1999), and reflected in the concerns of the sample of both FMS and CALM mediators in the current study, the outcome of the mediation process can be both intangible and concrete. At a less tangible level, a successful ‘outcome’ could be improved communication between a couple, even if some, or all of the issues remain, in practical terms unresolved:

For the mediator it’s not going to be a failure if you don’t actually get them to agree everything. That’s not necessarily why they come to mediation. Sometimes they come to mediation to try and learn how to talk to each other. Sometimes they achieve that without actually agreeing anything. (CALM 36)

A more concrete ‘output’ from the process would be the recording, in a documentary form, “some mutually acceptable proposal”.

For the solicitors in the sample the objective was to reach a negotiated settlement formalised in a legally binding minute of agreement, registered in the Books of Council and Session in Edinburgh. The focus in this Section is on the common element: the written summation of the process.

For the solicitors it was anticipated that the minute of agreement would include both child-related and financial issues:

The purpose of the settlement agreement is to resolve all issues…if the children were to reside with Mrs Hamilton and have contact with their Dad, that is loosely described…If they had come to an overall agreement about aliment and capital sum, then it would all go into the separation agreement, because as soon as it’s in and signed and recorded it’s binding. (Sol 06)

Clauses covering finance would be quite detailed:

There would be a clause about any balance of payment left to be paid, and what method of payment, and how often, or, if it were a one-off payment, what date it should be paid on. (Sol 15)

In respect of contact and residence of the children, however, the structure would be much looser, the arrangements being “as mutually agreed” between the parties:

So if they say they’re not bothered if one person has residence, then nothing needs to be said in any formal sense, other than that the children will reside with, for example, Charles, and Emma will have contact and residential contact as mutually agreed between the parties. (Sol 05)

Partly this reflects, for solicitors, the spirit of the Children (Scotland) Act 1995, and the emphasis on non-intervention. It is also felt to build in flexibility for the parents and children where it is not anticipated that this flexibility would be abused. However, the difficulty of enforcing contact arrangements was also alluded to by two solicitors.

An additional value of the “little piece of paper to hang it on”, was that:

Everybody knows where they are. If you draw the line people know what the rules are, then that’s much easier to accept than being left with a free choice. If the absent parent knows that every second weekend they have the children, that’s much easier than negotiating every last move with the other parent. (Sol 10)

It is, therefore, seen as having a psychological value, structuring the future formal relationship between separating and divorcing couples. However, as the solicitor’s comment above implies (Sol 10), it is not something necessarily organic to the parties, but a set of ‘rules’ applied to the family.
The third function of a minute of agreement, as described by the solicitors is that it can be used to protect against the unanticipated. Clauses can be inserted to ensure that if, for example, there has not been full disclosure this can be subsequently challenged:

> What you often do say is, for the purposes of this agreement it is understood that the matrimonial capital amounts to the following…If this £50,000 we discover under the bed, the whole thing’s open for grabs. (Sol 07)

Also built in may be clauses covering succession, and statements to the effect that the agreement is in full and final settlement “so that neither of them can come back later and get another capital sum against the other” (Sol 13). While serving to protect the client, such clauses also serve to protect the solicitor. One lawyer sought to make the agreement as detailed as possible “If you don’t you’re making a rod for your own back”.

What is also apparent from solicitors’ descriptions is the formal structure of the agreements, it is the language of the law, of “the first party shall pay the second party”, of “clauses” and “full and final settlement”, the details are “engrossed”. Even in this respect it has a very different character from the documentary output described in the context of mediation.

For people working with FMS mediators the proposed solutions would be documented in a Memorandum of Understanding. At the time of the study this document also included financial information. CALM mediators produce a Summary of Mediation and a financial summary. Neither the Memorandum, nor the Summary are legally binding, something mediators were at pains to point out to people. Solicitor-mediators, in particular sought to distinguish between a Summary and an Agreement, which for them, had a specifically legal meaning. To underline the distinction one solicitor-mediator ensured that even in style the mediation document was different from a legal document:

> It’s not an agreement, it’s just a summary of what’s been said. There is a style for it, and I’ve tended to be even more informal in the style so that it doesn’t look like a minute of agreement. In my work as a solicitor, minutes of agreement are probably the most common document, it has a particular look and feel about it, and I make a summary of mediation completely different, it’s more chatty. (CALM 32)

The idea is for couples who have gone through the mediation process to take the document to their solicitors for ‘translation’ into a legally binding document. Both the Memorandum and the Summary, however, perform a dual function. Firstly, they serve to narrate what the couple propose:

> [It] sets out quite clearly what they’re going to do about residence and contact for the children and how things like holidays are going to work…How things are going to be divided and what they are going to do for the future. (FMS 46)

> The structure of the summary would be that Ian and Jenny had been to meetings..if one option had been preferred, and I hate using the word agreed…then I would detail that. If there were two or three options then I would again detail those in the summary. (CALM 38)

Secondly, the documents account for why particular approaches have been adopted. This is especially the case where a couple may be felt to have developed a set of proposals which might not otherwise be endorsed by a court:

> And sometimes things you might think aren’t fair, if they both agree then that’s their option to do it. It would be stated very clearly in the

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22 Since the completion of the study a separate schedule of finances has been introduced by FMS.
Memorandum of Understanding that we've discussed this fully with the couple and this is what they both want. (FMS 46)

If there is anything that's really way off from what we would think of as the norm, you'd want to explain in the mediation Summary why. (CALM 33)

There were, however, differing expectations as to what solicitors would do with this information. Solicitor-mediators seemed to regard advising solicitors almost as collaborators in the process, a legitimate check and balance, especially if there were concerns that someone was agreeing under pressure:

This is where Vicky still has the protection of a solicitor being able to say to her 'really you can’t agree to that because you're not getting anything of what you're entitled to’, and go through it with them. (CALM 27)

Rather than feeling undermined by the potential for solicitors to ‘take it to bits’ they seemed to regard this as a positive mechanism.

The comments of several FMS mediators suggests, however, that they could see the potential for advising solicitors to subvert the process, and attempted to anticipate this:

We say to people that their solicitor may say that they might have got a better deal, but we hope that, having been through the mediation process...it might not be the solution that a solicitor would have got for them, but it’s what they want. (FMS 43)

There is, though, a tension between an approach which sees solicitors both as having the potential to subvert the process, and as a fall-back position if someone is agreeing under pressure. This is illustrated in the responses of one FMS mediator:

But that [Memorandum of Understanding] is not a legal document, they just take that to their solicitors. But sometimes I’m quite naughty, what I do say to them when they go away armed with that bit of paper, is ‘now please remember that your solicitor is there to take instructions from you’

Interviewer: HOW COULD YOU BE SURE PEOPLE WEREN’T MAKING AGREEMENTS UNDER PRESSURE?

That’s the mediators’ job. If Mum is suddenly saying ‘he can have 80% of the matrimonial assets, and I only want 20%, I don’t want to have anything to do with him again, I don’t want his bloody money’, I would be very careful. I would write in to the Memorandum of Understanding that Mum had agreed that this was a fair and just settlement, and I’d make absolutely sure that she took it to a lawyer. (FMS 51)

While the responses of the solicitors to a Memorandum or Summary were not systematically explored in this research, the comments of one suggest that they would see their scrutinising role not as intentionally undermining the mediation process, but of meeting their own professional obligations:

Once they’re at that stage they are coming back to me to discuss it...And I would say to them ‘this is less than you’re legally entitled to, this is more than you’re legally entitled to etc’, not to discourage them, but because I feel that there is a duty there to advise them. (Sol 06)

Another solicitor expressed concern about questions of negligence if a lawyer did not critically examine the summaries produced in mediation:
I’m concerned that an agreement, struck between parties, that they’re happy with, only going to solicitors to make it legally binding, if it turns out that one of them wants to overturn it, who’s fault is it, who’s negligent there? Almost certainly the solicitor, but their solicitor should have gone behind it...You have to do as your client instructs, but that client can only instruct you to do things if they’re fully informed and they know the implications of that instruction. (Sol 13)

A solicitor-mediator in the sample even instanced an occasion when, in their capacity as a lawyer they were presented with a document prepared in mediation with which the client was quite happy. In their capacity as a solicitor, they had to point out that the husband’s pension had not been referred to:

I felt the summary wasn’t fair and reasonable, and we didn’t go ahead to an agreement. (CALM 61)

A further apparent difference in emphasis, if not in substance, between CALM and FMS mediators is the status given to the open summary of financial information. While FMS mediators referred to the inclusion of financial information within the Memorandum of Understanding, CALM mediators made reference to a separate document detailing financial information and vouching. Unlike the Summary of Mediation this separate document can be used in any subsequent court action:

For this couple I would probably want to do an open financial summary...That for us is pulling together all the financial information which they have given to us which, if they approve, it is sent to each of their solicitors and can be referred to in court. That takes from the court process a lot of problems by way of ancillary orders and incidental orders asking for release of information. (CALM 25)

In summary, the objective of the solicitor-client relationship is a legally binding agreement, prepared following negotiation between solicitors acting for each individual. The mediation process involves a two-step approach. The first stage comprises the preparation of a summary of the process and an account of the proposals with which both parties concur. This has then to be taken to a legal adviser for translation into a legally recognisable form. The role of solicitors in this is seen by mediators as both a check and balance to the process itself and/or potentially subverting the couple’s own agreement.
CHAPTER FOUR  STRATEGIES FOR PROBLEM SOLVING

4.1 INTRODUCTION
Chapter three describes the steps for resolving issues in dispute, from entry into the system, through to identifying and appraising options. In this Chapter the focus shifts from the process itself to the underlying strategies, including client/couple management techniques, employed by the three professional groups, to move the process forward. To draw out the differences and similarities in these strategies, each of the professions is described separately, based on practitioners’ responses to the case studies.

4.2 FMS MEDIATORS

Information sharing
In the context of child-related and financial issues, the FMS mediators use a strategy of information-sharing. In respect of finance this is expressed through the collation and sharing of information on assets and liabilities, income and expenditure, using the medium of the flipchart. As discussed in Section 5.5 this, together with vouching, is the main mechanism available for ensuring financial disclosure. In dealing with child-related issues this sharing may be concerned with specifics, such as Joshua Macintosh’s appointments with a child psychologist. It also encompasses more general discussions about how each perceives the other as a parent. This sharing of perceptions both serves as a jumping off point for discussing possible options, but also serves as a way for the mediator to manage conflict. For example, in the case of Vicky and Jonathon Macintosh (Case Two):

“It’s sometimes good to stop them and get them to talk about the children and what they’re like and how their parenting...because usually you’ll find that even if there’s a lot of negative vibes between the couple they have very positive things to say about their parenting....

…I would get Vicky to talk about Jonathon as a dad when they were together, and how much contact Jonathon had with the children and how much they did together as a family. (FMS 53)

This strategy was also felt to enable people to talk face to face about the children “for the first time” and to give the couple the opportunity to express their “emotional” concerns. In respect of the Hamiltons, for example, and Morag’s wish to stay with her father, one mediator described a process by which:

With appropriate use of questions, to give Jenny the opportunity to say ‘if this is the case it hurts me as a mother if my child is going to leave me’. I’m not going to ask her that in direct terms, but I would like to create a situation where Ian can hear her, in terms of her fears and concerns as well as in terms of demands. And vice versa...By bringing it on to a more emotional plane, you give people the option to just hear one another as human beings. (FMS 48)

The strategy of information-sharing is predicated on and underlines the jointness of the process. But FMS mediators reinforce this further by reference, in financial matters, to “joint problem solving”. In a child-related context the issue is one of encouraging parents to take on “joint responsibility”: for the children and for future parenting. But it is also expressed in terms of both parents equally taking responsibility for the distress to the children caused by the separation, and for easing or minimising this distress. For example, in relation to the Macintoshes, and specifically Joshua’s disturbed behaviour, one mediator described how they would encourage a recognition on the part of both parents of their joint responsibility:
And recognising that whatever they are doing can be contributing to what is happening to the child. And we very much focus on that, and try to ensure that it is a joint responsibility, and not just the responsibility of one, which Jonathon may be indicating here...he has a responsibility there also. (FMS 44).

This would extend to anticipating Jonathon’s involvement in Joshua’s appointment with the Clinical Psychologist, and “if he doesn’t we’d be working out why that is”.

Should parents waiver, mediators reinforce the message concerning the importance of working together by reference to the needs of the children and how children like to see their separated parents still jointly making decisions for them. For example, in the case of Vicky and Jonathon Macintosh:

I always talk about the fact that children, even very young children are very pleased when they see their parents co-operating about them, and actually meeting to talk about them. (FMS 45)

Reference to the courts
As a way of promoting resolution through mediation, a strategy employed in discussing both financial and child-related issues was to set it in contradistinction to the formal court procedure. While the mediation setting was described as a place where people were empowered to arrive, through a process of negotiation, at a “fair solution”, the court was a place where decisions, which neither would like, would be imposed by a third party, outwith their control:

If they seemed fairly entrenched and taking a different point of view and not willing to negotiate, we can say the worst case scenario is that you take the matter to court and a third party will make the decision, which might cost you money and time and it may make the relationship between the two of you a lot worse and create problems with your children. (FMS 43)

Not only would a decision by the court be outwith the parties’ control, but the couple could not anticipate what the outcome would be: the court was a vortex of uncertainty, and a place best avoided. For example, in relation to Charles and Emma Andrews’ dispute over the residence of the children, one mediator anticipated that if they went to court it was unlikely that the existing arrangements would be overturned, nonetheless this could not be assumed:

We can discuss with them, but we would leave it clear that we would have no idea what a court would do. And I wouldn’t even put in that it’s most likely the court would give the children to dad. All I would do is say ‘when you go to court it’s not actually in your hands. The court then make a decision’...But I think that’s the reason that you would encourage them to work it out together, because you don’t actually know what the Sheriff is going to do. (FMS 54)

Further, mediators would suggest to couples that, if they failed to agree, their children may be requested to attend court to express a preference as to which parent they wished to reside with, something, which, it was implied, was to be avoided:

And they wouldn’t be asked in mediation ‘do you want to stay with your mum or your dad?’, they would be asked in a court. (FMS 46)

Yet, despite this apparent demonisation whereby the courts are represented as wresting control from parties, creating uncertainty and increasing conflict, mediators were, nonetheless, prepared to cite the courts in a more positive light to support or discourage a particular course of action. This is illustrated by the following comment made in the context of the Jonathon Macintosh’s stated preference for ‘joint residence’:
Sheriffs don’t like joint custody (sic) very much... no court would wear the fact that he had custody... no Sheriff’s going to give him custody if they’re going to be at a childminder’s. But you would also be trying to help him by saying... the court would give a reasonable contact to him. (FMS 53)

In the case of the Hamiltons, one mediator’s own disquiet concerning the proposal that Morag stay with her father emerges from questions concerning child-care arrangements. This is followed up, and potentially justified by, reference to what a court might do:

*I’m thinking along the lines of if they went to court, the courts would encourage the children to stay in the matrimonial home and probably together with one parent, unless they could say there’s no reason for it.* (FMS 46)

There is therefore a combination of both a distaste for the formal process, especially as it potentially affects children, and a respect for the law, and a willingness to invoke the formal authority of the courts to influence a particular course of action.

**Emphasising the positive**

Perhaps as part of the strategy of engendering a sense of joint undertaking, there is, in the context of child-related approaches, a desire to emphasise the positive. Where, for example, each member of a couple, such as Charles and Emma Andrews (Case Three), or Vicky and Jonathon Macintosh (Case Two) were disputing residence of the children, to defuse the conflict the response was to stress the positive emotional context and point out those areas on which the couple are agreed:

*You must both love them very much, and I’m sure they love you very much.* (FMS 51)

Another mediator described how, in identifying areas of agreement and “problem areas” for the Hamiltons, they would accentuate the positive in terms of what they, as parents had achieved:

*I’m trying to get an understanding of what the areas are agreed on, what areas of joint parenting are being managed well. And I would point that out to people. It’s very helpful to point out to people that they’re managing 75% of this really well, ‘hats off to you, the kids have a relationship with both of you’. Because I think folk are not used to that in a dispute situation, the emphasis is all bad.* (FMS 48)

In the case of the Macintoshes, one mediator described how they would try and draw out from them the positives in the past, and also the potential for fathers to “become better dads” following separation.

The emphasis on the positive, while perhaps seeking to make people feel good about themselves (and each other) at an emotional level, may also be seen as facilitative of immediate and on-going communication between parents in respect of their children.

**Contact arrangements**

As a strategy for progressing discussion in connection with child-related issues, the sample of FMS mediators described how they would encourage the couple to talk about both past parenting and current contact arrangements. For example, in Case Three in which Emma Andrews was described as having moved out of the family home nine-months prior to the mediation, the practitioner described how they would find out from the couple:

*What arrangements have been in place over the last nine months, do they see their mother on a regular basis, do they have every weekend...just how has it been working and how did they arrive at those arrangements.* (FMS 50)

This concern with past and present arrangements serves three functions as a strategy. Firstly, it enables the mediator, as in this case, to establish how the couple have been able to communicate and
also, as noted above, to express their views on each other’s past parenting role. Secondly, it enables a
discussion of the children’s past experience and current reaction to the situation. This provides an
opportunity to discuss how the children’s concerns may be minimised or addressed. One FMS
practitioner would, for example, suggest to Jonathon and Vicky Macintosh (Case Two), that they
consider involving the service’s specialist children’s worker, someone who was independent of the
mediation process, but who could see the children to assist them to cope with their own feelings
around their parents’ separation. Thirdly, focusing on past or current arrangements acts as a stepping
stone for considering the practicalities of different options:

So getting a picture of what life is like already...because it’s clear that the
mum already is the person looking after the children during the day. But
I wouldn’t have an ulterior motive about that: it would be to genuinely
get a picture about what happens during the day...and how they each
would see their preferred option working out in practice. (FMS 49)

As a strategy for addressing resistance to a partner’s proposal for residence or contact, particularly in
Cases One and Two, practitioners would encourage Jenny Hamilton and Vicky Macintosh to
articulate their concerns. As with the strategy of information sharing generally, this served both to
provide an opportunity for the other partner to hear and respond, but also for the couple to re-assess
the real or underlying source of their concerns:

If Jenny’s concerns were just about Ian’s working hours we would say
‘are you happy for Morag to live principally with Ian if that could be got
round?’...and look at the practicalities...We would also try to assess
whether it’s the parents that are saying this as some sort of battle between
the two of them, some sort of stand of. So we’d try and identify that and
focus them on what would actually be best for the children. (FMS 43)

In Case Two, the aim would be to encourage Vicky Macintosh to separate out her concerns about
Jonathon’s reaction to her, from his relationship with the children.
In addressing the ‘practicalities’, mediators would encourage the couple not only to think of their own
working patterns and the implications for child care, but also the implications of a change of
residence for the children:

That’s something I would raise with this couple: how important is it that
the children stay in this house. If they move would they lose school and
friends – that would be a terrible disruption to the children. (FMS 47)

There was also a concern about the impact on the relationships between the siblings in Case One:

And if the children were going to live in separate homes, if that’s what
they agreed, think about how the siblings would remain in contact with
each other, and how important that was to each of the children. (FMS 43)

In Case Three a number of practitioners would want to explore the implications for Abigail and Zoë
of Emma Andrew’s new partner and his two younger children:

And one of the things we don’t know and we would be asking about is
whether Zoë and Abigail have already had contact with the new partner,
who they see when they go and have time with mum, how does that work
and with his children. (FMS 50)

In this Case ‘interim’ arrangements had effectively been in place for the nine months since Emma
Andrews moved out of the matrimonial home. In Cases One and Two, however, mediators would be
encouraging couples to consider interim arrangements, for example Morag Hamilton trying out living
with her father:
I would also be exploring interim arrangements, this is an important part of exploring the options. I would hope that Morag would have at least tried living with her dad by the time the mediation’s finished. (FMS 48)

In respect of Case Two, the aim might be to look at arrangements for contact between Jonathon and the two boys in a way that minimised the contact between the parents and was acceptable to the children and Jonathon:

And the mediators do quite a bit of work talking about the stress the children had been under and the fact that they are showing symptoms of distress and difficulty, and that from then some sort of restricted access is indicated at this stage anyway...And...you build up contact slowly...Even suggesting something like tea at the grandparents with dad coming too, so it was a safe environment for the children. (FMS 53)

Subsequent mediation sessions could include a discussion of how well these interim arrangements worked.

**Limiting expectations**

It is notable that in a financial context, where the imperatives are different, the discourse of the upbeat evident in relation to child related approaches is to a great degree missing. Here the focus is on limiting expectations. In connection with the Hamiltons, for example, the stress was on getting them to “face the fact that you will be worse off”, or that they are going to have to “tighten your belts”. Even in relation to the comparatively well off Andrews’:

“they’ve [the Andrews’] had a fairly comfortable lifestyle up to now and it’s going to change and I think they need to think about the ways in which that inevitably must change”. (FMS 50)

One practitioner described the process as one in which the couple decide “Who’s going to have the jam today and who wants the jam tomorrow” (FMS 56).

The trigger for this anticipated down-grading in expectations was the visual display of income and expenditure and the “gap” which would need to be filled.

**Looking at income and expenditure**

As suggested, the starting point for dealing with financial issues is the collection, by the couple, of information on income and expenditure, assets and liabilities, and the visual display of this information in the mediation session. The approach taken in respect of matrimonial assets is discussed in Section 5.4, but one practitioner summarised the essence of the process thus:

We’ll have spent half-an-hour agreeing or not agreeing what are matrimonial assets. Once agreement is reached on what are matrimonial assets, then agreement has to be reached on valuation of them. Once agreement has been reached on valuation, agreement has to be reached on the percentage split. (FMS 51)

In terms of income and expenditure, the objective was to encourage each partner to project likely spending patterns, for themselves and their children, once the couple were living in separate households. This serves three overlapping purposes. Firstly, this assists the couple to identify the ‘homework’ that each needs to do, for example finding out about the costs of different housing options:

So I think, rather than going on with all the other figures I think what we’d be talking about is the blanks [on the financial information forms] and what options has she considered already: has she gone and spoken to the council, or what about private letting, is there anything else that she’s got on her mind. (FMS 49)
Secondly, for this worker at least, the process of going through the expenditures helped people to start building a picture of what their life would be like in the future:

\[ \text{So it's not just a paper exercise, it's not just about the money on it's own. (FMS 49)} \]

Thirdly, it provides a lever for the mediator, and an impetus for the couple to identify options:

\[ \text{When Vicky comes to compile her expenditure sheet the first thing } \text{she's got to have is rent...which in the private sector will be somewhere around } \text{£500 a month...and then she's got to find council tax, her own living expenses, and the children's expenses..So I'd just turn round and look at Jonathon and ask 'where's that going to come from?' She'll see that and she'll go rushing round to the council and put her name down for a house. (FMS 51)} \]

Although practitioners varied in terms of whether they began with assets or income and expenditure, for the purposes of identifying and rejecting options the two sets of figures needed to be looked at in tandem, as part of what one mediator described as a process of “creative juggling”.

For example, in the case of the Hamiltons (Case One):

\[ \text{Sit there with a calculator and say 'O.K. here's 50/50..how's it going to work? Do you want to go with your aims of keeping a roof over your head, for Ian? How's that pan out for you Jenny? If he hands over all the equity to you, you could acquire } \text{£20,000 of equity, but you can't afford it. How's that going to work?' (FMS 48)} \]

In respect of Cases One and Two, a number of mediators would discuss how the couple might seek to maximise their incomes, either through applying for Benefits, or undertaking more work. In the case of the Macintoshes, several of the mediators suggested that a willingness, on the part of Vicky, to look at ways of increasing her income would facilitate the negotiation with Jonathon:

\[ \text{You'd look at the gap with them, and look at the values, and bring them back to the principles of fairness..and you would ask for suggestions from them about ways of managing the shortfall..and hopefully she would have talked about..maximising her business so that she's beginning to contribute more to them. It will really be quite important how independent she is coming over so...there was a feeling of fairness, of sharingness. (FMS 53)} \]

Ultimately, however, in the context of financial issues, solutions were structured by the couple’s own aspirations for themselves, and their children, and the resources they had available. As one practitioner whose practice consisted only of co-mediation remarked in the context of Case One:

\[ \text{I don't know what the answer is, but it's not really for me to know what the answer is, it's for the four people in the mediation session to work on. (FMS 43)} \]

**Summary**

Comparing the strategies towards the different elements of all-issues mediation, what the data suggest are that while, in financial matters, the benchmark is the law, in child-related issues the benchmark of a good solution is the less well-defined best interests of the child (See Section 3.6.2). This begins to touch on a more substantive difference between the strategies employed in relation to financial as opposed to child-related issues. In respect of financial dispute resolution, the strategy, in terms of the mediator’s role appears more ‘hands off’ in character. It approaches the paradigmatic mediation approach of an impartial, independent, person enabling a couple to arrive at their own solutions on
the basis of information and the joint exploration of the implications of different courses of action. The mediator is a source of knowledge and a facilitator, but not an advisor. The strategy in the context of disputes around the children, appears, by comparison, more ‘hands-on’. This is manifest, as suggested earlier, in mediators acting as counsellors, or in a quasi-therapeutic role. Additionally, elements of practise suggest an advising role. This emerges, for example, in discussions around what, how and when children are told of their parents’ separation:

There is the issue of what the children have been told. I would always ask them ‘what is the children’s understanding of the separation? If they’ve not been told yet, how are you going to tell them?’ …Hopefully they can agree the terms in which the children are told. They’d maybe come back to fault and blame. I would say ‘How are they going to feel if you, Ian, say I didn’t want this separation’. And I think the mediator can do a job of saying ‘If you were eight and you hear that it’s your mum’s fault, and your parents separating is a big trauma for you, and it hurts you, who are you going to look for to blame, and there’s your dad telling you your mum’s to blame, so your blaming your mum, so your mum’s bad and your dad’s good, how does that play out in a child’s mind?’ So it’s projecting.

(FMS 48)

As discussed in Section 3.4, this also emerges from the ordering of issues for discussion, in the implicit encouragement towards a “joint parenting plan”, and in assumptions concerning arrangements for residence and contact (Section 3.6.2). To reiterate the point made in Section 3.6.1, this is not intended as a criticism, but to draw attention to the problematic nature of impartiality. The law, specifically the Children (Scotland) Act, the values of the service, specifically the primacy given to children, coupled together with the knowledge and experience of the practitioner may, inform strategies which serve to encourage people toward particular solutions.

4.3 CALM MEDIATORS

The strategies employed by the lawyer-mediators have elements characteristic of those used by solicitors and others which feature in the accounts of FMS mediators. There are, though, also differences which would appear to be specific to the particular conjunction of legally trained practitioners performing a mediatory role.

The law and the courts

The first feature which distinguished the CALM practitioners from FMS mediators was their use of, and attitudes towards, the law and the courts. Rather than, what one FMS mediator interviewed described as a “black cloud” threatening to undermine the process, for CALM mediators the law was integral to the enterprise, setting the groundrules and informing the parameters. For the lawyer-mediators it was the law, rather than the assumption of moral or social values which underpinned their approach. For example, in the context of child-related issues, the law was drawn on to encourage and reassure both parents that they would continue to have contact with their children. It was not the specific social values bound up in the discourse of a joint parenting plan, but a legal right and responsibility. In respect of the Andrews’ both wanting the children to reside with them one practitioner described what they would say to the couple:

‘It is the law at the moment, given the Children (Scotland) Act, that there are rights and obligations that children have towards their parents and that parents have towards their children. You have an obligation to maintain contact with your children, you’ve got an obligation to look after them and support them…and that’s a joint obligation’. (CALM 30)

For this practitioner the acid test was “what would happen if it went to court”. In respect of financial matters, as discussed in Section (3.6.2), this approach is articulated through the concept of ‘fairness’. For solicitor-mediators this is rooted in the notion of a fair and equitable division in the context of the Family Law (Scotland) Act 1985.
In effect, the law (and the courts) provide the framework within which discussions take place. It is their knowledge of the law, as solicitors, that practitioners felt they drew on to facilitate that process. As described by one solicitor-mediator:

> What we see our role as is giving them the benefits of our experience and the way in which we know the courts locally deal with things..the rider when I’m going through that introduction about the FLA [Family Law (Scotland) Act, 1985], I’ll say to them that a lot of people work under the impression that it’s a 50/50 split, and there are certainly cases at court which justify that, but equally there are cases where there has been justification for a different type of sharing, and the court have gone with that, and we give them illustrations of these. (CALM 25)

In relation to disputes over finances, a key ‘strategy’ was giving people some understanding of the legal parameters, specifically the Family Law (Scotland) Act, in general, rather than case-specific terms. This comprised a “general information dump” (CALM 25), or “broad romp through the legal framework” (CALM 33). As also suggested, the law could be drawn on or reiterated when focusing on specific aspects, for example when discussing economic disadvantage. In these more specific contexts reference to the law can serve a number of functions: as information to the parties; as a parameter for the discussion; and, as suggested above, a mechanism for both appearing to distance the solicitor-mediator from an advice-giving role, while at the same time coaxing people in particular directions.

Contrarily, although the law forms the bedrock to the approach, solicitor-mediators were also keen to stress to couples the degree of discretion built into the Act, specifically the factors for diverging from a 50/50 division of matrimonial property. On the one hand this was presented as opening up opportunities for the couple to arrive at their own solutions:

> What you tend to do is list the undisputed items of matrimonial property and ask them to have in the back of their mind this whole thing about equitable division. But I also say to them...the financial settlement for these people might not be in accordance with the law, there might be some other form of settlement that is appropriate to them both that isn’t represented precisely by what the Family Law Act says. (CALM 32)

On the other hand, the fact that the “Section 9 circumstances” were open to interpretation made some solicitor-mediators tread even more warily:

> My experience of these things in application is that there is this grey area of how the courts will view these situations. It depends on the particular judge you get. All I would feed into the mediation is that how these matters are dealt with if something is a grey area on which they can get advice from their solicitors. (CALM 35)

Another “grey area” was the likely outcome of a CSA application. While several solicitor-mediators would be prepared to give an idea of the range of a CSA determination, others felt that such information was too close to advice giving. Certainly, in their accounts there appeared to be a sense of familiarity with the technical aspects of the law and its interpretation. However, this experience can bring with it its own dilemmas, as summarised by one practitioner:

> The advantages of being a lawyer when you’re dealing with money related mediation is that you know yourself 90% of the time roughly what a fair solution would be. The disadvantage is exactly the same because you do have to avoid being a lawyer and saying ‘well this is what you should do’. (CALM 61)
Reinforcing neutrality

For solicitor-mediators this raised two issues: the use of their knowledge and the information they imparted in a way which did not compromise their perceived neutrality between the parties i.e. was even-handed; and in a way which was understood as information and not advice i.e. was non-directional. Although present among FMS mediators, solicitor-mediators appeared to be particularly at pains to be perceived as neutral, in both these senses. This apparently greater self-consciousness may stem from the need felt by the sample to distinguish their mediator role from their advocacy role, both personally and in their practice.

The strategies used to reinforce a perception of their neutrality between the parties was in the form of the questioning used, the timing of the information-giving and in the ways in which information was communicated.

In terms of questioning, lawyer-mediators were keen to be seen as even-handed. One practitioner, for example, described how they would be exploring with Jonathon Macintosh (Case Two) the practicalities of his proposal for joint residence of the two children:

*I would be asking certain questions of Jonathon. I wouldn’t do it in a critical way, because I’d address questions to Vicky as well. There is a problem of balancing it. If you go too far against one he might feel ‘this guy’s getting on at me, he doesn’t want me to have joint residence of the children’, which of course is not the case.* (CALM 32)

Several solicitor-mediators would give legal information early on in the process, before a specific question was discussed to avoid potential accusations of partiality:

*I would tend, as soon as possible, when I know there’s an issue, give a very broad outline of the very broad legal framework, just so they know that broad picture before you start discussing it so that they don’t feel, if it’s brought in at a later stage, that you’re aligning with one or other if it happens to be information that might favour one or other if brought in once you get into the nitty gritty.* (CALM 33)

A third strategy was to provide information in a way which also sought to be even-handed. For example, in relation to the “minefield” of pension rights one practitioner described how they would give a “general overview of the law”, and suggest they obtain transfer values and discuss with their own lawyers how they might divide the pension:

*And it’s much more even-handed because you can say that to them both, to discuss it with their lawyers, because they all have different ideas of what they’re entitled to.* (CALM 61)

This strategy shades into the desire on the part of the practitioners to be seen as a neutral within the process: to not be thought or seen to be directing towards particular solutions. It was this which they felt distinguished their mediation role from their role as a solicitor. As lawyers they were able to impart legal knowledge and technical expertise; but as mediators they were not then responsible for translating that knowledge and expertise into the best solution, this was the responsibility of the couple. The approach was to “feed them things”, but not to “lead” them:

*You are saying, generally, this is the approach the law takes...you are saying there are various options, the court can either do this, the court can do that...you have to decide whether you can actually pick an option that’s going to be acceptable to both of you...but that’s completely different from saying ‘Oh, Charles, in your situation I really don’t think it’s wise for you to do this’.* (CALM 36)

This desire not to be seen to ‘lead’ is reflected not just in the character of the information given, but in the information effectively withheld. For example, in discussing maintenance for the Macintosh children (Case Two), one practitioner would not be indicating to Jonathon the assumed CSA ceiling of 30%, “that’s probably a little too far in giving detailed legal advice to them” (CALM 29). This is
also manifest in the apparently ‘hands off’ approach illustrated by practitioners in the context of the Macintoshes’ dispute over the antiques:

*I think all the mediator could do is say ‘well, these are the legal principles that would normally be applied, but it’s quite a messy area’, and hope that they would then come to a compromise themselves about it.* (CALM 24)

Similarly, in connection with the potential economic disadvantage suffered by Charles Andrews:

*As a mediator, luckily, it’s not my job to tell them whether this is something they should take into account. What I would discuss with them is …it is one of a number of factors that can, in terms of the law, that the court has a discretion…I wouldn’t bring it up necessarily, but I would have said to them perhaps check with their solicitors.* (CALM 36)

However, as suggested in the context of option identification (See Section 3.5) and appraisal (Section 3.6) couples could be encouraged to consider particular solutions in more subtle ways than direct advice-giving. For example, one mediator described having “in the back of my mind” a way out for Vicky and Jonathon Macintosh in respect of aliment and maintenance, and describes how they would effectively move parties toward consideration of this solution:

*Now, again this is where you have in the back of your mind, ‘I can think of a way out of this one.’ …She will say, ‘Well, £25 a week is not acceptable, because he earns £1,000 per week on many, many occasions.’ So I would say, ‘Well, is that constant?’ ‘No, that’s probably only about once a month or something like that, that he earns £1,000 a week’….. Right, then, what other possibilities are there? They might for instance come up with what I might have in the back of my mind is that he could make a standard weekly payment but he might perhaps come up with a suggestion that he could pay on top of that figure, maybe once a month or once a quarter or something like that, which would help her to pay, quarterly bills perhaps, or something like that.* (CALM 39)

Reference to what a court may or may not do may be a way of distancing themselves from appearing to give advice, but, potentially, may also have the effect of positioning people. One practitioner, for example drew the following distinction:

*I feel that I do have a job to do to give them a background of what a court would do, and what my doubts are, but it’s not my job to tell them that’s what they must do.* (CALM 37)

While, in principle, this leaves the couple free to to make their own decision it would take a very determined couple to act contrary to such ‘information’.

Another ‘authority’, CALM practitioners would have recourse to was the parties’ own solicitors. Although FMS mediators would refer people on for specialist advice, there did appear to be an even greater readiness among CALM mediators to suggest people obtain their own advice. Arguably this may reflect the high proportion of referrals to solicitor-mediators from other lawyers, but may also reflect this attempt to distance their legal and mediation roles. This arose when there was a potential dispute, for example over the division of a pension, or where they felt they were being required to give advice, as in the instances cited earlier in respect of CSA determinations. To a degree, parties’ solicitors comprised a silent partner in the undertaking:

*Also saying ‘remember your reality test, you’re going to take this back to your solicitors, do you think your solicitors will like this distribution?’* (CALM 25)
Information sharing

Before looking at the strategies employed by lawyer-mediators specifically in respect of child-related and financial matters, two approaches were evident in both contexts. Firstly, the technique, discussed in the FMS context, of information-sharing. Solicitor-mediators would, (with varying degrees of enthusiasm) use a flipchart or large chart to note down financial information and options as a stimulus for identifying solutions:

So you'd have up on the flipchart you would have various different options, and then you would try and work out what option would mean in practical terms. And actually take them through it in a visual way so they're sharing information on the flipchart, and then see what it would mean. (CALM 33)

It was not just sharing financial or practical information, but also a sharing of emotional experiences. Store was set by the solicitor-mediators on facilitating “reassurances” between parties, for example, in a child-related context parents were encouraged to acknowledge that, irrespective of residence arrangements, the other parent would remain involved in the children’s lives. This has a similar quasi-counselling role comparable to that identified in an FMS context:

Jenny might be worried that she’s going to completely lose the relationship that she has with (Morag), and if you can establish that and get her to say that in mediation, you can then work on getting Ian to acknowledge Jenny’s concern...and to give her reassurance...and assurance, that he would actively promote the contact and relationship between Jenny and Morag. (CALM 31)

Reassurances may also be sought about the financial settlement, for example in relation to Jenny Hamilton (Case One):

She maybe needs reassurances that he won’t leave her penniless if he moves out but he will put in place the resources to do various things. (CALM 26)

Identifying aims and lowering expectations

The process of option identification and appraisal is discussed in Sections (3.5) and (3.6). For CALM mediators, as for FMS practitioners, it is an emergent process: preferred solutions arise from the visual display and shared discussion of the practical pros and cons of particular courses of action. Part of this would be about identifying an individual’s aims for the future:

I find it useful, rather than saying ‘how are we going to divide these?’, saying ‘Charles, Emma, I’m going to ask you both the same question, what do you want out of this, where do you want to be in two years time?’ And then to use the practical issues of where they see themselves staying at least partly to drive the division of assets. (CALM 61)

But, it is also about lowering expectations, particularly when addressing issues of aliment and maintenance. For example, in relation to Case One:

Because if Jenny wants to stay in the matrimonial home, if she wants to receive financial, ongoing financial support, if she wants Jamie to continue to be financed in the same way, all from Ian, then it could be that the use of some sort of diagram or whatever, could show that there is one pot and if it has to be divided, there is no way that Ian can afford to go down that road. (CALM 38)

In terms of maintenance, the approach is a microcosm of the strategy in respect of capital assets: information-giving on the approach the law and courts would take; a visual display of each party’s
income and expenditure; a discussion of what each needs and how this can be practically achieved from the resources available:

Again it is a question of finding out where they are both coming from, what their views are, asking Vicky to assess what she will need as a monthly income to live on. Rather than just talking in general figures try and put it into practical terms again…It would be worthwhile, obviously, finding out from Jonathon what he feels he should be paying, and just discuss that and, hopefully, by doing so the difference between them would be resolved. (CALM 29)

Residence and contact: the law and the practical
As for FMS mediators and solicitors, the key strategy for lawyer-mediators assisting couples to resolve child-related issues is reference to the principles of the Children (Scotland) Act (See Section 5.1), in particular the implications of residence and contact, and emphasis on parents reaching their own decisions.
In terms of identifying options, one strategy was to include a discussion of current arrangements. This served both a descriptive and analytical function, beginning the process of identifying the needs of the children and how they might be met in practical terms in the future. In respect of the Macintoshes, for example:

I would try and home in on the practical arrangements for the children…it may well come out that it is the case that Jonathon has to start work early in the morning, or work late in the evenings, so Vicky is going to have to do these practical things…So you could perhaps get the parties to come to the conclusion..that the only possible arrangement was that the children do spend a large part of their time in the care of the mother. (CALM 29)

As this suggests, ‘reality testing’, was at the heart of the process for the solicitor-mediators. But it was not just in terms of practical arrangements, but about re-focusing attention from the needs of the parents to that of the children:

I think I would spend some time focusing on the problem from the children’s point of view..If the children..were to move home, or there was some other change in their lives that was substantial, I think we’d clarify the effects that might have on them. This is what mediators call ‘reality testing’: what would it mean for the children if such and such happened? (CALM 23)

In discussing their strategies for identifying options a degree of direction emerges. One practitioner, for example, felt there were “difficulties” with Jonathon’s proposal for joint residence, and placed the onus very much on Jonathon to justify how this would work. Similarly another queried the value of Morag Hamilton going to live with her father:

I think it would only be in the most exceptional circumstances that you would be wanting to see an outcome whereby the middle child stay with dad, but the oldest and the youngest stay with mum (CALM 28)

Normalising and mutualising
The sort of management tools drawn on by the CALM mediators to move the process forward in respect of child-related issues appeared to be different from those they employed when dealing with financial matters. As discussed earlier, there is a stress on enabling couples to reassure each other of continued involvement in their children’s lives. In addition, the solicitor-mediators (like their FMS peers), used discussion about the children as a way of defusing tensions. For example, one practitioner felt that talking about Theo and Joshua might help “break the ice” between Vicky and
Jonathon Macintosh. They were also keen to draw attention to any positives, for example, one practitioner interpreted Zoë and Abigail Andrews preferences as indicating:

*That they want both parents to know they love them very much.*  (CALM 33)

In the same vein practitioners spoke of “normalising” and “mutualising”. Normalising was sought by hoping to the couple that their experiences, and the children’s reactions were common for families going through a similar process. “Mutualising” was used as a strategy for underlining the shared nature of the parents’ interests in and concerns for their children:

*It's quite good at that point to try to mutualise between the parents their joint concerns..that they want to agree something and they both value the parenting role that the other has with the children.*  (CALM 37)

However, CALM mediators were also encouraging parents to look at their own behaviour, especially in the context of a child’s apparent reluctance to have contact with the other parent. In the case of the Macintoshes, practitioners would be looking to the couple to address how they communicate with each other and to the children about the other parent. In response to a claim by Vicky Macintosh that the children were reluctant to visit their father, one practitioner explained how they would:

*Get her to explore why, and would it be different if she dealt with the kids in a different way. In the same way he shouldn’t be bad-mouthing her, she should be more positive about the children going.*  (CALM 32)

In addition to establishing a “mutualising atmosphere”, for the discussion of future arrangements, a number of solicitor-mediators (7) sought to assist couples to set up interim contact arrangements. This was a way to “tide” people over between sessions, but also a strategy for encouraging people to move forward, to agree a “first step”. In the case of Jonathon and Vicky Macintosh, for example, one practitioner would discuss the contact arrangements that could be put in place temporarily between sessions:

*And you might find, if the thing went reasonably well...he might be more of a mind the next time we meet to look at something else.*  (CALM 32)

### Informing children

The other practical issue was that of informing the children about the separation. Among the sample a number (9) indicated that they would establish whether the parents had discussed the future with the children, and would give parents the opportunity to explore and agree how and when they might be told. While some of these practitioners seemed ready to suggest the sort of things parents might say to their children, at least one felt reluctant to cross the boundaries between information-giving and advice:

*I would not advise how best to do it, but by discussing it as a general issue..the parents will work out the best way to do it according to their particular circumstances.*  (CALM 23)

### Summary

The thread running through this overview of the strategies employed by the sample of solicitor-mediators is the use of the law as integral to the process, and a discourse with which they are at ease. Both the generalities of the law and the specifics of court practices are drawn on as authorities. At the same time, the element of discretion and interpretation was felt to both open up the opportunity, in mediation, for couples to take control of their own destinies, and as the source of disagreement and conflict. It is in connection with the discretionary nature of elements of the law that solicitor-mediators were aware that the line between information-giving and advice could be breached, and with it the apparent neutrality of the mediator.

Solicitor-mediators shared with FMS mediators and non-mediator solicitors a strategy of encouraging avoidance of the court as an arena for conflict resolution, on the grounds of cost, time, trauma and
loss of control. One solicitor-mediator, for example, discussing Case Two, would emphasise to Jonathon the increasing expenses he would incur, and the clawback the legal aid board might require from Vicky, if they failed to arrive at a solution. In effect, recourse to the courts was the “worst case scenario”, as described by one practitioner. Several others would suggest to couples who were ‘deadlocked’, or becoming ‘bitter’, to talk with their solicitors to find out what a court might do in their situation.

4.4 SOLICITORS

4.4.1 Introduction
Where mediation emphasises jointness, the formal lawyer-client route is predicated on particularity: on the solicitor acting on behalf of a client, negotiating with the other party’s agent, and, where necessary representing their client in court. By its nature the process effectively involves two sets of strategies on the part of the lawyer. Firstly, the negotiation strategies brought into play between lawyers acting on behalf of each partner. Secondly, case management strategies drawn on by lawyers in their relationship with their clients.

4.4.2 Solicitors Negotiating with Solicitors
Focusing on lawyer-lawyer strategies, the first point to stress is the emphasis by sample practitioners on seeking a negotiated settlement and avoiding the court route. For a number, in fact, a case going to court was seen as a “failure”. Among the disadvantages cited were the length of time a court action would add before a conclusion was reached, and the financial costs, particularly in cases where there were few assets to argue over, and/or where any settlement would be subject to a legal aid “clawback”. In respect of the Hamiltons (Case One), for example, one solicitor commented:

At this level nobody in their right mind would go near the court..you just don’t go near a sheriff unless there’s a huge, relatively big gaps between you because financially it’s suicide. (Sol 07)

In addition, as discussed in the context of divorce (Section 5.6), solicitors appeared anxious to avoid creating further acrimony between a couple raising a divorce action:

It doesn’t do them any good to go to court, because people just become angry and bitter, they just begin to see things in a different perspective, it’s not a negotiating tool, it’s more of a battlefield to see who can get what and how much it costs them. (Sol 15)

Nonetheless, solicitors are undoubtedly prepared to have recourse to the courts as an actual or threatened strategy, as one commented “You can’t do what we do for a living in matrimonial law and not be prepared to go in to court” (Sol 08). The circumstances which would precipitate a court action include a perceived need for an emergency residence order, or, in a case such as that of Vicky Macintosh, where the client was felt to need the protection of an interdict. Where a client needed money urgently and a partner was not prepared to pay, a number of the sample would initiate a court action for interim aliment. Certain issues would also prompt a more rapid recourse to the courts. Two of the sample of lawyers described how, in disputes over contact, they would be quick to pursue a court based action. One described how they would act quickly on behalf of a parent without contact because of the perceived difficulties of re-establishing contact with children if this is prevented for any length of time. The second solicitor, responding to the case of Vicky Macintosh (Case Two), would act quickly for more strategic reasons:

If she had good reason to make the contact restrictive, then, I suppose, regrettably, the advice would be to make it as restrictive as quickly as possible because that sets up the status quo in her favour. (Sol 06)

A dispute on a point of law, or over a valuation would also necessitate the intervention of a sheriff. Less specifically, sample solicitors would initiate a court action where the other side was perceived to be acting “unreasonably”. For example in the context of the Andrews:
If there was an offer made and that was refused and they couldn’t come to anything in mediation...usually at this point it would have to be that one party was being unreasonable, I would then be suggesting going into court. (Sol 05)

A number of the sample lawyers suggested that, as a case management tool they would establish a cut off point. Arguably, the rapidity with which the threshold between negotiation and recourse to the courts is crossed is an indicator of how “adversarial” practitioners could be said to be. One solicitor, for example, described how he would put a time limit on negotiation on Mr Andrews’ behalf:

And I would be saying with the other solicitor that we are prepared to negotiate this for the next month or two months. At that point we’d simply apply to the court. (Sol 17)

Several other solicitors described how, if the other side were perceived to be “dragging their heels” they would offer their client the option of going to court, although this would need to be in the context of a divorce action:

I think if you feel that there is no room for constructive negotiations, then, rather than everyone becoming very tired and frustrated, it’s better just to draw a line under that. (Sol 18)

Although the sample of solicitors would seek, initially at least, to avoid the overtly adversarial route represented by court actions, in favour of negotiation, this is not based on the assumption of a joint enterprise between parties, or of parties’ equal and joint responsibility. The negotiation process is not, in other words, based on an assumed consensus, but on anticipated conflict. It is expressed in a discourse of “opponents”, of “the other side”, and in a strategy based on “negotiating from a position of strength”. In this context ‘trust’, is not between the couple but between the solicitors acting for each party, based on an assumption of a shared knowledge base and appreciation of the parameters.

A breach of trust in this context is “when you get solicitors who won’t operate within the parameters”. It is a consensus based on shared professional values rather than assumed shared social or moral values, outwith those professional values. This is reflected in the methods of negotiation employed by solicitors acting as intercessors, translating the personal troubles of their clients into a shared professional legal discourse.

The solicitors in the sample varied in terms of their preferred or usual method of communication with “the other side”. For some it was primarily based on correspondence:

It would be by correspondence..We very seldom speak to each other about it unless things got really bogged down (Sol 04)

Others employed a combination of correspondence, telephone calls and possibly face to face meetings with the other party’s solicitor.

Solicitor to solicitor negotiation, without the presence of clients was felt to provide an opportunity for a “franker” discussion, without the “emotional” side. It is a process eased not just by shared assumptions, but also by practitioners’ familiarity with each other:

I think when you’re dealing with local solicitors in a small community like this you tend to know most of the solicitors..And I would ’phone them up and run a few ideas past them and say ’what do you think about this?’ to see if we can reach some middle ground. (Sol 08)

The sense of familiarity, and hence control over the situation, is challenged once the parties are introduced in to the setting. A number of solicitors actively promoted joint meetings between the parties and their respective lawyers. One, for example, thought that such a meeting at which both the other party and their solicitor were present might be productive for resolving the disagreement around residence of Morag Hamilton (Case One):

You’re firing letters back and forth the parties lose sight of what’s going on, but if they’re sitting round a table they can say ‘the reason I’m saying
this and the reason I’m sticking to my guns on this is x, y, z’. They’re able to say it face to face. (Sol 11)

On the surface this seems to replicate a mediatory approach. However, in structure and underlying principles it is quite different. The key difference being the presence of each party’s own solicitor, and the ability for each side to withdraw and discuss their strategy:

And they feel much safer when you’re at a meeting, because they know you’re not going to push them into anything that they don’t want…I always make (it) absolutely clear that …if they want to say anything to me they don’t want to say in the other’s presence, then just to say that and we’ll go off. (Sol 11)

For the solicitors who used joint meetings as a strategy it was a practical means for cutting short the process. It was not, however, seen as an impartial process. It was partisan to the extent that each solicitor would be there in their capacity as agent for their client, and, as the comment above suggests, would not be used by the solicitor to “push” their client into doing something they did not want. Further, it is partial in the sense of what is discussed jointly and what is held back, indicated by the possibility of client and solicitor withdrawing together.

Not all solicitors were comfortable with the idea of a joint meeting. A number cited bad experiences where clients had been abusive either to each other or to the solicitor. Such experiences perhaps illustrate the absence of an assumed consensuality in these contexts. It may also imply a feeling of loss on the control on the part of the practitioners:

You have to watch or your clients end up bitching. It’s very difficult to keep them in line sometimes. (Sol 13)

The apparent lack of moral authority of solicitors in these contexts may arise from their relationship with their clients. Lawyers are, in principle, acting on their clients’ instructions, as such imposing order may be more problematic.

The other contact cited by the sample was initial correspondence to the other party where their solicitor was not known or where, as in the case of Mr Hamilton (Case One), they did not have a solicitor. If an initial letter was sent direct the aim was to encourage the other party to obtain legal advice. In addition, however, solicitors might be seeking confirmation of assets and setting out broad proposals. Several practitioners spoke of trying to write in terms, which, as one put it, did not create “any more aggro than is necessary” (Sol 16). Nonetheless, it seems from the examples given by the sample solicitors of the sort of thing they might write in an initial letter, that the tenor and the inclusion of a time limit for a response under threat of court action, may have the potential to exacerbate the situation. For example, one solicitor described what their first letter to Mr Hamilton might contain:

The first paragraph will say.. ‘my client wishes to point out that she would wish the children to remain in the family (home) with her...we would appreciate you may have a different view but our client considers that applying the rule of paramountcy to child welfare, on balance it would be in the child’s best interests to be together. I trust he would agree with that, so that we don’t have to ask the court to resolve the matter’. (Sol 07)

Whatever the method of communication, the character of the solicitor to solicitor negotiations have a game like quality, where the outcome may not be winning or losing, but a compromise “hammered” out by the practitioners acting for their clients. One lawyer, for example, describing their strategy in respect of Mrs Hamilton (Case One), suggested that they always liked to get the first shot in:

You’re at a slight advantage if you’re the one who’s got your proposals down first...if you’re starting point is what you say you want he’s got to try to talk down from whatever she’s looking for, as opposed to her trying
to talk him up...it’s just a process of negotiation, offers and counter-proposals. (Sol 11)

In respect of financial matters, a number talked of “levers” they could use in achieving a solution, for example Charles Andrews’ larger contribution to the matrimonial home. Or offering what one lawyer described as “little sweeties” to the other side to induce a settlement.

While one lawyer specifically rejected the attitude of solicitors who “ask for the sun and then settle for the moon” (Sol 03), a number suggested that they would ask for more, on the assumption of realising less. For example, if arguing for other than a 50/50 division, one practitioner described how they might propose a 60/40 split:

So that would be part of your approach and then they would beat you down to 55/45. You’ll say ‘We’ll go with it, it’s not bad’. (Sol 07)

In the case of Charles Andrews this might take the form described by one of the lawyers:

I’ve said that Emma should really be paying Charles some form of periodic allowance for three years. We could probably negotiate that down to one year, until he gets his pension. (Sol 10)

Another strategy discussed by two of the sample was of stressing reasonableness, backed up by a threat either of further claims or court action. For example, one solicitor would suggest to Charles Andrews that they held the issue of Emma Andrews’ private health insurance “up our sleeve”:

Carefully tell them that we’re being reasonable could you be reasonable too, because we’re aware that you’ve got these other claims that we are not pursuing. We want a fair settlement, but there are other avenues we could go down, if she’s being difficult. (Sol 13)

By the same token, solicitors were sensitive to their own positions of weakness: anticipating counter-proposals or the other party also having “leverage”. In the case of someone like Vicky Macintosh, as discussed in Sections (5.4) and (5.5), the emphasis may be on reaching an agreement because of the practical difficulties of enforcing financial claims in respect of someone who is self-employed.

It is, of course, a process that, in many respects, happens away from the client. It is a discussion by proxy. What cannot be assessed, on the basis of these data are the relative gains or losses: practical, emotional, or financial of this indirect method of negotiation.

4.4.3 Solicitor-Client Negotiations

Information giving and collecting

Solicitors are acting on their clients’ instructions, yet, at the same time they are influential in shaping the nature of those instructions.

As in mediation, this influence is exercised through information-giving, for example about the law and legal requirements and what a court might do in specific circumstances. This is evident in the case of the Macintoshs (Case Two), where solicitors would be encouraging Vicky to enable Jonathon to have contact with the children, given that if the case went to court this would be the likely outcome.

But the approach is not solely one of information giving, it is a strategy for moulding people’s expectations. For example, in respect of Vicky Macintosh, one practitioner described how, in discussing the capital and division of assets they would:

Get a feel for how the client wishes to have the matter dealt with, what her expectations are: if they’re too high, then try and bring her down gently; if they’re too low, advise her what her rights are. (Sol 04)

More specifically, in the context of the distribution of assets, lawyers would limit Mrs Hamilton’s expectations, given the limited resources available:

I try to get over to people that a lot of it is common sense, and not so much the law...if the money is there it can be used to support the wife and
children. If the money is not there no court or CSA can magic it out of thin air. (Sol 03)

While, as part of their negotiation strategy with the other side, lawyers may ask for more than they would expect to settle at, with clients it is a case of emphasising needs and resources. One practitioner, for example, would be sending Charles Andrews away to do his sums saying:

‘You tell me how much you need to live on a monthly basis’. I don’t think there’s any value whatsoever in looking at it from ‘how much can you get from..?’ (Sol 10)

Solicitors’ strategies for dealing with recalcitrant clients was variable. One described taking a firm approach:

If we’re going to conduct negotiations, be prepared to put to the client the other point of view and be very firm with the client and suggest that another point of view is an appropriate point of view. (Sol 14)

If, for example, Zoë and Abigail Andrews (Case Three) were indicating that they wanted to stay with their mother and were settled in the matrimonial home, this solicitor would be suggesting to Charles Andrews that he give up his interest in retaining the house.

Another solicitor suggested that they might cease to act for a client who rejected a good offer “for no good reason”.

Other practitioners, however, were more diffident about how far they felt they could impose solutions. Several put this in the context of the client needing to feel that the solicitor was on their side. One practitioner felt that if confronted by someone adamantly opposed to contact, they would inform them that it was likely to be imposed by a court, but could not go so far as to suggest that their client should try contact:

I think they need to feel that their solicitor is doing a good job for them..that they feel their solicitor will bat for them (Sol 06)

This perhaps illustrates the tension between both advising and taking instructions. Ironically, in the context of solicitor-solicitor negotiations, ‘other’ solicitors were criticised for being too ready to “adopt whatever the client wants and regard that as being the immutable game plan” (Sol 14).

Solicitors are, therefore, weaving a path between appearing partisan, while at the same time coaxing or persuading people in particular directions.

The element missing from the process, but evident in the mediation, is joint information sharing. Information on assets and liabilities, income and outgoings is collected by each individual solicitor and client, exchanged and reviewed individually:

I would ask Mr Andrews to draw up a list, a schedule of his income and outgoings, and, where possible, to bring me vouchers to show me the amount he pays. And I would be asking for similar information from Mrs Andrews’ solicitor. I would be going over her schedule with him, to obtain his comments as to accuracy..and I would be sending his to her solicitor. (Sol 17)

Each side will develop proposals based on this information, with the negotiations taking place through solicitors, based not on goals or fairness, but assumed achievability. One lawyer, describing how the process might proceed in the case of the Macintoshes suggested that the couple attend mediation to establish what would happen with respect to the children while the two lawyers together agreed a schedule of property and looked at the accounts for the business. Once the couple had agreed on where the children would reside, and Vicky had indicated what sort of accommodation she would be looking for, the solicitors would use the financial information as a basis for “bashing out a deal on income” (Sol 09).

The law and the courts
As has been suggested throughout, solicitors draw on the law and the courts to inform and justify particular courses of action. They inform the parameters, for example the degree to which courts were felt to be responsive to an other than equal division of the capital, or the likelihood of someone being awarded a periodical allowance. But reference to the courts and sheriffs could be used both as a threat and a promise. In the context of child-related issues, as indicated above, the likelihood of a court granting contact was an argument for persuading an otherwise reluctant party. On the positive side, the courts were used to support the status quo in terms of residence, and therefore used as a source of reassurance for Jenny Hamilton, Vicky Macintosh and Charles Andrews.

In financial matters the law and the courts could be cited as protective of clients, for example several solicitors would make reference to the measures available under the Matrimonial Homes Act. The law could also be used as a threat to the other side if negotiations proved protracted or the other party proved “unreasonable”. For one practitioner it was the law and case law which distinguished the strategies available for dealing with financial matters as opposed to child-related matters:

The catalyst for resolving matters of a financial nature, is, in many respects, the threat of the court resolving the matter, and the court has got more scope…because of the codified nature of the 1985 Act, than it does in matters to do with children where the non-interventionist approach is called for. (Sol 14)

While for solicitors reference to the law and the courts is a potential weapon, both for defence and offence, in their negotiations with other solicitors and with clients, it does not carry quite the same sense of demonisation which threads through mediation discourse. It is used more as a strategic device.

Child-related strategies

In comparison with their close involvement with financial matters, solicitors adopt a more ‘hands off’, approach in response to child-related issues. This is reflected in the encouragement lawyers give to people to sort out their own arrangements with regard to children; by their greater preparedness to refer people to mediation, or other agencies, to assist them sort out these arrangements; and by the comparative looseness of the clauses covering children in Minutes of Agreement (Section 3.7). Although parental responsibility was cited on occasion as the rationale for such an approach, the stress appeared to be less on the moral dimension, than a reflection of the non-interventionist principles of the Children (Scotland) Act (Section 5.1). In effect, if it could be resolved by agreement there were no issues of law involved, and no requirement for lawyers to be involved beyond an information giving and guiding role. One solicitor summarised this approach:

I always give people exactly the same advice about the children, which is, unless there is a problem which they can’t deal with and which is a problem of a nature which only a court can deal with, then they sort it out themselves. They don’t need lawyers to exchange letters about who sees the children when. Once you concede the principle of contact then either sort out the problems..between the two of you, or go to mediation. (Sol 09)

This is not, however, to say that solicitors are not directional. Like mediators, lawyers are predisposed to certain solutions. In terms of residence of the children, there was generally, though not exclusively, a preference among the solicitors for the preservation of the status quo. This emerges in their responses to areas of conflict. For example, in relation to Case One, while several lawyers would put the ball back in Mrs Hamilton’s court to justify why she wanted to retain residence of the middle child, several others indicated a clear preference for maintaining the family unit:

What I’d be saying is that, generally speaking, families, children, shouldn’t be split up in that way..And you would try to get Mr Hamilton’s concurrence on that. (Sol 03)

This would be counterbalanced by encouraging extensive contact:
Why not suggest the most liberal of access or contact. That might soften the blow for the wee one. (Sol 07)

In respect of Case Two, the assumption, similarly, was that the children would reside with Vicky Macintosh, argued on the grounds that the courts generally view it as being in the child’s best interest to reside with their natural mother. As expressed more forcefully by one practitioner, acting for Mrs Macintosh, as the children’s mother:

I wouldn’t have any truck with disputing residence. I would think that residence should be with mum and contact with dad. (Sol 08)

Practitioners’ strategies to encourage Vicky to accept contact included, as suggested above, reference to the likely response of the courts, and/or persuasion.

Given the background to the case, several practitioners suggested arrangements could be set up to minimise the contact between the parents when the children went to see the other parent. In the face of the eldest son’s apparent reluctance to see his father, practitioners employed a number of strategies. Firstly, to encourage both parents to consider their own behaviour. For example, Jonathon would be under duress not to be abusive about or to Vicky:

If you say to the solicitor on the other side ‘Joshua is reluctant to go for access (sic), so if your guy does have access it can’t be that he collects him and spends the weekend badmouthing his mother’. (Sol 08)

Similarly, solicitors would be expecting Vicky, for whom they were ‘acting’, to consider her own behaviour and attitudes:

I think it’s my job to make her aware that she could be exploring her own attitudes because she could be influencing the child. (Sol 09)

Practitioners also anticipated contact with the Clinical Psychologist to whom Joshua had been referred, to establish the source of the child’s difficulties:

It is the parents’ responsibility, and therefore the solicitor’s responsibility to look at these issues and see how they can be unwound….In this case, if he’s seeing a psychologist we might have a report from the psychologist, just to find out if there is a background to it. (Sol 04)

As another solicitor stressed, this would be to obtain an independent view, “we wouldn’t be seeking to rent an opinion or hijack that” (Sol 18).

Several practitioners proposed that in this case contact begin in a limited way, with a view to building it up over time. The stress was also placed on establishing a routine. The opinion of the clinical psychologist would be drawn on to inform the arrangement.

As suggested in Section 3.6.2, and apparent from their anticipated approach to Case Two, in disputes in respect of residence and contact of children, solicitors may find themselves in the anomalous position of promoting the welfare of the children, in ways that perhaps run contrary to the expressed preferences of their client.

At three years and eight years old, the ages of the two children in Case Two, together with the history of domestic abuse directed toward the mother, perhaps informs the greater degree of active intervention on the part of the solicitors.

In respect of Case Three there is again an assumption of the continuation of the status quo:

The sheriff is not likely to move the children from him unless there is a jolly good reason why they should be moved. (Sol 13)

In Case Three, however, a greater weight appears to be given to the children’s views as a deciding factor, the girls being 12 and 14 years old. As discussed in Section 5.2, the age of children was significant in determining the extent to which their views were canvassed and acted upon. Again this may draw from the Children (Scotland) Act (Section 6), which presumes that a child of 12 years is of sufficient age and maturity to form a view.
The situation with regard to the children is quite straightforward in that if the children want to live with mum they will live with mum, if they want to live with dad they’ll live with dad, I don’t really see that as being an issue. (Sol 14)

In response to the apparent vacillation of the two girls, in terms of who they would wish to live with, one solicitor felt it would be useful to obtain an independent voice, possibly in the form of a report from a psychologist. Another practitioner would offer to speak to the girls if that was what they wanted to do, to establish whether their indecision could be resolved by either having joint residence or extensive contact with the other parent.

Across the case studies, solicitors appeared responsive to the psychological/emotional needs of the children involved. This emerges not just in respect of Case Two, but also in response to the other cases. For example, one solicitor suggested that Morag Hamilton may be wanting to stay with her father because of insecurity stemming from the break up, and an anxiety that she might not see her father at all, “she may be reassured when things settle down a bit that she’s still getting to see both of them” (Sol 15). It was, however, only this solicitor who suggested that both parents speak with the child together. Although keen to promote the welfare of the children, the discussions mediators would anticipate having with couples about the best way of informing children about the break up of the marriage, was not evident from the solicitors’ accounts.

Finance related strategies

In their responses to solving child-related issues, solicitors were, to a degree, acting as advocates for the children of the marriage, to the extent of proposing solutions contrary to the stated preference of the party who was their client. In relation to resolving financial disputes the focus is less clearly divided: the strategy is to attain that which is achievable for the client (and their children). But even here, the accounts of the sample of solicitors suggest that achievability is not at the cost of overlooking the other party’s own needs. The data suggest that solicitors seek to find compromises “that cause each of them [parties] the least pain”, to be “reasonable”, or work to a “game plan which would probably be beneficial to both of them”.

In respect of Case One, for example, the limited resources meant balancing out Mrs Hamilton’s need for aliment, and the means for realising her share of the matrimonial capital. But it would also require Mrs Hamilton making “hard decisions” about the number of hours she was prepared to work if she wanted to retain the house. In other words, the solicitor’s concern was not just with what they would be seeking from the other party, but also with establishing with Mrs Hamilton the contribution she herself would be prepared to make.

The strategy in Case Two was to ensure the continued viability of Jonathon Macintosh’s business, as a source of income for Vicky and the children:

Looking at it purely from a principles point of view, you have to look at a solution which will achieve her goal, but at the same time be reasonable and affordable. A court’s not going to bleed him dry. And it’s not going to benefit her either, because if she bleeds him dry he’s not going to be able to maintain her and the children, so it’s killing the goose that laid the golden egg. (Sol 16)

Again short term and long term interests may be in conflict. A number of solicitors proposed that Vicky receive the insurance policy, as part of the capital settlement, with her ideally continuing the premiums to cover her future pension needs. It was however recognised that this may not be feasible:

But that’s looking at her long term needs against her immediate needs. The question is what’s more important, her long term needs or her immediate accommodation needs and raising capital to buy accommodation. (Sol 12)

In respect of Case Three the strategy was to look at some way of offsetting to enable Charles to retain the family home, but to also acknowledge the precariousness of his financial position:
It would be a question of how persuasive you would be in saying that she should not derive 50% of the net free assets. (Sol 05)

The common theme among solicitors is acknowledging the parameters and the need for compromise, but not neutrality. Solicitors were clear about who they were acting for, as reflected in statements such as “the best option for Charles, who is my client...” But this partisanship is tempered with a spirit of compromise and a concern with practicalities, as suggested by the comments of one solicitor describing the proposal for Vicky Macintosh to do a “trade off” between the flat’s contents and the disputed antiques:

What I’m looking at for my lady is that she’s going to have to furnish and equip another house on a fairly limited income and with fairly limited capital at her back. If she can take the lion’s share and give him a capital allowance, then that’s a reasonable option for her...I would tend to do a trade off, for example, it’s handier for Vicky and the kids to have a three piece suite than an original oil painting, though Vicky might not feel that way! (Sol 08)

4.5 SUMMARY

Chapters three and four illustrate the differences, or unique characteristics of each of the three professional groups, as well as suggesting areas of similarity.

The most fundamental difference is the joint nature of the mediation process described and emphasised by CALM and FMS practitioners, compared with the particularity of the solicitor-client relationship. In mediation, negotiation is face to face between parties, facilitated by the mediator. It is a formalised encounter, participants, for example, sign a form to indicate their willingness to abide by the rules of engagement of mediation. The means of communication and expression throughout the process is visual, through the display of information; and verbal between the couple and between the couple and the mediator. For both CALM and FMS practitioners improved communication between the parties, whether accompanied by a set of proposals or not, would be regarded as a successful outcome of the process.

The solicitor-client route is, by its nature characterised by particularity. Direct contact is, for the most part (excluding joint meetings), between lawyer and client, and between solicitors. Negotiation is effectively by proxy. The character of communication may also place greater emphasis on the written format: correspondence between solicitors and between solicitors and parties. Although solicitors appear concerned that parties remain able to communicate, particularly in the interests of the children, from their accounts improving communication did not emerge as a specific process objective.

The accounts of the three professional groups demonstrate differences in the extent of their relative involvement in the total process of separation and divorce. CALM and FMS mediators are involved at the point of negotiation. As part of the process of assisting couples to identify possible solutions both groups of mediators would be concerned to explore the couple’s “emotional” concerns. The mediator’s role also encompasses facilitating a discussion around the best way for parents to inform children of the separation.

Solicitors professional involvement is broader, encompassing, as appropriate, pursuit of court orders such as interdicts, initiating divorce proceedings, making legal aid applications, preparation of minutes of agreement, as well as negotiating on behalf of clients. While their accounts describe their role in informing and advising clients, there was little reference to responding to client’s emotional needs. Further, while acknowledging the emotional needs of children, lawyers did not describe discussions with clients around informing children.

Perhaps more elusive to summarise, but just as significant, and related to, differences of process, are the different assumptions, values and expectations of the three professional groups. For example, for both CALM and FMS mediators, the joint nature of the process appears to be built on an assumption of consensus and the potential for trust between parties. This is illustrated by, and facilitated through, the process of “re-framing” and “mutualising” the concerns each party brings to the mediation, to re-present these in non-confrontational terms (See Section 3.5.2). The emphasis in FMS mediation on ‘Fairness” as a criteria by which couples are encouraged to appraise options (See Section 3.6.2), is perhaps indicative of this consensual framework. For solicitors, by contrast, the
language and the strategies employed appear to be based on anticipated conflict. Trust is not assumed between the couple, but between solicitors acting on behalf of each party. For lawyers ‘fair’ is as defined by law.

FMS mediators, in their stress on joint parenting and on joint problem solving, appear to draw on a discourse which stresses social or moral responsibility, and a service value system which places the child at the centre. This centrality of the child, is reflected in accounts of why practitioners undertook all-issues mediation (Section 2.3.3), and the perceived aim of the process as being “primarily to help them [couple] to manage future parenting” (FMS 48). It emerges, obliquely, in the use of the term ‘parents’ to describe the users of the service, even in the context of finance-related issues. Arguably, it is manifest in the prioritisation given to child-related issues in the agenda for mediation sessions (See Section 3.4). It is also suggested that the strategies employed may encourage couples toward particular solutions. The description of the process as setting the scene for continued joint parenting further suggests a service value or objective pre-existing and independent of the Child (Support) Act (See Section 5.1).

For CALM too, the stress is similarly on achieving the best for the children. But this is not accompanied by statements suggesting this is the primary focus of the service. There is a similar emphasis on the continued involvement of both parents. But in their accounts, this is expressed as a reflection of the values of the couples attending mediation, rather than the values or raison d’être of the service. This is perhaps also reflected in their accounts of the determination of the mediation agenda (See Section 3.4). In their descriptions of the process couples to CALM mediation are described as ‘couples’ or ‘parties’ or ‘people’: their role as parents does not appear as the defining characteristic. CALM mediators also appear to draw more heavily on legal norms as a formal benchmark of rights and obligations.

In terms of the strategies they employ, differences emerge not just between professions, but in terms of the issues in dispute. In relation to children, solicitors accounts suggest a strategy specifically reflective of the principle of non-intervention embodied in the Children (Scotland) Act 1995. Unless there was a point of law at issue they would encourage their client to resolve the matter informally with the other party, possibly by attending mediation. As a strategy to overcome client resistance to contact or residence by the other party, solicitors would make reference to the Act, to justify advising their client in ways potentially contrary to the client’s stated preference.

In financial matters solicitors were, by comparison, more ‘hands on’, in terms of their own role, describing the negotiation strategies they would employ with the other party’s agent. The touchstone, however, was achievability, in terms of the law, the interpretation of the law in the local courts and the resources available to the couple. Solicitors saw their role not only as providing advice, but as moulding expectations.

Both CALM and FMS mediators described similar strategies when dealing with financial issues: sharing information, identification and appraisal of options. These strategies appear to include reducing people’s expectations.

In child-related matters the actual strategies described by CALM and FMS practitioners are not dissimilar including: promoting the positive; discussion of current arrangements; identification of the needs of the children; an exploration of the practicalities of arrangements for the future. Both practitioner groups would explore with the couple possible interim arrangements for the children while discussions were in progress.

All three professional groups described the value of establishing a routine for the children. Similarly they would expect the couple or client to consider their own behaviour and to separate their own concerns from that of their children.

As part of the process of option appraisal, CALM and FMS mediators, as well as solicitors would draw on the law and the interpretation of the courts. But these ‘authorities’ could be used both positively and negatively. The law, specifically as enshrined in the Family Law (Scotland) Act 1985 and Children (Scotland) Act 1995 could be called upon to set the parameters for solutions (See Section 3.6.2). Reference to legal principles could also be drawn on to provide reassurance to the parties to the dispute, if, for example, one party was concerned about losing contact with the children. By the same token, the law could also be used to rein in expectations, if, for example, someone was
appearing to seek to prevent contact with the children, or exclude an item from inclusion in the valuation of matrimonial property.

Invocation of the interpretation of the law by the courts was similarly used both to encourage and discourage. One the one hand, the likely action of the court was used by all three professional groups as a benchmark to either support or discourage a proposed course of action. For CALM mediators in particular, reference to the law and the courts may also serve as a means for distancing themselves from appearing to give advice. On the other hand, there was an element of ‘demonisation’ of the court. For CALM and FMS mediators recourse to the court as a forum for dispute resolution was represented as a loss of control on the part of the couple, opening up uncertainty and increasing conflict. It was set in contradistinction to the mediation process and the price of failure. For solicitors too, the court was seen as a potentially costly and conflictual forum, but one which they would invoke as a strategic device, or have recourse to if negotiations broke down.

CALM and FMS mediators were keen to draw the distinction between passing on information about the generalities of the law, and giving advice on the implications of the law in a specific case. CALM mediators appeared to be particularly at pains to be seen to distinguish between their role as an impartial, neutral mediator, and their role as an advising solicitor. Solicitors do not need to make such a distinction, since their professional role is that of providing advice to their client. Nonetheless, what the accounts of the process and strategies reveal is the problematic nature of partiality and impartiality. For solicitors this was reflected in the tension between advising and taking instructions. The accounts of the lawyers interviewed suggest that practitioners were performing a balancing act between appearing partisan i.e. being perceived by the client as on their side, while at the same time encouraging people in particular directions. For example, in finance-related matters, solicitors’ partisanship was tempered by their knowledge and experience, a spirit of compromise and a concern with practicalities. In response to disputes over residence and contact of children, solicitors may effectively act as advocates for the children of the marriage, promoting solutions in ways which are perhaps contrary to the stated preferences of their client.

In the mediation context, the data suggest that the stated objective of mediator impartiality and neutrality may be similarly tempered. It could be argued, that the knowledge, expertise and values CALM and FMS mediators bring to the process may serve to encourage people in particular directions. While mediators do not explicitly indicate a preferred course of action, their role in generating options (See Section 3.5.3) and the use of references to the law and the action of the courts, although described as ‘information’, may, arguably, function in a not dissimilar way from solicitors ‘advice’.
CHAPTER FIVE  SPECIFIC LEGAL AND POLICY ISSUES

5.1 CHILDREN (SCOTLAND) ACT 1995

5.1.1 Practitioners’ Views of the Children (Scotland) Act 1995

In the research interviews practitioners were asked their views on the impact of the Children (Scotland) Act 1995. In addition, from their accounts of the process a number described the situations in which they might make specific reference to the Act.

The three key features of the Act cited by practitioners across the professional groups were the emphasis on joint parental rights and responsibilities, the significance attached to obtaining the children’s views (see Section 5.2), and the shift away from custody and access to residence and contact. In addition, solicitor-mediators and solicitors particularly noted the stress on the principle of non-intervention by the courts. In the context of general discussions of the Act, specific reference to the principle of non-intervention was not, however, made by FMS mediators.

For the FMS practitioners the philosophy behind the Act served to reinforce what they felt had been their usual practice:

*The Children (Scotland) Act I’m very grateful for because in a way, it just sort of sets out in legislation what I think we’ve been doing for a very long time, which is encouraging parents to be working together in relation to their children, focusing on the children and the children’s needs and looking at it more as responsibilities, rather than rights to have contact with.*  (FMS 44)

Reflecting this, two of the eight FMS mediators who made general comments on the Act felt it had made no difference to their practice.

The majority of the sample of CALM mediators had only been practising as mediators since the implementation of the Act, so were not able to make any pre-Act comparisons. Yet they too felt that the Act had reinforced both the philosophy behind mediation, and the process:

*The philosophy behind the Children (Scotland) Act is akin to mediation. It’s the same philosophy of parents should resolve these problems for themselves if possible...they are both going to have parental responsibilities and it’s just a question of working out, practically... what is the best arrangement for the children.*  (CALM 29)

This perception of the Act as confirming or comparable to the ethos of mediation is reflected in the generally positive view of the principles of the Act among mediators. For the FMS mediators the stress was placed on the value to the child; for the CALM mediators the emphasis was not just on responsibilities towards children but the joint rights of parents. For example, replacing custody and access with residence and contact, was seen as a way of assuring and reassuring both parents of their continued involvement with the children:

*[The Act] really does help because the legal position now accepts the fact that children are not possessions to be fought over. And it does help to make it a more practical problem solving thing, you’re able to say to people that a residence order is only saying where they should be based, both parents still have the same rights and responsibilities, it’s not anything like the same as custody and access.*  (CALM 33)

One of the solicitors interviewed also felt that the Act reinforced their pre-existing practice in respect of continued parental involvement:

*What it’s done is reinforce what we said for years, that the other party is entitled to contact.*  (Sol 09)
Other solicitors, however, described how the non-interventionist principle had put a brake on seeking court orders in respect of children. One, for example, suggested that whereas in the past they would have felt negligent if they had not put an order in, now they had to justify this in terms of the welfare of the child. Another suggested that the principle “makes us think about the whole thing a lot more, so less gung ho” (Sol 18).

Among the solicitors it was felt that the Act, by replacing the sense of ownership, of winning or losing, implied by ‘custody’, had been beneficial:

**People previously used to fight and see ‘custody’.. to see residence as the prize, if you explain to them that you’re both still going to have parental rights, then maybe it’s not so much an issue. (Sol 18)**

There were, though, among the solicitors, expressions of disquiet. Perhaps reflecting a need for something other than a moral agreement between parties, several solicitors felt that the reliance on non-intervention in respect of residence and contact had left some people not knowing what the boundaries were:

**We’ve been left up in the air, nobody knows exactly what they’re entitled to at the end of the day with residence and contact..it’s a lot less certain what’s happening to the children..You have to be on very good terms to be able to agree what’s happening to the children, because you have these joint decision-making powers. (Sol 06)**

This solicitor felt that there were as many problems now as there were before the Act. In terms of the case studies, the mediators in the sample would make reference to the Act to both inform and clarify what people were seeking to achieve, as well as to reassure. For example, in respect of the Hamiltons, one CALM mediator described how they would “explain how the law works as far as the children are concerned”.

In respect of the Macintosches one FMS mediator described how they would talk in “a general way” about the Act and “what that means about parents’ responsibilities and rights, and what that means for them” (FMS 44) adding that if they can come to an agreement there was no requirement for a court order. Similarly a CALM mediator described how, in exploring what Jonathon was seeking from ‘joint residence’, they would emphasise that the courts don’t like to intervene in residence issues:

**Because I think sometimes fathers maybe perceive that, under the old system, before the Children Act, that if one party was awarded custody it is the be all and end all, maybe assure him that the courts don’t look at it in such a clinical way nowadays..he may just want reassurance that he will be consulted on major decisions. (CALM 24)**

Reference by mediators to the Act in “general terms” appears to be a strategy for encouraging people to move away from particular positions, either by providing a basis on which to reassure a partner who may not have residence, of their right to have contact with a child, or by pointing out that, if pursued, a reluctance by one partner to facilitate contact may not be supported by the court. This same reference to the law as a means of encouraging people to re-think their position is evident in the responses of the solicitors. For example, Vicky Macintosh would be advised by one solicitor that one of the things “she has to be absolutely clear on” is that:

**She doesn’t get a right of residence or a residence order unless there is a dispute which can’t be resolved either at mediation or otherwise. (Sol 09)**

As in this example, rather than as reassurance, reference to the Act by lawyers, is used as a way of reining in people’s expectations.

### 5.1.2 Summary

All three professional groups identify the same key features of the Children (Scotland) Act, the exception being the principle of non-intervention, which was specifically cited only by the solicitors and solicitor-mediators. For the FMS mediators the principles behind the Act were seen as backing
up their pre-existing practice. For the CALM mediators the Act was seen as reinforcing the philosophy and practice of mediation. Solicitors presented a more mixed picture. For the majority, the referral to court as a last, rather than as a first resort was identified as the major change. Most saw this as a progressive move, making discussions in relation to children less combative. Other lawyers, however, felt that in the absence of an order setting out their respective roles, parties were left in an ambiguous position.

Discussions around the case studies suggest that, insofar as the mediators made reference to the Act it was to inform, clarify and reassure, but also as an indirect means for encouraging people to reconsider their stated positions. Lawyers made similarly use of reference to the Act, but in a more direct way to rein in people's expectations.

5.2 OBTAINING CHILDREN’S VIEWS

5.2.1 Introduction
In each of the case studies at least one child was expressing a view with potential implications for residence and contact: in Case One Morag Hamilton was expressing a preference to stay with her father, contrary to her mother’s wishes; Joshua Macintosh, Case Two, was apparently saying he did not want to have anything to do with his father; and Zoë and Abigail Andrews were expressing to each parent that they wished to stay with them. These elements of the case scenarios enabled a discussion of the means by which the children’s views could be ascertained and fed into the mediation and negotiation processes.

The patterns which emerged suggested differences within and across the three practitioner groups, influenced also by case specific characteristics, particularly the ages of the children involved. To simplify the discussion each sample group is discussed separately.

5.2.2 FMS Mediators
At a general level, the sample of FMS mediators was divided between those who were both prepared to see the children and had experience of having done so, albeit infrequently; those who would potentially see children, but had not actually done so; and those who had not spoken with children in mediation and expressed a reluctance to do so.

The picture which emerged from the responses was that bringing the children into the mediation itself, as a means of enabling a child to express his or her view, was very much a last resort.

Irrespective of experience and case, the common theme among the FMS mediators was that it was the parents’ role to identify what the children’s views and needs were:

*We see our client group as being very much the separating parents, and what we try to do is to get the parents to address what the children’s needs are and to work out some ways as to how they can find out.* (FMS 44)

The parents would, however, not just channel the children’s expressed wishes into the process, but would be responsible for determining the degree to which those wishes could be met, or would be overridden, by their own assessment of the children’s needs. As summarised by one practitioner in respect of Case One:

*If the child felt particularly that she wanted to do it, and the parents had agreed not to, then [though] we have to take the children’s views into consideration the child won’t necessarily get what he or she wants.* (FMS 46)

Insofar as it was felt appropriate to see the children this would only be if certain criteria or safeguards were met. One practitioner, for example, described the guidelines that they personally would use:

*My three criteria are that mum must want it, dad must want it, and the child must want it, must know why he or she is coming and want to come.* (FMS 51)

A number of practitioners added that parents would have to be prepared to take into account what the child or children were saying.
Having met these criteria the child would not be seen in the mediation session with his or her parents present, but spoken with separately, by the mediator. Issues of confidentiality between mediator and child were met by only passing on those elements of the discussion that the child wanted “brought back”. Two practitioners described how, when seeing a child, they would use a flipchart and coloured pens, marking up those items which could be passed on to the parents and those which remained between the mediator and the child.

Central however, was the view that children had to be protected from adult decision-making. The purpose was not for the child to make a decision about residence or contact, but to comment on the details of the arrangements. The children were, therefore, able to express a view but within boundaries established and agreed by the parents. For example, in Case Three one practitioner described the sort of discussion which Abigail and Zoë might contribute to:

*The children are not actually put into a position of making that decision, but they’re actually put in a position where they can say to mum and dad, ‘that sounds ok, but this is what we would like’. Dad’s going to have them on Wednesday night, Abigail may go to guides, so [she says] ‘I’m quite happy to go to Dad’s on Wednesday night, does that mean Dad’s going to take me to guides and collect me?’* (FMS 54)

FMS mediators would advise parents that children over a certain age were entitled to obtain their own legal advice and would have their views taken into account by a court. However, as one practitioner commented in respect of Morag Hamilton, the aim was specifically to avoid this outcome:

*They can of course with this new Act go to Court...well children over 12 can go to a lawyer and get legal aid and things, but we try to avoid anything like that in mediation if they could have some interim arrangement to see how it was working.* (FMS 46)

Summarising the general approach of the FMS sample, the comments suggest that for the practitioners the most appropriate way for children’s views to be incorporated into the process was via the parents, both in terms of identifying their children’s wishes, but also in determining the parameters within which the children’s wishes could be met. Insofar as children were directly involved, it was to fine-tune arrangements made by the parents, not to make fundamental decisions, specifically in terms of with whom they would wish to stay.

These general approaches are illustrated in the practitioners’ responses to the three case studies. In respect of Case One, the mediators noted that Morag was close to being of an age when a court would take her views into account. At the same time it was felt that she was still too young to fully understand the implications of her expressed wishes or to take on “adult decision-making”. One of the practitioners who had not had practical experience of interviewing children, felt that Morag should not be put in the position of making a choice between who she stayed with, nor given the power. It was the parents responsibility to identify what they felt was best for her, but to also identify a range within which her view could be listened to and acted upon. It was the mediator’s job to help them agree upon the range.

The means for enabling Morag to voice her views might be through the parents, or possibly through the mediator meeting with her.

In respect of Case Two, the Macintosh children, aged 8 and 3 years were considered by three of the four practitioners responding, to be too young to be directly involved in the mediation. The aim would be to assist Vicky and Jonathan to identify the children’s needs. The fourth practitioner would contemplate seeing Joshua, but not a child younger than eight years. Again the aim would be to enable the child to have some input into the fine detail of arrangements, not to be given a decision-making role.

Three of the four FMS mediators indicating a view in respect of Case Three, would consider seeing Zoë and Abigail Andrews, albeit again only as a last resort. As suggested above, the focus would be on the detail of when they saw each parent, how the “parenting plan that the parents have made will...grab them”, not on the parenting plan itself.

### 5.2.3 CALM Mediators
There was, on the part of the solicitor-mediators, a marked reluctance to contemplate speaking with children in the context of mediation as a way of ascertaining their views. It was, as a number of the sample remarked, an unresolved, but current, issue for CALM. Across the sample only one person had practical experience of involving children in mediation. The remainder felt that they had not dealt with situations where such contact would have been appropriate; one person said they had not been trained; another did not believe it was built into the mediation system. Underlying these reasons lay a combination of concerns over the principles of involving children and practical considerations. At one level there was a concern among the solicitor-mediators about the depth of their experience in handling what could be potentially “fraught” situations:

*I’m not sure enough about the dynamic of that. I’m scared that with my level of experience and my level of knowledge that I could potentially do more harm than good.* (CALM 61)

But even among those who felt more confident and, as one pointed out, as solicitors they were often asked to see children, there was disquiet both about the mechanics and the purpose behind the children’s involvement.

The nuts and bolts of how they would actually speak with the children in itself posed a dilemma for the solicitor-mediators. If the mediator spoke to the child alone, apart from the parents, practitioners felt it could compromise the presumed transparency of the mediation process and undermine the ‘trust’ built up between mediator and couple:

*I think it is difficult if you have built up a sort of trust in the mediation with the parents and...you agree to see a child who then says they don’t want anything to get back...that interferes with the relationship in mediation, I would think.* (CALM 36)

For the CALM mediators the issue was not just of ensuring confidentiality for the child, but the repercussions for their own relationship with the parents.

The one mediator who had seen children outwith the sessions with the parents, referred to the trauma for the children of having to speak to a third party. For the mediator it also raised the dilemma whether the child was expressing what he or she really felt, or was influenced by what the parent with residence was saying.

On the other hand, if the children were brought into the session with the parents, it was felt to risk exposing the child to acrimony or pressure, even if groundrules had been determined in advance:

*I’d be concerned about having the child there with the parents in case the child said ‘I want to be with mum’, and dad goes ballistic. I would be a bit wary of putting a child through that ordeal.* (CALM 24)

The CALM mediators’ concerns over the mechanics of bringing children into mediation was not a blanket exclusion of the possibility. Drawing on the case studies practitioners could envisage situations where older children such as Abigail and Zoë Andrews may become directly involved. Nor did this reticence reflect an ambivalence about the importance of children’s views and wishes feeding into the process. The preferred method, however, as in the case of FMS mediation, was for these views to be identified by, and channelled via the parents. The solicitor-mediator’s role was to discuss with parents how they might establish what their children’s wishes were. One solicitor-mediator, for example, described how the preferences of the Hamilton children might feed into the process:

*That’s a question to take back to Ian and Jenny and ask ‘You’ve done things as a family in the past, how would you normally make decisions as a family? How would you, in the past, take into account what the children wanted?’ And if that didn’t come up with anything then I might suggest ways of speaking to the children, and work through a plan, and support the parents in doing that. But it’s the parents who are in the mediation,*
and if the children’s views are to be taken into account, it would have to come from the parents. (CALM 34)

Whether the means for identifying and responding to children’s views was directly through their presence at a mediation session, or indirectly via the parents, solicitor-mediators were unanimous that it was not about children having to make decisions. Like FMS mediators, solicitor-mediators drew a distinction between parental responsibility for decision-making, and the child’s role in influencing the fine detail. For example, if Abigail and Zoë Andrews were to be directly involved in the mediation session the purpose would be to discuss contact arrangements, or “specific issues”, not to make a decision on residence. Similarly, if the process were more indirect, the parents would be encouraged, by the mediator, to focus on the practical arrangements with the children, and not raise the blunt question as to who they would prefer to live with:

Try and get them to talk to the girls...not about ‘who do you want to live with?’, understand that’s the last question that you’d really be wanting to ask, or anyone should be asking them, it’s ‘what are the practical things that are important for you at the moment?’ (CALM 33)

For CALM practitioners, as for FMS mediators, children’s wishes were not, however, necessarily, equivalent to their needs. This was expressed both in relation to 12 and 14 year old children, as in the cases of younger children of 11 or 8 years old:

The child’s views and preferences are important...but what children want is not necessarily in their best interests, and the be all and end all is what is in their best interest...there are many factors to be looked at in determining their best interests and one of them is what the children’s expressed wishes are. But that is just one of the factors, it is not the pre-eminent one. (CALM 23)

Although putting the emphasis on the parents as decision-makers, several solicitor-mediators seemed to allude to the problematic nature of the obtaining children’s views, drawing on a legal discourse. For example, one practitioner acknowledged the importance of taking children’s views into account, but felt that the means had not been fully addressed, specifically in mediation, but also more generally in the context of the Children (Scotland) Act:

You can’t take children’s views from ex-parte statements because both parents could have different versions of the truth, which quite often don’t tie in with what the children...I do a number of reports for courts as well, and more often children have more sensible views on how things should go for them. (CALM 38)

Another lawyer-mediator felt there were limits to mediation where there were fundamental differences of fact. Addressing the issue of Joshua Macintosh’s apparent reluctance to see his father, the mediator commented:

We’re not a court, we’re not hearing evidence, we can’t take the views of the children. We’ve just got to try and talk it through with the parties. We cannot resolve fundamental differences of fact, it can’t be done. (CALM 29)

This practitioner went on to say that if the dispute between the parents proved irresolvable, then the appropriate course of action would be for the court to order a report.

In their readiness to acknowledge the court process as a third way by which a child’s views could be expressed, the CALM mediators were closer in approach to their non-mediator legal colleagues than FMS practitioners. As found among the solicitors (See Section 5.2.4 below), resort to the court process was not actively promoted as a first resort, but was seen as a legitimate course open to the children.

Reference to what a court would do was also used by CALM mediators as a way of encouraging parents to acknowledge their children’s views. In relation to Case Three, one solicitor-mediator
would “mention” to the Andrews’ that, in views of the two girls’ ages “their views would certainly be taken into account by the court, and should be, I think, taken into account by the parents” (CALM 40).

As this suggests, there are case specific differences. The responses in relation to Morag Hamilton, Case One, were not consistent across the CALM sample in terms of how much weight could be given to her views, given her age. However, the tendency was to assume that her views would be identified via her parents, rather than her being present in the mediation session. One practitioner suggested she could be involved in a court action. Practitioners responding to Case Two, were all of the view that not only Theo, but also Joshua Macintosh, were too young to be involved in mediation. As noted earlier, if the parents remained in dispute, the recourse anticipated was via the courts and a court report.

In respect of Abigail and Zoë Andrews, solicitor-mediators would draw the Andrews’ attention to the potential for the two girls to obtain their own legal advice, and for their views to be taken into account. A number could also envisage the sisters being brought into mediation.

5.2.4 Solicitors

Solicitors were in a particularly anomalous position insofar as obtaining the children’s views were concerned. On the one hand they acknowledged the increasing weight being placed by the courts, in the light of the Children (Scotland) Act, on enabling children over a particular age to give a view. On the other hand they were divided as to the best means for ascertaining those views. As with the FMS sample, a range of opinions were expressed. Firstly, there was a group of three solicitors who had, and would be prepared to speak to children:

Where possible I do like to speak to the children, it’s their lives and therefore it’s only fair that if they can express a view their view is sought. (Sol 12)

Secondly, a number of the sample had spoken with children either formally as advising solicitors, or informally to establish a child’s view, but were ambivalent about the experience. Thirdly, were those practitioners would not anticipate speaking to, or taking instructions from a child:

I wouldn’t sit down with an eight year old wain and say ‘tell me about it, I want to hear from you’. I’d be looking for other agencies. (Sol 04)

As found among CALM mediators, the ambivalence expressed about speaking to children appears to stem partly from a feeling among some lawyers that they did not have the appropriate expertise:

I am a solicitor, I am not an expert in what is best for the child. (Sol 06)

But it also arose from the potential for a conflict of interest to arise between the views expressed by the child and the wishes of the client for whom the solicitor was acting. For example, a solicitor ‘acting’ for Mrs Hamilton (Case One), would not anticipate also advising Morag:

Given that the child is saying that she doesn’t want to live with her mother, it wouldn’t be appropriate to advise the child (Sol 11)

Where the objective was to establish a child’s view rather than to give legal advice or take instructions, those practitioners who would not anticipate seeing a child themselves would look to the parents or to other professionals or other agencies. Solicitors would initially try to address the children’s views through the parent. Where there was an apparent conflict, for example, Joshua Macintosh’s apparent reluctance to see his father, or, as in the following example, Morag Hamilton’s preference for residing with her father, practitioners would explore this with the parent who was their client:

So I’d ask [Mrs Hamilton] questions and say “can you give me some insight as to what you believe her reasons are...Are they genuine and if they are genuine and sincere do they make sense to you, or are they perhaps simply a childish wish”. (Sol 07)
Additionally, solicitors may draw on independent advice. Three practitioners suggested, for example, that the mediation service could be involved to establish the children’s views:

_Some of the mediators will actually see the children, and discuss with them, and bring them together._ (Sol 03)

In the context of Case Two, several solicitors suggested that, in the light of the eldest child’s apparent reluctance to see his father, they would seek advice from the child psychologist. A third would consider involving a child psychologist for Abigail and Zoë:

_The ideal is to have an independent voice and an independent ear. In extreme cases the child has seen a child psychologist...it would depend what Charles told me about the children’s acceptance of the situation._ (Sol 10)

One solicitor would refer a client to the local branch of Children First. If the cases reached court, four solicitors would anticipate a court reporter being appointed to ascertain the children’s views. For example, one practitioner suggested that, at eight years old, Joshua Macintosh was unlikely to be spoken to directly by the Sheriff:

_But an option may be for some form of independent report, where someone might have a bit more training to try to assess the wishes of the child._ (Sol 18)

The potential involvement of the courts and the formal processes available, as part of the solicitors’ frame of reference, is also illustrated in the following comment by a solicitor responding to Case Three:

_If an Action is raised I would not like to see the intimation on them [Abigail and Zoë] dispensed with...I would hope these girls get an intimation of the action because they may want to put their say in. If it came to it that they didn’t put their say into the Sheriff...I would be strongly moving for a report, and a reporter to speak to the girls, if not the Sheriff._ (Sol 13)

This lawyer appeared to see a role for the court as providing a forum for children to express their view.

A number of solicitors also referred to the role of Child Welfare Hearings as a forum for the discussion of children’s views, although some practitioners appeared more enthusiastic about the introduction of the Hearings than others (Cleland 1997; p. 101; Neilson 1997). The legal framework for feeding in the children’s own views also surfaced in the approach solicitors took to informing clients that children could obtain their own legal advice. While not necessarily seen as an ideal solution, the opportunity for the child to be independently represented was presented as an option to consider. For example, in relation to Case One, one practitioner suggested that if Morag Hamilton was “particularly mature” they may suggest she get her own legal advice.

In essence, although solicitors may not speak directly to a child, they will explore informal and formal routes by which these views may be expressed.

In terms of the areas over which children’s views could be canvassed the sample expressed similar views to those articulated by the FMS and CALM mediators. Several solicitors, for example, felt that although children should be given a voice, they should not be put in the position of having to make fundamental decisions. Further, a number of the sample made the distinction between enabling a child to express a view and for their views to be acted upon. While the child’s wishes would be listened to, in terms of action it was their needs which were paramount:

_Even a child of 12, 13, 14, their views are important, but the test is ultimately what is the best for the children, and it may be the children’s view is not what is best for them._ (Sol 12)
Focusing specifically on the case studies, the common theme in respect of Case One, was that, at 11 years old, Morag Hamilton could obtain her own legal advice. Solicitors would also be advising Jenny Hamilton, that because of her age a court would give weight to Morag’s views. In practical terms one practitioner discussed how Morag’s views might be translated into contact arrangements which included holiday and residential contact.

Joshua Macintosh (Case Two), at eight years old, was considered too young to be approached formally, or for his views to be considered to be definitive. Other means of identifying his needs and wishes would be explored, such as via the child psychologist, or, if the case reached court, through a Child Welfare Hearing (Cleland 1997; Neilson 1997). One solicitor described how they would explain about the Child Welfare Hearing to Vicky Macintosh, adding:

> I think it’s a good thing, because you can put all the other matters aside and try and have an informal meeting and try and thrash out what is the best thing. In particular at that you could look at some way to assess Joshua’s wishes. (Sol 18)

Joshua’s reluctance to see his father may be addressed by trying to encourage limited contact as a first step.

The focus tended to be specifically on Joshua, not on his three year old brother (and this tended to be true also among the responses of both FMS and CALM mediators). This may be because, as one solicitor commented, at that age “they’re not going to understand the implications of a separation. Their power of speech is just developing, so they’re views…they have other needs” (Sol 12).

In Case Three, the two girls, aged 12 and 14 years, were considered old enough to have their views taken into account to the extent, according to one practitioner, that the court would just say “the children can go and stay with who they want to”. Other agencies or professionals such as mediation or a child psychologist might be drawn in to assist the girls’ in their apparent “indecision”. One solicitor described how the expressed preference of the sisters to stay with both Charles and Emma would need to be met on “practical basis”. Another practitioner, who would be prepared to speak to them directly, if they were willing, to establish whether “joint residence or extensive contact” would address their concerns.

5.2.5 Summary
Across the three groups there was an acceptance, in principle, of the need for children’s views to be acknowledged. The differences, within and across groups, centred on how this could be achieved. The majority of CALM and FMS mediators expressed a reluctance for direct contact with even older children: seeing it as part of the mediation process to enable parents to identify and respond to their children’s specific wishes and needs.

Solicitors, too, would, in general, be reluctant to speak to children, not least because of the potential conflict of interests which may arise. Practitioners would look to the parents or other agencies or professionals to assist children to articulate their preferences. For solicitors the formal route of a court action, for which children over a certain age could obtain their own legal advice was an option. While less protective of the children than an approach which places emphasis on the role of parents and parental responsibility, the formal process, arguably gives the child a direct route into the decision-making process. The associated question however, for all three practitioner groups is the degree to which even older children could or should influence decisions in principle such as residence and contact.
5.3 CHILD SUPPORT AGENCY: ATTITUDES AND IMPLICATIONS

The role and impact of the Child Support Agency (CSA) was discussed by practitioners both in general terms and specifically in the context of the three case studies. Where FMS mediators made general comments concerning the CSA these tended to be neutral, referring to the use of CSA assessments as providing a baseline for couples seeking to agree a figure of maintenance for their children. However, one FMS mediator also remarked that people in mediation would tend to negotiate their own figures, rather than apply to the CSA. In a not dissimilar vein, one CALM practitioner would query with a couple who suggested CSA involvement why they felt it necessary to bring in an outside agency, rather than try and resolve the matter themselves through discussion.

It was the legal practitioners in the sample, whether interviewed in their capacity as solicitors or as lawyer-mediators who were unanimous in their condemnation of the operation of the CSA. The Agency, and the process for determining levels of maintenance for children was variously described as “a nightmare”, “a disaster”, “a monster” and “the most disorganised organisation on God’s earth”. What raised such ire was:

- The perceived inefficiency of the Agency;
- The apparent incomprehensibility of the formulae for determining child maintenance;
- The uncertainty this created for solicitors seeking to negotiate settlements and for couples attempting to agree a level of on-going support.

In addition to the irritations arising from the difficulties experienced of getting through to the Agency on the telephone, or the confusions for clients stemming from getting “lots of letters on the same day saying different things”, the main source of contention was the length of time taken before assessments were made:

> They take so long and that’s from both points of view, because the person who has residence could be waiting a year-18 months before there’s an order, and the person who doesn’t have the residence is then met with an order and 18 months arrears. It’s damn all use to anyone. (Sol 16)

The length of time was compounded by the difficulties associated with the formula for determining the level of maintenance:

> I find the CSA’s method of coming to assessments completely incomprehensible. I have obtained the CSA handbooks where they’ve got the proforma calculations. But if anybody asks me to give them a view as to how much their CSA liability is going to be I’ve found time and again when I’ve tried to use this formulae that it’s impossible to advise somebody because of this question of exempt income. (Sol 05)

One law firm included in the sample has in fact taken the view that because of the potential for error they would not advise clients of the possible level of determinations. Other individual practitioners were a bit more confident about making some kind of assessment, several used a rule of thumb of one-third of net income.

The solicitor-mediators in the sample would, in general avoid attempting to suggest to couples in mediation the level of likely assessment, both because of the risks of getting it wrong, and because, as discussed in Section (4.3) this may be interpreted as advice rather than information. People would be advised to contact the CSA helpline to get some idea of the possible figures involved. This was also the FMS approach. Several of the solicitor-mediators were, however, prepared to venture a broad indication, one, for example would suggest that “it can’t be worse than one-third of your net”.

A combination of the slow response time and the apparently unfathomable nature of the CSA calculations posed a problem for lawyers (including solicitor-mediators speaking in their capacity as lawyers) seeking to negotiate a settlement. One solicitor described it as introducing “an unknown factor into the equation”, any settlement agreed having the potential to be overturned once the CSA assessment “kicked in”. Both solicitors and FMS and CALM mediators felt it was important to warn people that any agreement they may arrive at could be superseded by a CSA assessment. For example, one solicitor-mediator would draw the Hamiltons’ (Case One) attention to the Agency:
And that any agreement which they may reach can be superseded by the intervention of the CSA, either because Jenny has to go on benefits, or because either of them can, at any stage, go to the Agency and obtain an assessment which supersedes any voluntary agreement. (CALM 31)

The CSA was, therefore, felt to introduce uncertainty into the process. It also represented for the solicitors (qua solicitors) a loss of control, a sense that part of the process had been taken out of their hands:

It’s taken any control we had over aliment away from us. The unpredictability of it is a nightmare...You can bend over backwards, you can jump through all sorts of hoops, you can get some wonderful agreement as to aliment, which can all be overwritten by an application to the CSA. (Sol 11)

It was solicitors (and solicitor-mediators in their capacity as lawyers) who raised the practical problems for client’s arising from the Agency’s slow response times, specifically the absence of alternative, court-based, avenues specifically for obtaining financial support for the children. In a mediation context this could be part of the discussions. In the formal route, solicitors would seek to negotiate an agreement on the understanding that it could be subsequently overturned. Alternatively, they may take a “back door route” through the courts by making an order for interim aliment for the spouse1. One solicitor suggested, for example, that if Vicky Macintosh (Case Two) was experiencing difficulties obtaining financial support from Jonathon, then:

We could make an application in her name for interim aliment and the court are usually quite sympathetic to the fact...they do seem to be prepared to grant it by the back door pending a determination by the CSA. (Sol 18)

Not surprisingly, among the legal practitioners, there was a degree of nostalgia for the “old days” when applications for aliment could be made direct to the court in terms of its comparative speed and certainty of outcome:

It used to be so easy in that you just went to court, you could get a hearing in court in two weeks, say to a sheriff this is what he earns, this is what she earns, and the sheriff would make an order, and without formulas people did have a generally good idea of what the sheriff was likely to decide. It was done quickly and solved a whole lot of problems. (CALM 29)

The discussion of the three case studies reflect these general comments.

As part of the information-giving process, FMS and CALM mediators would include a discussion of the role of the CSA and the implications of CSA involvement. Mediators would suggest people contact the CSA helpline to obtain a “ball-park” figure which could be used to assist the discussion. The emphasis was, however, on encouraging the couples to arrive at their own figure for a suitable level of maintenance.

The main, case specific, differences emerged in respect of Cases One and Two, where the likelihood of CSA involvement was greater. Several of the FMS and CALM mediators discussing these cases would draw attention to the involvement of the CSA if Jenny Hamilton or Vicky Macintosh applied for benefits. One solicitor described the sort of strategic approach they would take in respect of Vicky Macintosh:

CSA agency might assess him and say that he actually has sufficient income to pay her enough to bring her off benefits and that may well happen. Having said that, what might happen is that we might reach an agreement, he might say ‘I can pay you £500 a week’, and she might think

‘that’s four times what I’m getting on benefits, so it’s in my interest to take that amount, I don’t care that I’ve got to pay full rent, because I can augment that with my Family Allowance. (Sol 08)

It was also in respect of the Macintoshes that several solicitors emphasised the importance of reaching a negotiated arrangement because of the difficulties of enforcement in connection with a self-employed person (See Section 5.5):

The CSA are not going to be particularly helpful because they put the self-employed to the bottom of the pile because they’re so difficult to deal with. (Sol 09)

In the case of the Andrews’, one solicitor-mediator described how they would inform the couple about the CSA, warning them that:

In their circumstances that it’s almost worse than useless because they’d certainly never deal with the application that was made. (CALM 61)

Several solicitors, however suggested that the threat of the CSA would be used if Emma Andrews was proving recalcitrant:

I couldn’t see Emma not paying for the children to live, but obviously there are sanctions, you can go to the CSA. If there was total intransigence there…then there is an alternative for Charles. (Sol 10)

Like the courts, the CSA, in spite of its assumed inefficiency, could be used strategically as a negotiating tool.

5.4 MATRIMONIAL PROPERTY

5.4.1 Introduction

The discussion of the strategies employed by the three professional groups (Chapter 4), and the ways in which practitioners appraise options (Section 3.6), provides an overview of the approaches adopted toward resolving disputes in connection with both children and property. This section takes a more focused look at how mediators and solicitors defined matrimonial property, and compares the means by which problems associated with specific assets were dealt with or resolved.

5.4.2 Defining Matrimonial Property

The legal definition of matrimonial property, the criteria for inclusion and exclusion, and the ‘relevant date’ at which assets and liabilities would be valued for the purposes of division on divorce, are set out in Section 10 of the Family Law (Scotland) Act 1985.

In their accounts of the process, both CALM and FMS mediators described how they would draw a couple’s attention to the importance of agreeing a relevant date2 for the purposes of valuing assets, and the need to apportion items, such as pensions, to exclude contributions made outwith the period of the marriage. CALM and FMS mediators would seek to enable a couple to reach an agreement on this date, described as the date of separation, as part of the mediation. One FMS practitioner, for example, referring to the Hamiltons (Case One), both of whom were still living in the same house at the time of the mediation, described how the mediators would explain to them about the relevant date:

As they haven’t separated what we would normally ask them to do is to agree on a date for the valuation, and explains the reasons why one date might make a difference to the assets. (FMS 43)

Solicitors too described how they would explain to clients the importance of the relevant date for the purposes of valuing assets. Their accounts did not indicate how this date was negotiated. One lawyer,

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2 Section 10 (3) of The Family Law (Scotland) Act 1985 defines the relevant date as whichever is the earlier of (a) the date on which the parties cease to cohabit; (b) the date of service of the summons in the action for divorce.
however, alluded to the potential for the date to be a source of disagreement between parties, and possible “tinkering” by the client:

*Try and establish a date of separation. Sometimes there is a bit of debate around the question of separation. They may have been separated, albeit still in the same house. I try not to explain the significance of it too much at that point in terms of the importance of the date of valuation for assets, because I sometimes feel if you were to point that out people might then be inclined to tinker with the date. What you want is for them to tell you the factual date.* (Sol 18)

CALM and FMS mediators indicated the sort of additional information they felt was required to establish whether and what proportion of assets such as life policies could be included in the schedules of property. Solicitors described going through a similar process. Several, for example, described the checks or questions they would go through to identify items for inclusion or exclusion. Their accounts appeared to place an even greater stress on the fine detail. One solicitor, for example, described how, in connection with the Hamiltons, (Case One) they would obtain “a “good history” of the house “to make sure it actually had been acquired as a matrimonial home” (Sol 03). Another described the three questions they would ask:

*Whether, at the time they got married either of them had any savings or funds or houses, from the point of view of whether there’s a separate property argument, or possibly an argument over the source of funds for the property to be excluded. The next one is to ask whether there’s been any inheritance, again to know whether that is separate or to know if it's someway been converted into matrimonial property. The third is whether there’s been any life-time gifts, and if so have they been kept separately, or have they been in-mingled, and then it would be a question of source of the funds. My thinking in asking is that it’s not the sort of thing people would volunteer unless you specifically asked.* (Sol 18)

The difference in emphasis (if not in practice), may reflect the mechanics of the processes. Couples in mediation complete financial information forms, the details of which are displayed and shared. Solicitors are effectively eliciting the same information by a different means. It may also, indirectly, be another indicator of the differences in role. For mediators defining matrimonial property is part of their information-giving role:

*Reminding them...that the matrimonial property is defined in terms of the Act as everything accrued during the marriage right up to the date of separation. And that what we have done is to identify all these items on the schedule.* (CALM 25)

For solicitors, information collected is preparatory to their own role in the negotiation process:

*Charles has got his lump sum, but I think you could argue that...although paid after the date of the marriage, was almost entirely attributable to before the marriage. Let’s say one-fifth of it would be attributable to before the marriage. Now, for all these arguments there are counter-arguments, I’m not saying they would be successful, but I think you start from a position of strength.* (Sol 10)

Two solicitors, in the context of discussing gifts and inheritances (see Section 5.4.6) argued that non-matrimonial assets could be converted into matrimonial assets if they were a way of one party realising their claim. Again, this suggests a more strategic approach to defining matrimonial property:
The way the Family Law (Scotland) Act is framed is that the principle relating to matrimonial property and the sharing of matrimonial property in a specific way, which excludes third-party gifts. All the other principles of Section 9 are not linked to matrimonial property. So if, when the parties separate, they don't have any matrimonial property...that doesn't mean to say that the wife doesn't have a claim. (Sol 16)

5.4.3 Section 9 Principles - Acknowledging Economic Disadvantage

The ways in which practitioners dealt with principles relating to Section 9 of the Family Law (Scotland) Act 1985, specifically in respect of the potential economic disadvantage suffered by one party (Section 9 (1) (b), and the economic burden of child care (Section 9 (1) (c)), suggests both within-group and across-group differences.

No consistent pattern emerged from the responses of the FMS mediators. Several responding to Case One, noted that Jenny Hamilton had given up her career and had no pension, and envisaged that some sort of balance could be achieved through earmarking Ian Hamilton's pension, contingent on the couple's agreement:

Jenny has been looking after the children and given up her career, why should she be penalised? How can that be fair, because she would have no pension at 60....Perhaps they might agree to her having a small share of the £46,000. (FMS 47)

Another FMS mediator, discussing Case Three, anticipated that any economic disadvantage experienced by Charles Andrews would be dealt with in the context of a discussion of the couple’s relative earning potentials:

And hopefully that would be taken into account in the final calculation by the earning partner. (FMS 45)

The comments of another FMS mediator in response to the same case suggests a degree of reticence in dealing with the issue. In part this derived from the difficulties of quantifying the level of disadvantage, though the mediator suggested this might be overcome by Charles seeing a financial adviser to estimate the potential loss of pension. But there was also a sense that, given that it was based on a decision made in the past, by choice, and that to pursue it through the formal routes might cost more than would be gained, it should almost be set aside:

We come fairly future focused..If we talked it through and came up with some kind of balance off. But if they couldn't agree that's the type of litigative thing that solicitors make more money out of than the person who gets financially disadvantaged... So it may not be in Charles' best interests to push that one, rather than to accept that was something that they actually decided to do as a family at that point in time. (FMS 54)

The element of reticence and the reliance on the voluntary nature of the agreement, has its echoes in the comments of the CALM mediators. Among these practitioners the principles of economic disadvantage and the economic burden of children were specifically grounded in the “Section 9 principles” of the Family Law (Scotland) Act, in a way that did not appear in the accounts of the FMS practitioners. However, the principles were regarded as very much a "grey area" and one which some of the solicitor-mediators appeared to feel uncomfortable dealing with in a mediation context. Again, however, as in the case of the FMS mediators, the sample reflected a range of approaches. On the one hand there were those who would raise it directly:

I can tell them about the Family Law (Scotland) Act, 1985..Section 9 principles. I would paraphrase..about the law, equal division is the initial assumption, but where there are children, for instance, there is usually an
argument for a division that is other than 50/50, and the range for that, in my experience, runs from 30/70 to 45/55. I would always suggest that if they had any doubts about that they check that with their own solicitors. (CALM 34)

On the other hand there were solicitor-mediators who were reluctant to mention it unless it was specifically raised by one or other party. For example, in the case of Charles Andrews taking early retirement to care for the children:

Well, as a mediator, luckily it's not my job to tell them whether this is something they should take into account. What I would discuss with them is probably it is one of a number of factors that can, in terms of the law, that the court has discretion, and I would sometimes refer them to their solicitors. I wouldn't bring it up necessarily. (CALM 36)

As found in the response of FMS 54, above, some CALM mediators were, in their own minds assessing the viability of the parties pursuing their arguments. One solicitor-mediator, for example, discussing Case Two, felt that they would not be looking for an unequal division in Vicky Macintosh’s favour, partly because there were, according to the practitioner, no "exceptional circumstances", but also because of the limited resources available for division. Similarly, in respect of Case One, the fact that the only assets available were the house and the pension, which was not immediately realisable, would, it was felt, mitigate against an unequal division in Jenny Hamilton’s favour. Further, if Jenny were to argue that she had lost opportunities through giving up her job, one practitioner felt:

That is not one for which I would suggest, in the circumstances, measures in a great deal of money. She was only a nursing assistant at a fairly modest level. (CALM 28)

This solicitor-mediator felt that the approach to take would be a practical one, exploring how long it would take for her to train to get back into work.

In effect, for mediators, both FMS and CALM, the discretionary nature of the “exceptional circumstances”, the problems of quantifying, or making the potential disadvantages sufficiently concrete, together with the anticipated difficulties of realising any loss, where financial resources are limited, seem to inform the apparent reticence of practitioners to engage with these factors in a direct way. For CALM mediators the response was to advise people to discuss this with their own solicitors. Among the solicitors in the sample, the economic disadvantage experienced by one or other party, and the economic burden of caring for children were bargaining counters, or "levers" in the negotiation process, but ones which had to be tempered by the resources of the parties and the likely response of the courts. One solicitor, for example, discussing Case Two, commented:

I think there is merit in moving away from the 50/50 split. Vicky has a number of the Section 9 principles of the Family Law (Scotland) Act, in that I would imagine that she has been largely financially dependent on Jonathon and she is going to have the primary economic burden of caring for the children...But I would start from the 50/50 principle and look at the assets that were available. (Sol 08)

Similarly, in respect of Jenny Hamilton (Case One), several solicitors could anticipate being able to argue that a fair share would not necessarily be an equal sharing:

But that only works to the extent of the parties resources, and if they don't have any money there, they don’t have any money there. (Sol 11)

Lawyers were also sensitive to the fact that these arguments could be prejudiced by, for example, the degree of financial support one party may contribute toward the care of the children, such that the economic burden is felt to be shared. One solicitor also felt that the argument for economic disadvantage, in the case of Mrs Hamilton, may be diluted if the settlement included Jenny's acquisition of the house:
She stayed at home, she's not got a career, she's not got a pension. The counter-arguments put forward are that she did benefit financially in the sense that Mr. Hamilton, being the breadwinner, providing her with a house...and she's going to acquire the asset, so she didn't suffer a particular economic disadvantage. (Sol 03)

Another solicitor, speaking more generally, felt that the courts had not made great use of the opportunity for an unequal division afforded by Section 9 of the Family Law (Scotland) Act. They felt that this was reflected in the character of negotiations. The accounts of other lawyers in the sample suggest that they are prepared to argue for exceptional circumstances to be taken into account in negotiations on behalf of the client. But, like mediators, they are aware that issues of resource availability and the degree of interpretation placed on these principles by the courts, may detract from arguments for an other than 50/50 split.

5.4.4 Pensions

In two of the case studies one or both partners had occupational pensions. In the case of the Hamiltons, Ian had a pension valued at £46,000. In the case of the Andrews’, both Charles and Emma had pensions, Charles had also received a lump sum payment at the time of his early retirement. The following draws out some general themes, followed by a discussion of some of the case specific issues which arose.

General Issues

All of the practitioners dealing with Cases One and Three would draw couples’ or clients’ attention to the inclusion of the pensions as matrimonial assets, noting that it could be an “emotive issue”, particularly for the pension-holder. As discussed in the context of financial disclosure (Section 5.5), practitioners from all three professional groups would seek vouching for the pension’s value. It was, however, only solicitors and CALM mediators who, in their accounts, explicitly drew attention to the different ways in which pensions could be valued, and the implications. One solicitor, for example discussing the Andrews’ believed that while a transfer value of Emma’s pension would be adequate, an actuarial value may be required for Charles’ “because I think I’m right in saying that you can’t get a transfer value of a pensions in payment” (Sol 13).

It was understood, and would be explained to couples and clients of all three professional groups, that the valuation period was from the date of marriage to the date of separation. The treatment of the pension in terms of apportionment was more open to interpretation. It was generally (though not exclusively) understood that in terms of the division of the assets, pensions, because they were not immediately realisable, would not necessarily be split 50/50. A CALM mediator described how the range would be explained:

Pensions are dealt with by lawyers all the time. I would explain..You normally don’t split a pension 50/50, you normally would say that the person who is holding on to the pension should hold on to a greater value because they get the money later...I would give them a range, and the range in my experience is 50/50 in exceptional circumstances to about 55/65, but typically 60/40. (CALM 34)

One of the solicitors was more specific, suggesting that Jenny Hamilton would be entitled to at least 43%.

In order to inform people of the range, solicitors and solicitor-mediators were able to draw on their day to day experience, FMS mediators drew on the advice of the service consultants:

I don’t think you do just divide it [pension] by two. I think it is weighted in favour of the husband, so the legal adviser told us, and he gave us a

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3 Section 10 (5) of the Family Law (Scotland) Act includes as matrimonial property “The portion of any rights or interests of either party under a life policy or occupational pension scheme” accrued during the period of the marriage up to the relevant date.
fraction, which I can’t remember, but I would look it up if I was doing a real case. (FMS 52)

For both CALM and FMS mediators in general, the desire to avoid appearing to give advice may render discussion around pensions particularly problematic. As one CALM mediator remarked:

If you’re dealing with pension rights, which is a minefield, a very, very complex area, and one in which I, as a mediator, I couldn’t possibly sit and advise them both as to their rights in terms of pensions..what I can do is give a general overview of the law, but I will say..you will need to discuss with your lawyer exactly how you might wish to divide that up between the two of you. (CALM 61)

The complexity of the area and the degree of scope for interpretation may conflict with the desire to be non-directional, impartial and to not be seen to give advice.

Case Specific Issues

In respect of Case One, the key issue was how to achieve an equitable settlement in a context where the most valuable asset, Ian Hamilton’s pension, was not realisable. The most common approach by both CALM and FMS mediators and solicitors was to suggest that Jenny Hamilton retain the house. Since the equity on the house amounted to around £19,500 practitioners explored different ways by which a more equitable sharing could be achieved. The option considered most frequently across professional groups was the possibility of earmarking Ian’s pension, or agreeing a deferred payment of a fixed sum. However, having raised it, practitioners then went on to reject it. One solicitor in the sample summarises the disquiet expressed in one form or another by lawyers responding to this case:

I don’t have a great deal of experience in relation to deferred payment…One of the ideas behind divorce is the clean break, and to have this payment in 20 years time seems to detract from that…I tend to recommend to people ‘.a bird in the hand, if you get enough money to continue to pay the mortgage you’re better to go for that than a promise that in 20 years time you’ll get a share of his pension’..so I think achieving practical benefits and immediate benefits is preferable. (Sol 03)

The feeling that earmarking went against the spirit of the clean break; uncertainty that the money would be realised; the more pressing demand for resources in the shorter term; a lack of experience on the part of legal practitioners; and what one CALM mediator described as the lack of a “consistent approach” from the courts, discouraged solicitors from promoting this approach, although they would mention it as an option to their clients. FMS and CALM mediators reflected this ambivalence, and clearly saw it as an area where a couple would need to take legal advice:

They could consider earmarking, but that’s something they’d have to go to [their] lawyers and the court, it’s not something we can do here, and I’ve found this is particularly not a favourite option of lawyers..but it certainly is an option for them to look at. (FMS 46)

One CALM mediator suggested that, even in their capacity as a lawyer, it was difficult to advise people, and in a mediation context even more difficult to give people information on which they can make an informed decision, adding:

It’s not really a cop out, I think you are entitled in certain situations to say ‘you ought to get advice from your solicitors about this’. (CALM31)

The advantage of earmarking or deferred payment for Jenny Hamilton is that it would provide her with a pension. The problem, as one solicitor-mediator saw it was that given the more short term financial needs, the assumption that spouses who didn’t have pensions could buy one was “just not practical in these situations” (CALM 31).
In the context of the distribution of matrimonial property the problem was finding a flexible alternative to earmarking, given the limited resources available. The possibility of Ian borrowing money was raised by two FMS mediators, but with a question mark over whether this was really a viable option. Among the solicitor-mediators possible options suggested included: capital payment by installments, with any balance outstanding being paid at retirement; or Jenny retaining the house and Ian paying the mortgage as a way of offsetting her claim against the pension. Solicitors also seemed to favour an approach whereby Mrs Hamilton received her share of the pension assets in capital installments. The problem was the knock-on effect on the amount available for aliment.

So at that point we would have to say, ‘do you want to consider a deferred payment ...[or] do you want to ask him to pay by installments, by periodical allowance over a set period?’ And at that stage we’d have to say to her ‘if you want to do that that reduces the amount in the melting point for payment of aliment’. So that wouldn’t be in her interests, I don’t think. (Sol 06)

In respect of the Andrews’ the three themes to emerge were:

• The inclusion, or otherwise of Charles’ lump sum payment as matrimonial property;
• The cancelling out of the two pensions;
• The implications for aliment/periodical allowance of Charles Andrews’ pension.

In terms of Charles Andrews’ lump sum, received when he took early retirement, the consensus of opinion was that it was matrimonial property, although both a CALM mediator and a solicitor suggested that some of it would have accumulated prior to the marriage and should be apportioned accordingly. However, one from each of the three professional groups suggested that Charles may be at a relative disadvantage. Emma had a number of years pension-earning potential, but Charles’ was fixed. The FMS mediator suggested that Charles could speak to a financial adviser who could help work out what the potential impact of early retirement had been on his pension, and the figure brought back to the mediation for discussion. A solicitor and a CALM mediator suggested the relative economic disadvantage might have implications for periodic allowance or additional capital:

If you’d worked out what the differentials are, and what kind of support might be appropriate, if his pension was quite low, and his money from investments was a lot less than Emma had, then depending on what the other picture was, you could capitalise some of the money to obtain periodical allowance. (CALM 33)

In terms of aliment, several solicitors suggested that since one of the pensions was due to come on stream the following year, it undermined any argument for financial support for Charles, for whom they were acting.

In the responses to both cases, each of the three professional groups identified the significance of pensions to the discussion of matrimonial property. The responses also suggest practitioners’ awareness of the problems associated with pensions.

5.4.5 Self-Employment and Partnerships

Jonathon Macintosh (Case Two) was self-employed, running a business in which Vicky Macintosh was described as nominally a partner, for tax purposes. The responses to this element raise both technical issues and, as a corollary, questions of confidence and experience on the part of practitioners.

The comparative rarity of self-employed couples presenting for mediation is reflected in the comment of one FMS mediator who noted that there was no provision on the financial information form to collect information on a business. This mediator had not yet dealt with someone who was self-employed in an all-issues mediation context. In recognition perhaps of their relative inexperience, three of the four FMS mediators responding to this case described the self-employed/partnership (with debts) elements of the case scenario, as a “red flag”. Two of the practitioners would be seeking advice from their services’ legal consultants:
I think what I would be doing in this situation is getting some help and advice myself from our legal consultant, because I clearly need to learn much more about how businesses are handled in all-issues mediation. (FMS 49)

Although three of the CALM mediators referred to the “difficulties” surrounding businesses, none made reference to their own lack of experience in handling these matters, nor did solicitors. In dealing with this element of the case, CALM and FMS mediators described how they would discuss with couple what they wanted to do with the partnership. Solicitors would explore the implications for Vicky and the business of her leaving, and effectively dissolving the partnership, or remaining a partner. The advice appears to err on the side of Vicky relinquishing her stake. Retention of an interest was mooted only if, for example, they were not able to obtain a comprehensive agreement with Jonathon, in which case, if the business was doing well, remaining a partner would “give her that bit more leverage”. Staying a partner would also enable Vicky to draw an income from the business, qua partner:

If she thinks he may be difficult about paying money, then we could try to force the fact that she’s entitled to some drawings from the partnership, and there is a strict partnership law. (Sol 18)

Underpinning these approaches, as the last comment suggests, was a degree of suspicion in respect of self-employment generally. Two of the solicitors referred to the difficulties of both agreeing on the level of disposable income generated, and of enforcing payment of aliment when there is no employer. One solicitor even suggested that the CSA was similarly constrained in enforcing an assessment:

You have very limited...[means] of enforcing payments against the self-employed because you can’t get a deduction from earnings order, because they don’t have an employer...the CSA are not going to be particularly helpful because they’re so difficult to deal with: they fiddle their income and they work with accountants and they send in doctored accounts. (Sol 09)

For this solicitor, these difficulties reinforced the need to reach an agreement with Mr Macintosh for aliment, “a sort of compromise balance” between what he feels is affordable and what Vicky feels she needs.

For one FMS mediator, the degree of mistrust was articulated in terms of the problems of disclosure and potential power imbalances:

It’s tricky because there’s a lot of leeway for people to hide their assets and...more power imbalance for the one partner who has more knowledge. (FMS 53)

The degree of suspicion in respect of self-employment may also be manifest in the stress that mediators and solicitors placed on the importance for the couple of obtaining an independent valuation of the business, one that could be agreed upon by both parties. It was a solicitor who explained that Vicky had two options: to either make a claim on the business as a partner, or for it to be included as matrimonial property. The solicitor went on to set out the implications of these different approaches in terms of: the dates at which valuations were undertaken; the partnership arrangements; tax costs; and the likely response of the courts.

The distinction drawn between the business as a partnership or as matrimonial property, and the possible implications was less clearly stated by the mediators. One of the FMS practitioners, for example, described how they would be:

Helping them to work out what was going to happen to the business: was Vicky going to remain a partner, if she wasn’t what is her share in that? (FMS 44)

Another, however, was less equivocal:
It’s a capital asset, and in divorce law assets are split down the middle. (FMS 53)
The approach of solicitor-mediators also appeared to be to view the business as matrimonial property, irrespective of the partnership arrangements:

Because whether she’s a partner or not, because she’s a spouse, she’s entitled to a fair share of the assets. (CALM 39)

Solicitors in the sample, as suggested above, appeared to take a more strategic approach. One practitioner in particular was concerned with the nature of the partnership agreement, and the implications for the distribution of the shares in the business:

Businesses are not always matrimonial assets, it depends how much the parties have put into the business, and what the arrangements there are so far as distribution of shares are concerned...I’d need to find out what the partnership split was. If she’s a 50% partner she’s got a 50% interest in the business, and that is not a matrimonial principle that’s a partnership principle. It’s not necessarily 50/50, I would need to see the partnership agreement. (Sol 12)

As in relation to pensions, the apparent complexity of the legal principles at stake, underline the complementary nature of the formal and informal systems.

5.4.6 Inheritances and Gifts
In Case Two one of the areas of dispute was the ownership of items of antique furniture gifted by Jonathon’s (now deceased) grandmother, when the couple were cohabiting. The argument hinged on whether it was a gift to them both, and therefore, potentially matrimonial property, or solely to Jonathon, and therefore to be excluded.

Among the FMS mediators the interpretation was that if the items were a gift to them both, then it was matrimonial property. Several practitioners thought they might consult with their service’s legal consultant to confirm this approach. One of the FMS mediators would also be looking for supporting information for the couple about the nature of the "inheritance".

The strategies employed by the FMS mediators would include establishing whether the items had sentimental or financial value, as a way of looking at ways of sharing the items. Several practitioners would suggest to the couple that they obtained or put a value on the items in order to establish whether a financial arrangement could be reached whereby Jonathon was able to keep the antiques and Vicky "brought up level".

The objective of the FMS mediators was to try to get the couple to resolve the issue together, but if they were unable to reach agreement on whether or not the antiques comprised matrimonial property, or on their value, the only recourse would be to go to their solicitors.

The approaches adopted and the "tricky" nature of the issue was summarised by one FMS practitioner who commented:

..All we could do is explain the issues to them, and you might actually, rather than treating it as a totally legal thing, try and get them to look at whether there was any way they might consider sharing this bequest. You’re about respecting each other, and there may by things that one or other particularly values that the other is very willing to give way on...or he may be digging his toes in totally, in which case she would then have to resort to the legal...but the emphasis would be on trying to resolve this problem in mediation..it’s quite a tricky one that. (FMS 53)

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4 Section 10 (4) of the Family Law (Scotland) Act 1985 specifically excludes as matrimonial property items acquired in the course of the marriage by gift or succession of a third party. Under Section 10 (4)(b), however, items acquired before the marriage but used as “furniture or plenishings” for the family home, would be included as matrimonial property.
Among the CALM mediators, three of the five responding to the issue also referred to the "tricky" definitional issues surrounding property gifted before marriage or used by both parties in the matrimonial home:

> If you were to take a literal interpretation of the law then you'd probably say that they should really belong to him but there is this counter-argument that they've been used by her as well as by both of them, and he's willingly given them up on the basis that they would be each party's assets...So I would think that a proportion of the value would be attributable to her. (CALM 24)

The strategies for resolving the dispute would be similar to those employed by the FMS mediators: identifying whether the attachment was based on financial or sentimental values; and obtaining a value to "plug in" to the discussion. One solicitor-mediator described how they would "discount" the items "rather than allow them to get bogged down on whether it is or is not an asset" (CALM 39), and then work out how this could be achieved. Another practitioner described how, if the items had a high value they would hope the couple looked at it in the context of the other resources, or lack of, available to them:

> I would never suggest to them that they sell it, but if you let the £5000 resonate there for a while, and they look at the rest of their finances, they might come to some sort of agreement themselves about it. (CALM 32)

The emphasis would again be on achieving a compromise through discussion. The sort of arrangements which the solicitor-mediators anticipated might emerge could be an unequal division of the value of the items in Jonathon's favour, or a distribution of the items between themselves. The generally low key approach suggested by both the FMS and CALM mediators is evident also amongst the solicitors. Two of the six practitioners responding alluded to the difficulties of establishing whether or not the items comprised matrimonial property. One, for example, drew attention to the shared usage to which an item has been put as a defining characteristic. As with the mediators, however, the aim would be to achieve a compromise. One solicitor even went so far as to suggest that Vicky "forget it", based on the assumption that a court would be unlikely to believe that the items were gifted to them both. Another would leave the decision whether to pursue the issue through the courts to Vicky, but felt she would need to balance this against both the value of the items, and whether this course of action might jeopardise a "reasonable agreement". A number of the solicitors suggested they may want to get the items valued, especially if they were likely to have a high worth. As noted earlier (Section 5.4.2), even if not considered to be matrimonial property, the items could be used to realise Vicky's share of the assets. Another practitioner anticipated a practical solution whereby there was a trade-off between, as they put it, the three-piece suite for Vicky and the children, and an original oil painting.

All three practitioner groups recognised the ambiguous nature of the items for the purposes of identifying matrimonial property. The accounts of the solicitor-mediators seemed to suggest a particular sensitivity to the "tricky evidential questions" raised by the provenance of the items. All three professions would be looking for a compromise solution, and one which avoided litigation. This approach is summarised in the comments of one of the CALM mediators:

> Quite simply it's a situation where you have to work out whether it's worth your while financially to let a court decide about these things, and whether there's some compromise that can be reached. (CALM 27)
5.5 ENSURING FINANCIAL DISCLOSURE

5.5.1 Introduction
The need to ensure full financial disclosure is an imperative in both a mediation and solicitor-client context. The means for seeking disclosure and the penalties available if one or other party proves recalcitrant, are however different. A description of the general approach adopted by mediators and solicitors, is followed by an account of the specific issues raised when one partner is self-employed.

5.5.2 FMS and CALM mediators
The Agreement to Mediate (FMS) and Conditions of Mediation (CALM) include an obligation on the parties to provide full disclosure of their assets. For FMS mediators this was expressed in terms of the parties’ needing to be “open and honest”, for CALM mediators the issue was one of “trust”. However, as both FMS and CALM mediators noted, beyond this moral obligation, the mediator cannot be “100% certain” that there has been full disclosure, nor do they have powers of enforcement:

..in the first meeting you are telling them that they’ve got to make full and frank disclosure of all financial issues..they have to sign it [financial questionnaire] ..you’ve really got to do it on a basis of trust. (CALM 24)

Both groups of mediators do, though, rely on a number of safety nets. Firstly, the fact that information in mediation is shared: lists of assets are put up on the flipchart, and individual financial forms copied and exchanged between the parties. This allows each person to scrutinize and question the other’s disclosures:

They are saying, when they’re filling up the forms that they are warranting, they’re committing themselves to making a full disclosure..but you’ve got the extra test of the couple both being there, going over stuff, correcting one another. (CALM 33)

As a safety net this presupposes, that Vicky Macintosh, for example, has some idea what the business produces. However, as one solicitor-mediator suggested:

Mediation has to have an element of trust, and I think if somebody is not sincere when you get a disclosure, if their partner doesn’t know about it or suspect it, then they get away with it. (CALM 37)

The second main safety net for both FMS and CALM mediators is the requirement for the couple to each supply verification of assets, income and debts, through vouching. As summarised by one CALM mediator:

One of the disciplines that CALM mediation imposes on us is that we insist on vouching of documents, because if the summary is going to have any credibility or use, the lawyers shouldn’t have to go off and find this other stuff. It should be either vouched, or there should be a reason for it not being vouched. That part of the process is something that we work hard for the parties to get…we would say to them ‘look, you’ll need to get this’. (CALM 34)

A separate, but related issue is obtaining and agreeing the valuation of items identified as matrimonial property. As discussed in Section 5.4.2, both FMS and CALM mediators would signal to couples the importance of the ‘relevant date’ for the valuation of assets, as well as ensuring apportionment for the period of the marriage. The specific problems raised in connection with valuing a business are discussed in Section (5.4.5). In connection with the value of occupational pensions, life policies and the matrimonial home, the accounts of the CALM mediators seemed to place greater emphasis on exploring with couples how the values are determined and the implications of different methods. For example, one CALM mediator, explained how they would work through with a couple:
What’s the information? How are they going to get it? Are there grey areas such as life policies which might have quite a lot of value, and they might be wanting to look at sale values? And obviously pension details, have they requested transfer values?...If they want to get a value for the house it’s their choice how they do it, but they’ve got to know what kind of ways...Because people are wanting to use estate agents to value property...and you can say ‘Well, it’s certainly a choice and I know it doesn’t involve any outlay, the trouble is that you might find advising lawyers are saying ‘we can’t advise you to do this’, and that the cost of having a proper survey can just pay off’. (CALM 33)

This comment summarises a number of themes which emerge from the accounts of other lawyer-mediators. Firstly, the argument was put by a number of the CALM practitioners that, in terms of obtaining valuations, and the degree of formality, it is the couple’s choice. At the same time, practitioners appeared keen to stress to the parties the importance of obtaining accurate valuations. One solicitor-mediator, for example, described how they would go to “tedious lengths” to ensure a couple understood the implications of accepting an unverified figure, and sought to create a “safe environment” in which it is “perfectly normal and acceptable to look for valuation of things”. For this practitioner it was set in the context of “power imbalances” and enabling people to be assertive.

Secondly, CALM mediators had a weather eye to the likely response of their solicitor peers, as suggested by the comments above. By alluding to what a couple’s own solicitors might say if presented by an unverified set of figures, practitioners are, effectively, giving advice by dissociation. One CALM practitioner specifically couched the issue in terms of professional responsibility. For this practitioner, acting solicitors were ultimately responsible for verifying the information, but mediators also had a role to play in establishing the source and acceptability of valuations:

And I would reflect in my mediation summary, whether this was a valuation which was in tablets of stone, or whether it was one we had just agreed to work on. That would flag the thing up for the solicitor, who ultimately has to implement the agreement, to check on that. (CALM 31)

This alludes to the third safety net available to FMS and CALM mediators: the couple’s own advising solicitors.

It is all subject to legal advice, and a lawyer would review the information, and if they had reason to believe that wasn’t a correct picture they would presumably advise a client against signing it. (CALM 29)

The assumption is, therefore, that advising solicitors will appraise the financial summaries produced by mediators. It was, however a solicitor who raised the question of legal responsibility if a solicitor acts on the instructions of a client following mediation, and an element is subsequently found to be missing, to the detriment of the client.

For CALM and FMS mediators, the ultimate ‘sanction’, if trust is felt to have been breached, is to terminate the mediation. The responsibility for this decision may rest with the mediator. For example, if Ian Hamilton refused to present documentation confirming how much was in a building society account:

We would have to stop the mediation because mediation is a voluntary process, we can’t do it where people aren’t going to co-operate and play fair. (FMS 43)

But it may also rest with the parties, for example, if one was questioning whether there had been full disclosure, one CALM mediator suggested it would be up to the doubter to express their concerns:
To decide whether they’re going to accept what’s being produced for the purpose of mediation, or whether they feel that they then can’t go ahead. (CALM 36)

5.5.3 Solicitors

Solicitors seeking financial information upon which to draw up a schedule of assets, are also reliant on their client’s knowledge of what resources are available, and on information supplied via their own solicitor, by the other party. One solicitor, when asked how they ensure financial disclosure responded:

*You can’t. All you can say to the client is this is what he says he has, do you accept this..it depends on the client’s information and the other side coming clean.* (Sol 09)

Another solicitor would advise clients such as Mrs Hamilton “to be their own detective” and photocopy bank statements and notices for a “wee personal file”.

Having received a schedule of assets from the other party’s solicitor, one lawyer described how they would inform their client of other ways of getting corroborative information, but would add the rider that by further cross-questioning “it shows you don’t trust them”, something the solicitor was anxious to avoid. Nonetheless, if this solicitor was acting for the wife of a dominant husband they would take a more critical approach:

*With these people I’m more inclined to say we’ve got to go into this because I would suspect there would be a lack of disclosure, because if he has dominated his wife, he may not want to pay over anything he doesn’t have to.* (Sol 03)

Solicitors, like mediators, would seek vouching: both of their own client’s assets and liabilities and that of the other party’s. This would be the precursor to negotiation. For example, one solicitor, in response to Jenny Hamilton’s details described how they would establish through correspondence whether there were additional policies, pensions or debts:

*So we would have to see relative vouching for all these things, before deciding what the assets and debts amount to..And then we can negotiate the terms of any agreement.* (Sol 15)

For the majority of solicitors in the sample, the accounts suggest that obtaining valuations and vouching was seen as their role:

*Initially the solicitors would together get the necessary valuations.* (Sol 12)

One described how they would send a client a mandate to sign to enable them to obtain details of a policy.

The exception was a solicitor who felt it was a “waste of time and money” for solicitors to write to insurance companies, for example to obtain valuations. This, they felt, was something that could be done by the client.

Perhaps because it is an activity which, in general, takes place between solicitors, practitioners’ descriptions of the process were less concerned with the mechanics of obtaining valuations and vouching. They were undoubtedly responsive to the different ways of valuing property, this, though tended to be expressed more in terms of the implications for the bargaining and negotiation process, rather than as information for clients.

For the solicitors, a formal request to the other party’s agent for, and warranting of, full financial disclosure, was the ‘safety net’. This served to cover the solicitor in the event of other monies being revealed after the divorce:
If you haven’t asked for financial disclosure on your head be it, your client’s going to come and sue you, so you have to ask. (Sol 06)

The parties’ warranting of full disclosure also protects the individuals. For example, in the case of the Hamiltons, one lawyer suggested the inclusion of a clause in the minute of agreement confirming that both parties had made full disclosure, but that any significant undisclosed resources would be the subject of a subsequent claim:

If one of the parties is being a bit devious this clause is a good one to catch something. (Sol 15)

The ultimate sanction which solicitors could initiate where disclosure was not forthcoming was recourse to the courts:

If Mrs Hamilton said to me ‘I think there is money in the Halifax’, I could ask Mr Hamilton to disclose it. If he says there isn’t anything there and we ended up in court I could ask for a specification of documents, a Section 20 order, and you get the Sheriff to order him to disclose it. If he still refused I could then go to the Halifax myself, on the strength of the court action, and we can force disclosure that way. (Sol 06)

As in other contexts, however, this would only be a last resort, one which a practitioner described as “a real bummer” (Sol 09). As one solicitor suggested, this would only arise where the relationship had broken down to such an extent “there is not the same degree of trust” (Sol 03).

For mediators a combination of trust, transparency of the information sharing process and vouching are the mechanisms for seeking full financial disclosure. If trust is revealed to have been breached the ultimate sanction is the foreclosure of the mediation process.

For solicitors there is, to a degree, the same reliance on trust, and an awareness that it was not possible to be completely certain that there had been full disclosure. Where solicitors differ from mediators is in the character of the safety nets and the sanctions available where a failure to disclose is suspected.

The problem for both solicitors and mediators is when one party is unsure of the other party’s resources and whether and where they may be “salted away”:

If Mrs Hamilton says ‘I’m sure he’s got lots of money stashed all over the place, but I don’t know where it is’, that is very difficult. Ultimately you can’t guarantee that the other side had disclosed it all. (Sol 06)

5.6 DIVORCE

From the accounts of the sample of FMS and CALM mediators neither divorce itself, or the grounds for divorce was identified as a significant issue for discussion within the context of mediation. Insofar as it was addressed it was primarily for contextual purposes, or for providing the couple with information. One FMS mediator, for example, considered that the contentious nature of Vicky and Jonathon’s divorce action (Case Two) might suggest they were unsuitable for mediation. Discussing the same case a CALM mediator felt that Jonathon might want to discuss the ground of the divorce, suggesting that Mr Macintosh might not understand that the only way his wife could obtain a divorce without waiting two years was on the grounds of unreasonable behaviour:

Sometimes, although it’s a very difficult subject to focus on the actual divorce itself, sometimes if they discuss that and get it out of the way it can sort out a lot. (CALM 27)

Another solicitor-mediator responding to Case One was more directional in approach. Noting that the Hamiltons were seeking a divorce based on consent after two years he anticipated saying to them:

‘Assuming agreement can be reached on the financial aspects then the best way forward may be to have a separation agreement prepared setting out the position in some detail, and effectively dealing with divorce at a
later stage’...There’s a conciliatory element there of agreement and forward. I think it’s worthwhile emphasising to them that they can avoid a protracted court action based on fault such as behaviour or adultery. (CALM 23)

This “conciliatory”, rather than adversarial route is also the stance adopted by the solicitors in the sample, for all of whom the divorce itself was unquestionably part of their brief. As discussed in the context of preparatory information, solicitors would be seeking information on the possible grounds of divorce, but would also put pursuit of the divorce low on the agenda as “something we do further down the line”. Further, the solicitors would actively discourage a fault based divorce, even in respect of Cases Two and Three:

*If you do a separation agreement that gives you breathing space to then decide where you go for divorce. It’s not automatic that I would say to Vicky to go for unreasonable behaviour…There’s nothing wrong with her letting the dust settle for a couple of years and deciding to do a two-year consent divorce.* (Sol 08)

*Although Charles might be saying he wants to raise an action, that might not necessarily be the most productive approach. The alternative which I would be dwelling on, would be to negotiate a separation agreement, which would deal with all the financial matters, residence and contact of the children, and which might also deal with the question of divorce in two years.* (Sol 10)

The reasons solicitors would encourage a negotiated settlement and a divorce based on consent were that it would be a less expensive option for the client than a court action. But also, importantly because it “may well foster good relations between the parties”. Consistently across the sample of solicitors was a desire to avoid contention and acrimony. For two practitioners this was couched specifically in terms of the potential impact on the children. In respect of Charles and Emma Andrews (Case Three), one solicitor commented:

*They’re going to have to have contact with each other through the children, and if there’s a very acrimonious divorce based on adultery then that’s not going to benefit the children.* (Sol 10)

Insofar as solicitors would pursue a divorce action through the courts it would be as a way of resolving issues around finance if negotiations had broken down. For example, in the case of Mrs Macintosh (Case Two):

*She has grounds, so if we couldn’t make progress by correspondence, by negotiation, I would probably take quite a strict view on that..I tend then to reassess it and say to the client that we do have the option to look at raising proceedings if there are grounds.* (Sol 17)

Similarly, solicitors acting for Charles Andrews (Case Three) might consider raising an action if it was not possible to reach a financial settlement with Emma:

*But if Charles is looking for some form of maintenance from Emma…it may come to the bit where we may have to raise an action, including a crave for divorce on the grounds of adultery,…nevertheless that would allow financial claims to be made as well.* (Sol 05)

The point at which solicitors and mediators become involved, and the extent of their involvement is not coterminous. For mediators the divorce element is salient as context. For solicitors divorce is central to their family law work. In dealing with this issue the solicitors in the sample would seek to avoid a fault-based divorce in favour of divorce by consent, on the grounds of costs, but also to minimise the acrimony between the parties, in the interests of the clients and their children.
5.7 COSTS, CHARGES AND LEGAL AID

5.7.1 Introduction
This Section describes two distinct, but related issues: firstly, the implications of charges for mediation; secondly, how mediators and solicitors approach issues around legal aid.

5.7.2 Charging for Mediation
The study did not seek to address charging levels or mechanisms, whether by mediation services or solicitors firms. However, in addition to alluding to the high costs associated with formal methods of dispute resolution, practitioners made reference to the costs incurred by couples referred to mediation. Couples using CALM mediation are required to pay a fee per session, which would be shared by the couple. Lawyer-mediators generally use the Law Society Standard Unit, currently set at £88.50 per hour.

FMS is currently considering a charging policy, but at the time of data collection only two of the four FMS regions included in the study charged for all-issues. One service charges £30 per person per session, in the second the charge is £50 per session, the parties deciding between themselves how much each will contribute. The first joint introductory session is free.

As noted in Chapter 1, there is provision, on an experimental basis, by the Scottish Legal Aid Board to recognise CALM mediation as an allowable outlay for legal aid (Lancaster 1998). Among FMS mediators the view expressed was that, even where a charge was made, this was still cheaper than going through the more formal route alone:

*Could amount to 3-4 sessions for all-issues, which would work out at about £200. If they went through a lawyer it may be 4 –5 times that.*

(FMS 47)

CALM mediators too, on the whole, felt that mediation was a cheaper way for a couple to resolve their disputes. One, mediator, however, while feeling that it was a cost-effective method, nonetheless was aware that, by attending mediation, people were paying both the mediator and their own solicitors’ fees:

*Let’s say it’s non-legal aided (most of mine are non-legal aid). They’ve got their lawyers to pay, and often they’ll talk to their lawyers between mediation sessions, and they’ve got the mediator to pay. So, although mediation is quite cost-effective...you still have the possibility of...these two aspects to pay.*

(CALM 32)

Several CALM mediators described the costs of the sessions acting almost as a case management tool. Since people were paying it was felt that they would be more inclined to use the time productively, one for example, suggested that “if things were going really well”, the case of the Hamiltons (Case One) might be completed within two sessions, adding:

*People don’t want to waste their money, or feel they’re wasting their money.*

(CALM 34)

No data were collected on solicitors’ scale of fees. A number did, however, comment on the impact of the cost of mediation. Several, for example, suggested that mediation through CALM would be cheaper than going to court. Others, though, were less sure of the relative financial advantage. One solicitor in the sample, for example, would not refer a non-legally aided client to CALM, alluding specifically to the issue of parallel payments:

*I think these other ones are free [FMS], although they do make a donation, whereas with CALM are they not similar to solicitors’ rates?..On average it takes four hours…and they say ‘why pay that and my solicitor?’* (Sol 13)

Among the solicitors two questioned whether mediation was, in fact, a less expensive way of reaching a settlement. Both felt that if lawyers were to approach negotiation “the right way”, the formal route may be just as cost-effective.
5.7.3 Paying for Mediation

In those regions charging for all-issues, FMS mediators would include information on charges, both at intake and at the first joint session. The possibility of a legal aid contribution to charges was alluded to by only one practitioner. However, as noted above, this issue was not systematically explored in the interviews.

Among CALM mediators, three described checking out funding arrangements for mediation. For example, in a case such as the Hamiltons, one solicitor-mediator would be wanting to check out whether Jenny’s solicitor had obtained sufficient increase under the Advice and Assistance scheme, to cover the mediation services (and with Ian Hamilton whether he had the resources to meet the remaining half of the cost). Another CALM practitioner suggested that if a couple were unsure whether they were eligible for legal aid, they would be pro-active in contacting the couple’s solicitors:

*If they’re not clear about the position I will check with their solicitor about whether they’re covered for legal aid or not, because..if they’re going to be coming weekly we need to have them covered before they come for the first time.* (CALM 36)

It may be that the charges for CALM mediation, together with practitioners’ day to day familiarity with the criteria and mechanisms of legal aid applications, this is an issue of marginally greater salience to solicitor-mediators than was apparent from the accounts of the FMS mediators.

The significance of funding arrangements, from the point of view of the solicitor-mediators is underlined by the comments of one practitioner. This lawyer-mediator seemed to suggest that the rates paid by the Scottish Legal Aid Board may act as a disincentive to taking on more legal aid work, including, by implication, mediation:

*The other weakness of CALM mediation is the potential cost, which concerns me. I’m committed to a legal aid practice. But in the last three years that has put significant pressure on because in the past three years they haven’t increased the amount they pay us. But the rent and the cost of staff hasn’t stayed still.* (CALM 34)

5.7.4 Legal Aid

To obtain some understanding of how different practitioners identified and responded to eligibility for legal aid, the case details in respect of Jenny Hamilton (Case One), specifically made reference to the fact that she would qualify for legal aid or advice and assistance. The responses to this case, and to Cases Two and Three, highlight the different responsibilities of solicitors and mediators.

Irrespective of case, establishing legal aid eligibility did not, in general, appear to be relevant to FMS mediators. Only in respect of Case One, in response to the case details, did one mediator suggest they would specifically advise Jenny Hamilton to find out about her eligibility for legal aid. Both this practitioner and another FMS mediator, would inform Jenny that any support she received by way of legal aid would be subject to a clawback by the Scottish Legal Aid Board.

Outwith concerns around funding for mediation, CALM mediators too, did not, in their accounts of the process, appear to draw in to the mediation discussions of eligibility for legal aid. This was true across all three case studies. Perhaps as a corollary of this, only one CALM mediator, responding to Case Two, would anticipate forewarning Vicky Macintosh of the potential clawback if she were to receive legal aid. This practitioner would use this, and the likely costs incurred by Jonathon, if they took their case to court, as a means of encouraging the couple to arrive at a settlement which minimised these potential costs. Perhaps reflecting their other role as an advising solicitor, this mediator spoke of protecting the interests of their “clients”:

*I don’t protect the Legal Aid Board’s interests, when it comes to my clients I protect their interests, whereby if there was a settlement that could be achieved where there was not a clawback for Vicky, and no award of expenses against Jonathon…that just leaves more money in the pot for all of them, for Jonathon when he has the boys, for his business, which then funds aliment and all the rest of this.* (CALM 27)
If discussions of legal aid tend to be absent from the accounts of mediators, they are undoubtedly a presence in the descriptions of the solicitors, across all three case studies. In Case Two, for example, where no direct reference was made in the case scenario to legal aid, five of the six solicitors responding to this case, anticipated assessing Vicky Macintosh’s eligibility for legal aid, specifically for advice and assistance in the first instance. Similarly, in Case Three, despite the high value of the property involved, two solicitors would consider whether Charles Andrews was eligible for legal aid, given that much of the capital involved was the subject of the dispute.

Solicitors were also at pains to forewarn their clients that legal costs covered by the legal aid board would be subject to a clawback if the settlement amounted to over £2,500:

> I explain that legal aid is a safety net, it’s not a guarantee of legal costs getting paid. The costs have to be met from money that they get. As an example I say ‘If your husband has to pay you over £5000 your legal costs would be expected to come out of that, if your husband doesn’t pay you anything, your legal costs will be paid’. (Sol 03)

In terms of the strategies they employed, legal aid was seen as something of a two-edged sword by the solicitors in the sample. On the one hand, it enabled people to pursue their case. On the other hand, it could be used to discourage litigation, as the means of pursuit. This took two forms, depending on who the client was. For example, one solicitor suggested that the fact that Vicky Macintosh (Case Two), who was their ‘client’, may be eligible for legal aid, and Jonathon may not be, could in itself be used as a bargaining counter or “sweetie”:

> It may make it more helpful to him to come to a financial settlement with her, given that she qualifies for legal aid..he may save himself £1000 in expenses. (Sol 04)

However, the likelihood of the legal aid recipient having to make a contribution to their own legal costs, was a disincentive to a court based action and an incentive to pursue a negotiated settlement.

Again, in relation to Vicky Macintosh, one solicitor, for example, commented:

> After £2500 there is a clawback. But she would be receiving an awful lot more than that so there would definitely be a clawback. Which would mean that the more she could negotiate, in the office, the less her legal bills would be, the less would be clawed back. (Sol 06)

In summary, a comparison of the responses of mediators and solicitors suggests a difference in the emphasis given to the issue of legal aid. For solicitors, an assessment of eligibility for, and a weighing up of the implications, emerge from their accounts as a routine element of the process. For CALM Mediators, insofar as legal aid is of immediate salience, this tends to be in the context of charges for mediation.

Albeit obliquely, this seems to illustrate the complementarity of the two approaches. The mediation process is, by and large focused on the negotiation itself. Solicitors are engaged not just in the negotiation, but responsive to the practical issues which oil the wheels of the process, and subsequently see it through to its conclusion.
CHAPTER SIX  ISSUES FOR DISCUSSION

In this chapter we compare some aspects of mediators’ and solicitors’ practice and discuss the research in the light of some of the themes that arise in the literature on private ordering, specifically:

- partisanship and impartiality,
- power imbalances and client empowerment,
- perceptions of other professionals doing divorce work,
- perceptions of the law and the courts.

6.1 PARTISANSHIP AND IMPARTIALITY

The model of divorce mediation which has developed in Britain is one of bilateral negotiation between the parties, in an informal setting enabled by a neutral trained mediator. As recently defined in a Scottish study of mediation (Lewis 1999b; p. 1):

‘Mediation is a process in which a couple, at any stage in the process of divorce or separation including post-divorce, meet with an independent third party to discuss and attempt to resolve disagreements about issues relating to arrangements for children or the division of financial resources.’

This mediation ideal type is distinguished from the partisan advocate model of the solicitor operating in an adversarial legal system. In this model of mediation neutrality exists in two senses: neutrality between the parties and neutrality amongst options and outcomes. The UK College of Family Mediators Standards and Code of Practice (UKCFM, 1998), for example, describes how "mediators must at all times remain neutral as to the outcome" (para 4.2) and "mediators must at all times remain impartial as between the participants" (para 4.3). Similarly, the standard letter distributed by CALM mediators refers to providing legal information in an “impartial way” and excludes the lawyer-mediator from making judgements on decisions on behalf of the couple, or advising what the outcome should be. Neutrality towards options and outcomes implies the mediator has no commitment to any particular option or outcome, provided that the procedures followed are fair, and the outcome is agreed by the parties. Thus, in principle, a mediator would not seek to challenge an agreed outcome with which he or she might personally disagree.

In recent policy literature, it has been implied that mediator neutrality is preferable to, and more morally defensible than, partisanship. However, some academic research has questioned whether the ideal type of mediator neutrality is achievable. Some studies which have drawn attention to the problematic nature of impartiality and neutrality, specifically in the context of mediation (Bryan 1992; Grillo 1995; Greatbatch and Dingwall 1989; Lewis, 1999) have suggested it may not be desirable in all cases. Insofar as neutrality is achievable, it is argued that the mediator is unable to correct power imbalances in the course of the mediation process, or to counter an unfair outcome. Bryan (1992), for example, argues that in financial matters, the rhetoric of mediator neutrality can result, for the weaker party, in a loss of rights in financial agreements. In their empirical study, Walker et al (1994) describe how mediators, faced with an agreement about which they felt doubtful, were caught between what seemed appropriate in mediation, and what ought to have been done to help one or other of the parties. In these circumstances, mediators are, in Walker et al’s terms ‘walking on eggshells’ (p.105) rather than being able to express their concerns overtly. Both FMS and CALM mediators in the present study stressed the importance of retaining neutrality in mediation. Nevertheless, there were many examples where mediators appeared to be treading ‘on eggshells’. For example, all mediators regarded the proposal by one of the case study husband’s for ad hoc contact arrangements as unsatisfactory. But, whereas this same disquiet could be expressed head-on in the context of the lawyer-client relationship, in mediation the approach had to be less direct, to maintain the appearance of mediator neutrality.

In their analysis of patterns of communication in mediation Greatbatch and Dingwall (1989) suggest how, through their control of the process, mediators steered clients towards preferred outcomes. This was echoed in a view among the parties to mediation interviewed by Lewis (1999) with their perception of mediator partiality between parties, and towards particular outcomes. Grillo (1995) argues that mediators can influence the outcome with the power they have over the process, for example by steering couples toward joint custody, regardless of clients’ own preferences. The
responses of the mediators in the current study reflects the potential for different sources of mediator partiality and control to enter the process, for example the way in which issues for discussion were identified and priorities set. While mediators regarded priority setting as a matter to be decided by the couple (“it’s their agenda”), some direction from them nonetheless emerges. The core value of child-centredness in mediation is reflected in agenda setting, in the strategies employed to encourage couples toward particular solutions and in accounts of the perceived aim of the mediation process as being “primarily to help them (the couple) to manage future parenting”. Echoing Bryan (1992) the current study found that, compared to their approach to financial issues, FMS mediators were comparatively “hands on” in discussions in relation to children, for example encouraging parents to take on joint responsibility for the children and future parenting, with the aim of encouraging a future joint parenting plan. In one such example, the account of domestic violence against the wife did not appear to alter the mediator’s anticipated outcome for joint parenting. It could be the case that child related issues are not seen as the top priority for at least one party to the dispute; and that, given the choice, couples might place other issues at the top of their agendas. Nevertheless, mediators employ various discursive devices to guide discussions in particular directions, notably to steer couples to see their dispute in relation to their children. An analysis of the accounts of both FMS and CALM mediators suggests that information and options are presented and discussed in a selective fashion. Drawing on the practitioner’s knowledge base, through information-giving, in the concepts of ‘fairness’ employed, in assumptions of good parenting arrangements, and in the selective use of references to the law and the courts, there is a sense of people being encouraged in particular directions, albeit in a more opaque way than is perhaps the case in the context of solicitor’s practice. This point is not intended as a criticism of mediation, but rather points to a sophisticated strategy to make use of the expertise of mediators. It could be argued that a strict stance of impartiality would be less desirable inasmuch as it could be wasteful of the accumulated experience of individual mediators. Nevertheless it is at odds with a rhetoric of neutrality and couple control. Evidence from this study shows that a strict stance of neutrality between parties, options and outcomes can be problematic for mediators where any of these comes into conflict with the core values of the service, notably that of child-centredness. Rather than calling into question the core value itself, also at the heart of family law, perhaps the claim to impartiality should be qualified. The mediators’ tension between partiality and impartiality is paralleled in the solicitor-client relationship with solicitors appearing partisan while adopting a conciliatory ethos. As Bryan (1992) states, although lawyers have a professional obligation to pursue and protect the client’s interests during negotiation, this partisanship may be tempered by a spirit of compromise and a consciousness of what might be reasonable for all. A conciliatory ethos of identifying achievable goals in the best interests of both parties and their children is seen as part of a strategy to conserve the assets of a marriage and reduce the process costs of the dispute itself. As found in other studies (Lewis, 1999; McEwan et al, 1994; Griffiths, 1986) lawyers in the present study described their role as one of encouraging ‘reasonableness’ on the part of their client. What solicitors would encourage people to aim for was what was achievable and would “cause each of them [parties] the least pain”, or to work “to a game plan which would probably be beneficial to both of them”. In their responses to child-related issues, solicitors in the study were similar to mediators in acting as advocates for the children of the marriage, for example by proposing solutions contrary to the stated preferences of their client, as in the case study where solicitors resisted the preference of the mother (with a history of domestic violence) who wanted her children to have only restricted contact with their father. It could be said that the approach of both solicitors and mediators reflects the principles of the Children (Scotland) Act, 1995, which places the welfare of the child as the paramount concern and embodies a presumption of the continued involvement of both parents in children’s upbringing. However, this orientation extends to solicitors in other jurisdictions. Griffiths (1988) describing the practice of Dutch lawyers in the 1980s found a similar emphasis among practitioners who used their influence to encourage continued contact between the non-resident parent and the children of the marriage, on the grounds that the assumed best interests of the child took priority over the expressed wishes of the client where these were thought to conflict. From their study Davis et al (1994) concluded that the solicitors who were the most effective case managers were characterised by a willingness to give unequivocal advice, a strong conciliatory ethos, and strongly held pro ‘family’ (or pro-children) values. However, in a mirror-image of critiques of mediation, Davis et al also argue that a settlement culture may perpetuate inequalities between parties,
to the disadvantage of the weaker party, contingent as such an approach is on the competence of legal representation and the ability of a party to tolerate delay.

What emerges from this study is the qualified nature of both partisanship and neutrality for both solicitors and mediators. Mediators were seen to be less impartial, and lawyers less partisan than their respective ideal types would suggest. The typical practical stance of each group was much closer to the other and with more common ground than the mutually exclusive models of each would imply. While rhetorically partisan, in practice solicitors aim towards a degree of neutrality; for mediators a principle of neutrality is tempered by a practice of direction.

6.2 POWER IMBALANCES AND MODELS OF EMPOWERMENT

For the parties, neither the solicitor-assisted route, nor the mediation process is necessarily a meeting of equals, although potential or actual inequalities are articulated in different ways. Stemming from the joint nature of the mediation process, a concern among American commentators (Cobb, 1997; Grillo, 1995; Bryan, 1992) has been the degree to which mediation can be responsive to power imbalances between a couple, and whether couples can participate as equals when one party is dominant. The nature of imbalance can take a number of different forms (Lewis, 1999), and, it has been argued, is gendered by systematically disadvantaging women (Bryan 1992).

The mediators in this study are acutely aware of power inequalities as an issue for the mediation process and have taken considerable care to introduce measures into mediation training and practice to sensitize mediators to the ways in which power imbalances between partners can affect the mediation process. Both CALM and FMS mediators employed filtering mechanisms at the first point of contact and throughout the mediation process to identify possible power imbalances, especially those stemming from domestic violence. Practitioners in both mediation organisations considered that, while a history of domestic abuse was not a bar to participating in mediation per se, the proximity and severity of the violence, the preparedness of the abused party to be in the same room as the perpetrator and feel able to express her views freely, and evidence of intimidation in the course of a mediation session, were indicators of the appropriateness or otherwise of mediation. Organisational arrangements were also described by practitioners, for example waiting room and seating arrangements. However, as both CALM and FMS mediators concurred, no screening method is foolproof. From interviews with parties, research by Lewis (1999) found that violence had not always been disclosed, even in individual intake sessions, nor did parties necessarily feel that safety measures were sufficient to protect them. As the analyses of Grillo and Bryan (1992) suggest, the imbalances derived from experience of violence is again gendered, representing a "process danger for women" (Grillo 1995: 1545).

Mediators interviewed in this study were sensitive to other sources of power imbalances which may derive from the lack of skills or knowledge of one or other party, for example in handling finance. Both CALM and FMS mediators described strategies for attempting to counter these imbalances such as controlling the speed with which they would progress to enable the less knowledgeable partner to catch up. Further, mediators referred to emotional inequalities in accepting that the marriage was over that might make mediation inappropriate at a particular time.

Arguably, since the negotiation process in the solicitor-client route is largely conducted by lawyers acting for their clients, power imbalances between parties are, to an extent, mitigated. Where a history of domestic violence was reported, the information was used by solicitors as a prompt to legal action; several solicitors suggested they would advise the client of the protection available through interdicts. It may be that mediators would also draw people's attention to potential legal remedies, but only one practitioner, a solicitor-mediator, responding to the case study, mentioned that he would raise with the couple the options available.

Although the solicitor-assisted route potentially corrects for the imbalances derived from face-to-face contact between parties, other sources of imbalance may remain. Empirical studies of solicitors (Sarat and Felstiner 1995; Davis et al 1994; Griffiths 1988) draw attention to the differential and fluid power relationships between divorce lawyers and their clients. In this relationship, inequalities stem not only from the specialist knowledge of the solicitor, but in their capacity to transform or translate "everyday" discourse into "legal discourse" (Griffiths 1988; Cain 1979). Solicitors with different levels of expertise may introduce another power imbalance between a couple (Davis, 1994).

A more subtle power imbalance which can affect both forms of dispute resolution is the relative communicative abilities of the parties. Mediators describe the measures they employ if one party is more talkative to ensure that the less garrulous individual is given an opportunity to express their
view. But, as research in both mediation and legal contexts has concluded, it is neither the opportunity nor amount of speaking time which is necessarily significant, but the ability of the parties to tell a convincing story (Davies 1994; Conley and O’Barr 1990; Engle-Merry 1990; Dingwall 1988).

In a mediation context the power imbalance derived from the ‘naming of an action or event’ (Engle-Merry 1990: 111) may be expressed in the relationship between parties and between parties and mediator. This might be shown by mediators’ ‘re-framing’ an individual’s account, to re-cast it in less confrontational ways aimed at promoting a joint enterprise. Thus, in a process based on talk and on the skills required to give a good account, differential communicative competencies between all those involved may be an unrecognisable or unacknowledged source of inequality.

Models of empowerment: knowledgeable, professional representation and participation.

Closely associated to the value of impartiality of mediators is the value of couple self-determination and empowerment. Mediation is widely characterised as a means for resolving disputes that gives greater self-determination and empowerment to the parties than in more adversarial approaches to dispute resolution (Dingwall and Greatbach 1994: 391). Mediation, it is claimed, allows couples to maintain control over the dispute resolution process, which is thereby demystified. Further it is argued couples do not relinquish their autonomy to the courts or to lawyers who might otherwise increase conflict and bitterness, rather than the chance of achieving an amicable settlement. With their greater empowerment and control over the process, couples are thought to have a better foundation for their renegotiated future relationship as parents and a greater sense of ‘ownership’ of their settlement, and therefore more likely to comply with its terms. Implied here is a model of empowerment that derives from participation. However, participation is not the only basis for empowerment of the parties to a dispute, and participation does not necessarily lead to greater empowerment for all. It is arguable that where there are significant inequalities in power between parties, participation by both can result in a loss of power for the weaker party. It is not always recognised that an alternative model of empowerment underlies lawyer-assisted dispute resolution, namely that of professional representation by a knowledgeable and powerful advocate who is better able, through skill, training and experience, than the party to articulate and advance their case. Such a model might be thought to be equally empowering as one based on participation, particularly for a weaker party in a dispute.

Both mediators’ and lawyers’ approaches offer potential for greater client empowerment. While this is not a study of client’s views and experiences of dispute resolution, we note that little is known about whether clients felt empowered (Lewis 1999). If empowerment of clients is seen as a desirable policy objective, then perhaps the existence of both approaches offers scope for clients to exercise choice, a basic dimension of empowerment. That choice might be guided by consumers’ needs and preferences, the nature of the relationship being renegotiated, its prior history and in particular, unmanageable power differences, the need for protection, the need to conserve matrimonial assets, and the nature of the issues under dispute.

6.3 PERCEPTIONS OF OTHER PROFESSIONALS IN THE DIVORCE ARENA

As found in the SCPR study (Lewis, 1999), the majority of solicitors in this study saw a role for mediation in disputes over contact and residence of children and would be prepared to suggest to clients that they consider it as an option. There appeared to be less enthusiasm for referring clients to mediation for resolving financial disputes. Concerns were expressed by the solicitors about the ability of non-legally qualified mediators to deal with the complexities of the law in relation to financial matters. Additionally, lawyers questioned whether, in the course of the mediation process, people were made fully aware of their rights and entitlements. While potentially based on a misunderstanding of the objectives of mediation, such concerns reflect the perceptions of the different professional groups in relation to their own roles and those of the other professions. As in the case of referral practices, these perceptions can have practical consequences.

Mediators’ perceptions of solicitors were divided along service lines. Among FMS mediators there was some ambivalence about the role of solicitors in relation to clients participating in mediation. On the one hand, solicitors were presented as a force for good, as necessary for the process of mediation to be successful and legally robust. Solicitors were able to provide advice where the law was open to interpretation. Lawyers’ scrutiny of the Memoranda of Understanding, produced at the end of
mediation to document a couple’s proposals, was seen as a valuable check, particularly where it was felt there was a power imbalance between the parties. At the same time, there was a suspicion that parties’ solicitors may attempt to subvert the mediation process, undermining the solutions the couple have arrived at through joint discussion. FMS mediators sought to anticipate this by reminding couples that their solicitor was required to act on their instructions. Among CALM mediators, advising solicitors were regarded more positively, almost as collaborators in the process, and a valuable check and balance. Arguably this may reflect the high proportion of referrals to solicitor-mediators from other lawyers, or shared values developed in the course of their own professional training as lawyers. Referring people back to their own solicitors may also reflect a strategy on the part of lawyer-mediators to distance themselves from their advising role as lawyers from their ‘neutral’ and ‘impartial’ mediation role.

6.4 INVOKING THE LAW AND THE COURTS

For all three professional groups the parameters within which negotiations take place are set by the Children (Scotland) Act, 1995 and the Family Law (Scotland) Act 1985. Effectively, they are bargaining or facilitating negotiation in the shadow of the law (Mnookin and Kornhauser 1979). For solicitors, the law and the interpretation of the law by the courts, was the *lingua franca* of solicitor-solicitor negotiations. These negotiations were based on an assumption of a shared knowledge base and appreciation of the parameters. In the course of their consultations with their clients, the law and the courts were cited to inform and justify particular courses of action.

From their accounts of the process, what appears to distinguish CALM and FMS mediators is their attitudes towards the shadow cast by the law. While the law was seen as setting the parameters within which the couples negotiated there was, in the accounts of FMS mediators, a sense that it was an add-on to the real process of using their facilitative skills to enable a couple to resolve their disputes, particularly as they related to children. As described by one FMS practitioner, the law could feel like a "black cloud" threatening to undermine the process. In the accounts of CALM mediators the law was integral to the process. It was their knowledge of the law, as solicitors, that they felt they drew on to facilitate the process of dispute resolution.

Their different orientations to the law is illustrated by their use of the concepts of ‘fairness’ and ‘rights and entitlements’. For solicitors, the term ‘fair’, insofar as it was used, was in the legal sense of an outcome as a ‘fair and equitable’ division of the assets, and was set within a discourse of rights and entitlements. For FMS mediators ‘fairness’ was used in three senses. The formal "Principles of Fairness” discussed with couples at a first mediation session, encompass a conduct norm in which the couple agree to be fair to each other, as well as an outcome objective in which both individuals agree that the options will be fair to themselves and each other. It is only in the third usage that FMS mediators overlap with solicitors and solicitor-mediators in using ‘fair’ in the sense of being fair and equitable in the terms of the law.

There is no equivalent in CALM mediation to the FMS Principles of Fairness. Insofar as the language of fairness is used, it tends to draw on legal usage. The moral dimension implicit in FMS terminology is absent.

Other fundamentals of legal discourse were lacking in the language of both FMS and CALM mediators. With the exception of mention of parental rights and responsibilities in the context of the Children (Scotland) Act 1995, reference to rights and entitlements was not a feature of the accounts of either FMS or CALM mediators. In part this may be a function of not wishing to be seen to give advice. While prepared to give information about the law, information about ‘rights’ and ‘entitlements’ might be perceived as advice-giving. Further, in respect of FMS mediators it was suggested that this may stem from a specific strategy aimed at avoiding framing issues in what is perceived to be legal language.

The implications of this stress on ‘fairness’ and the reluctance to address rights has been noted by other commentators. Bryan (1992), for example, argues that concerns with fairness means mediators cannot draw on legal norms to balance power and reflect society’s perceptions of justice, because to do so would violate neutrality and the notion of couple empowerment. For Grillo (1995), the implications of discussion of rights can act to systematically disadvantage women. Grillo argues that
"if mediation creates a sense of disentitlement, it will interfere with the perceptions of redress of injuries in cases where they have in fact occurred" (1995: 1567).

For both groups of mediators there is a tension between a couple-focused, non-legalistic philosophy on the one hand and the need to work within the law on the other. This is reflected in the ways in which references to the law and the authority of the courts were used in the course of discussion. For both groups of mediators, as well as solicitors, the law and the courts were invoked both positively and negatively. They were portrayed as a positive force, a moral arbiter, to justify, validate and protect agreements. All three groups refer to the law and the authority of the courts to inform a couple or client of the formal parameters or benchmarks of a robust agreement within which options can be developed. Additionally, deferring to the law and the courts could be used more strategically by both mediators and solicitors to encourage or discourage particular courses of action. Reference to the Children (Scotland) Act 1995, for example, was used by solicitors to discourage a client from seeking to restrict contact between the children and the other party. FMS mediators described how they might make reference to the likely response of the courts to proposals for joint residence, or splitting up the children to live with different parents.

However, running parallel to this use of the law and the courts as authorities or benchmarks, was almost an element of 'demonisation', specifically of the court process. For CALM and FMS mediators recourse to the courts to resolve a dispute was something of a 'wild card', commonly being represented as a loss of control over the process by the couple, opening up uncertainty and creating unnecessary conflict. For solicitors too, the court was presented to clients as a potentially costly and conflictual forum, but also positively as a safeguard to which they could have recourse if negotiations broke down. These portrayals provided strong incentives to reach a settlement without recourse to the courts.

6.5 CONCLUSION

While there are important differences in approach amongst the three groups, there is in practice more common ground in working practice than one might expect from commonly made claims. This can be seen, for example, in relation to partisanship and impartiality. As found in research elsewhere, mediators have implicitly preferred options which stem from the core values of mediation that qualify its claims to neutrality in important respects. Similarly, within the formally partisan orientation of solicitors can be found an approach that is more impartial between the parties, geared to securing a reasonable negotiated agreement. While all groups attempt to ascertain the needs of the parties and their children, and work within a common legal framework, mediators tend towards more of a ‘needs and responsibility’ discourse, while solicitors tend towards a discourse of ‘rights and entitlements’. While all groups stress the continuing parental responsibilities of the parties, there is a difference in emphasis. Mediators tend to view clients as parents (with related issues to resolve), whereas solicitors’ reference is to parties (having a range of issues, including parenting ones). Rather than mediation or lawyer-assisted dispute resolution providing greater client empowerment, it is suggested that different models of empowerment operate: a participation and professional representation model. Mediators place greater emphasis on fairness of the process and procedural justice; solicitors on the fairness of the outcome and distributional justice. Each approach may have particular strengths to offer to different couples with different disputes, and different histories of power imbalances: a question of ‘horses for courses’.
CHAPTER SEVEN  CONCLUSION

Given the overlap in practice between the two approaches to dispute resolution, this chapter explores whether mediation-assisted settlement and lawyer-assisted divorce are most usefully seen as complementary or alternatives. We observe that all professionals now accept that their working context has become a mixed professional environment, with its attendant strengths and limitations. We suggest that this creates new issues and questions, and identify some areas for future research.

7.1 DIFFERENCES AND SIMILARITIES SUMMARISED

Differences
Piper (1996) has argued that mediation does not necessarily provide different norms and end products, but is only different in its settings and working methods. Although not concerned with ‘end products’, the current study illustrates both the points of convergence as well as divergence between mediation and lawyer-assisted routes to matrimonial dispute resolution. Undoubtedly, the working practices of the two approaches remain distinct, as are the assumptions underpinning these practices.

Most obviously there are differences in the working environment of mediators and solicitors, not least because mediators work with both parties, and lawyers with one. Differences were also found in the extent of overt direction and explicit advice to clients, and the mode of participation expected of clients. In a mediation context, identifying priorities are more client-led but enabled (and, as argued earlier, shaped) by professionals, compared to clients in lawyer-assisted settings, where this stage is more overtly professionally led. Some differences derive from the distinctive evolution and core values of each profession. Although all groups studied dealt with the full range of issues that arise on divorce, mediators place greater emphasis on the parties’ roles and identities as parents, in a manner consistent with its development from dealing with children-only issues.

Differences were clearly evident in the language employed by mediators (both FMS and CALM) and lawyers and in the different modes of dispute resolution and negotiation adopted by each group. Mediators employ to a greater extent the language of needs, responsibilities and preferences while solicitors tend to use the language of rights and entitlements. Mediators emphasise fairness in the process, whereas for solicitors fairness is oriented to outcomes. However these difference should not be overstated since there is a wide variety in approach within each group, with considerable overlap between the two. Mediators are conscious that they work ‘in the shadow of the law’, and lawyers couch the language of rights in a conciliatory context of reasonableness and compromise. Lawyers ascertain clients’ wants and preferred outcomes but these are ‘reined in’ if they are thought to be inappropriate, unreasonable or unrealistic. Mediators employ implicit strategies to mould ‘client-led’ options into legally acceptable form. While mediators devote substantial effort to reframing issues into less conflictual terms and seeking common ground for discussion, solicitors’ discourse allows more directly for recognising parties’ conflicting interests.

There is a difference in what is required of the parties to ensure each procedure is effective. Because mediation is voluntary on both sides, both parties must explicitly agree to take part, to be open and disclose honestly all relevant information. Thus, mediation presumes a degree of trust between the parties. Agreement to disclosure is built into the intake procedures for mediation, and there are weak verification controls; solicitors have stronger potential safeguarding procedures. This leaves mediation potentially more open to manipulation, and could leave one party disadvantaged in discussions about, for example, the division of matrimonial property.

Similarities
There are values and practices common to all three groups. These include an orientation to conserving assets, minimising process costs, facilitating compromise, reaching mutual agreement, and encouraging parties to behave reasonably and to ‘be sensible’ (King 1999). All share a problem-solving orientation that is forward-looking. Discussion of past behaviour, apportioning blame or seeking restitution is avoided or minimised. Both groups of mediators and solicitors perceive their role as that of advocate for the children of the marriage. For mediators this position potentially compromises a strict stance of neutrality and impartiality. The emphasis on the needs of the child over and above that of the client, similarly undermines the notion of single-minded partisanship on the part of the lawyers. Assumptions of partisanship in the context of the lawyer-client relationship
and a rhetoric of impartiality in mediation, may be more honoured in the breach. For mediators, their own expertise and knowledge base, together with the values they bring into mediation, may effectively undermine the rhetoric. For solicitors, assumptions as to desirable outcomes for children and achievability for the client, may inform a culture of tempered partisanship. In this respect mediation and lawyer-assisted routes are not so much dichotomous as defining a continuum of practices.

**Empowerment**

Each approach to dispute resolution supports a particular conception of empowerment, but also has the potential for disempowerment. As far as lawyers are concerned, there is a risk that the negotiation which takes place between practitioners may wrest control of both process and outcome from the hands of the clients. However, power imbalances between couples, based on structural gender inequality, a history of domestic abuse or communicative competence may actually disempower individuals in a mediation setting. As Grillo argues, "Don't call me, call my lawyer' are sometimes the most empowering words imaginable" (1995: 1599). As mediators themselves acknowledge, mediation is not suitable, appropriate or the preferred choice of all couples or individuals undergoing a divorce or separation. If empowerment is an objective of dispute resolution mechanisms, then perhaps one of the means for realising this is enabling people to make an informed choice of the route to be taken.

**Children’s interests**

Both mediators and solicitors give children’s interests very high priority. All three groups act to support the values and ideas underlying the Children (Scotland) Act 1995, notably the principles of parental responsibility, non-intervention, and the belief that children’s interests are best served by both parents continuing involvement in their lives. Mediation in particular stresses the need to impress on parents their continuing parental responsibility following separation and divorce, even if they are no longer co-resident with their children.

All practitioners in the sample made inquiries about children’s views about residence and, to a lesser extent, contact, and to confirm that children had been consulted by their parents. By and large, both mediators and solicitors rely on parents’ reports that they have consulted their children, and are able to represent their children’s interests and report their preferences. None of the three professional groups was enthusiastic about having children report their views directly, or indeed in involving children directly in the process of dispute resolution. This was seen to be unnecessary and even undermining of the parties’ parental responsibility. Even in the case where each parent had a different understanding of those preferences, bringing the child in was recognised as a possible but unusual course of action. Thus, for all three groups, while children’s views are taken into account in the decision-making process, the voice of the child is heard indirectly through their parents.

### 7.2 POTENTIAL RISKS IN EXPANDING INFORMALITY

Existing experience shows a demand for a variety of means for resolving the issues of relationship breakdown without recourse to the courts, where that variety exists. As mediation becomes more firmly established and if the supply of services expands, more divorcing couples can take up these services for dealing with some or most of them. There is perhaps in Scotland an opportunity to give divorcing couples real choice in the means of dispute resolution on divorce, which might avoid the risk in England and Wales, of which Maclean and Eekelaar (1998) warn, of lawyers for the poor and the rich, and mediators for the rest. In time, it may then be possible to assess who chooses what service, and what are clients’ experiences of and satisfaction with the services received. Such a scenario requires moving towards a mixed model for dispute resolution. The challenge for public policy, and for couples themselves, is to know which route is best for whom, and when. Nonetheless, there are potential risks in further expanding informality, whether practiced by solicitors, solicitor-mediators or mediators. In particular it is important that safeguards in family law for protecting the weaker party, and for individuals to pursue their rights and entitlements remain accessible for those who may need them. Dingwall and Greatbach (1994) argue that formality in law has virtues that are potentially lost in mediation, such as professional accountability for decision-making and protection of the weaker party against settlements that compromise her or his legal entitlements. They argue for greater recognition that, like any professional group, mediators have power, and need to be accountable for the process in which couples reach substantive decisions.
As Walker has commented (1994), mediation services have developed around the ‘cooperative divorce’ even if some non-cooperative couples may benefit from it. There is a risk in a mediation-dominated model of professional support on divorce of marginalising those who do not use mediation, for whatever reason. For some, the lawyer-assisted divorce will remain the preferred option, and moving to a mediation-dominated model will restrict their choice. There will also be some for whom solicitors are the only option. As mediators themselves stress, mediation is not for everyone, and some couples will always be deemed unsuitable for mediation. Such couples could come to be seen as acting unreasonably and find themselves further disadvantaged. They could find it more difficult to secure protection and enforce their rights if only a very reduced range of legal services remains available. Effective mediation, like other private ordering ‘in the shadow of the law’, requires a strong alternative for those for whom mediation is not desired or appropriate.

Some American writers (Bryan 1992; Fineman 1988, Erlanger, Chambliss and Melli 1987; Grillo 1995) have argued that the rhetoric of equality and formal equality of status in the course of informal ordering can inadvertently conceptualise issues to favour the more powerful and obscure the reality of vulnerability of one side and their need for protection. It may be that each party is vulnerable in relation to different issues, e.g. women and property, men and children. Bryan, for example, maintains that if mediation safeguards only the process from power imbalances, and the parties themselves determine the substance, then substantive inequality will filter in. ‘The focus on process, to the exclusion of concern with substantive outcomes, pervades informal justice’ (1992: 447). To some extent, these arguments can apply to all informal ordering, whether involving mediators or solicitors.

7.3 FURTHER RESEARCH

This study has identified gaps in our understanding. Rather than an ‘alternative dispute resolution’ perspective, it might be more helpful to examine all professionals’ input from a ‘transitions’ perspective that sees divorce as a process and not a discrete event. As we have seen, both types of mediation and lawyer-assisted divorces provide professional assistance to divorcing couples to negotiate the transition in their status, to renegotiate their responsibilities and relationships with each other and their children, and to manage the transfer of resources and other material necessities for that transition.

While this study examined the work of FMS and CALM mediators and solicitors using typical model cases, there is little complementary research based on direct empirical observation of actual mediation and solicitors sessions. Although such work would need to be sensitive to client confidentiality, similar research, conducted elsewhere, has addressed this issue (Davis, Cretney and Collins 1994; Sarat and Felstiner 1995; Griffiths 1986). Case trajectories could be followed to identify the different stages of each process, and how professional activity varies across them. While one recent study looked briefly at the clients’ perspective in mediation (Lewis 1999), more could be known about what clients choose, and why, and how they assess their experiences. With legal policy explicitly encouraging private ordering where possible, (and with over 12,000 divorces a year, the courts and legal system on their present scale could not cope with anything very different), it is important to ensure there is sufficient transparency and accountability in all out of court processes and that the objective of family law to protect vulnerable parties is not lost. Observational research on divorce professionals can also serve to monitor the use of public support for services.

In conclusion, this research has provided an examination of the goals and procedures of solicitors, solicitor-mediators and mediators working with divorcing or separating couples. It has analysed the differences and similarities in the objectives and informal processes employed by each group in a mixed professional environment working ‘in the shadow of the law’ on divorce. It has found that there are both important differences distinguishing the activities of each group and significant similarities in values, priorities and objectives. Taken together, their work forms a complementary framework, rather than defining mutually exclusive approaches. One could say that all of the divorce professionals aim to produce, by different routes, broadly similar outcomes: namely mutually agreed and enduring settlements consistent with the Family Law Scotland Act 1985 and the Children (Scotland) Act 1995, in which parental responsibilities can continue to be performed by both parents and where the basis for the transition of the adult relationship is agreed.
Annex 1 Study consent forms and letters of introduction

Dear Mediator

As you may be aware, the Scottish Office has recently funded a research project exploring the practices of mediators, solicitor-mediators and solicitors in matrimonial cases. The study, which is being undertaken by researchers based in the Department of Social Policy at the University of Edinburgh, will build on earlier research undertaken by Social & Community Planning Research for the Scottish Office, to which you or your colleagues may have contributed.

The aim of the current research project is to develop a picture of the procedures and processes mediators and solicitors employ and the goals they are seeking to achieve when working with people who are obtaining a divorce or separation. To do this practitioners who agree to take part will, in the course of an interview, be given details of a fictional couple presenting issues similar to those which mediators would find in their day to day practice, and given the opportunity to describe the approach they would adopt and the options which the couple might be assisted to consider. The ‘cases’ would include both child-related and financial issues.

Each interview lasts approximately one hour and would also include some general questions, enabling participants to discuss the aims and objectives of mediation in broader terms. Participation in the research would be on a voluntary basis, although, where required, travel expenses would be available.

To let us know whether or not you would like to take part, please complete the attached form and return it, as soon as possible, in the enclosed stamped addressed envelope, to the following address:
Fiona Myers
Department of Social Policy
University of Edinburgh
23 Buccleuch Place
Edinburgh EH8 9LN

Fiona will then contact you to arrange the interview at a location and at a time you would find convenient.

The study will make an important contribution to the development of policy in respect of matrimonial dispute resolution, and we think it is important to include the views and experiences of mediators in that debate. We therefore hope that you feel able to support the study. If, however, you have any queries, please do not hesitate to contact Fiona Myers, on 0131 650 4052.

Yours sincerely

Fiona Myers
Fran Wasoff
Enc
A Study of Mediators’ and Solicitors’ Divorce Practice
Agreement Form for All-Issues Family Mediators
Name...........................................................................
Contact address................................................................
...........................................................................
...........................................................................
Do you wish to take part in the research study?
Yes/No............... 
If you wish to take part please complete the remainder of this form.
Contact telephone number...........................................
Preferred location for interview....................................
..............................................................................
..............................................................................
Will you require travel expenses? (yes/no)..................
If yes, approximately how much are your travel expenses likely to be?
..............................................................................
With approximately how many couples have you started all-issues mediation in the past 12
months? (excluding in-take sessions).........................
Please return the completed form in the enclosed stamped addressed enveloped to:
Fiona Myers
Department of Social Policy
University of Edinburgh
23 Buccleuch Place
Edinburgh  EH8 9LN
0131  650 4052

THANK YOU
Dear (Partner's name)

As part of an extensive programme of research, the Legal Studies Branch of the Scottish Office has recently commissioned researchers within the Department of Social Policy at the University of Edinburgh to undertake a study exploring the practices of solicitors, solicitor-mediators and family mediators in matrimonial cases. The aim of the research is to develop a picture of the procedures and processes solicitors and mediators employ and the goals they are seeking to achieve when working with people who are obtaining a divorce or separation. To do this, solicitors who agree to take part will, in the course of an interview, be given details of a fictional couple presenting issues similar to those which solicitors and mediators would find in their day to day practice, and given the opportunity to describe the approach they would adopt and the options which the client might be assisted to consider. The 'cases' would include both child-related and financial issues. In order to identify the sample of solicitors for the study it would be most helpful if you could indicate to us those people within your practice who have extensive experience of matrimonial and family work, but who are not accredited lawyer mediators and who would be prepared to be interviewed. Each interview would last approximately one-and-a-half hours and would also include some more general questions, enabling participants to discuss broader issues concerning the different approaches to dispute resolution in matrimonial cases. The interviews will take place at a location and a time convenient to the individual solicitors. Fiona Myers will telephone you shortly to obtain the names of any solicitors within your practice who it would be appropriate to contact with a view to their inclusion in the study. Fiona would then approach them directly to arrange a time for the interview. The study will make an important contribution to the development of policy in respect of matrimonial dispute resolution, and we think it is important to include the views and experiences of solicitors in that debate. We therefore hope that you and your colleagues feel able to support the study.

We look forward to speaking with you in the next few weeks.

Yours sincerely

Fiona Myers
Fran Wasoff
Dear Mr
As you may be aware, the Scottish Office has recently funded a research project exploring the practices of mediators, solicitor-mediators and solicitors in matrimonial cases. The study, which is being undertaken by researchers based in the Department of Social Policy at the University of Edinburgh, will build on the research being undertaken by Social & Community Planning Research for the Scottish Office to which you or your colleagues may have contributed.

The aim of the research is to develop a picture of the procedures and processes solicitor-mediators, mediators and solicitors employ and the goals they are seeking to achieve when working with people who are obtaining a divorce or separation. To do this, practitioners who agree to take part will, in the course of an interview, be given details of a fictional couple, presenting issues similar to those which mediators would find in their day to day practice, and given the opportunity to describe the approach they would adopt and the options which the couple might be assisted to consider. The ‘cases’ would include both child-related and financial issues.

Each interview lasts approximately one hour and would also include some general questions, enabling participants to discuss the aims and objectives of mediation in broader terms.

Fiona Myers will telephone you in the next few days to give you an opportunity to discuss the study and indicate whether you wish to participate and, if so, to arrange the interview for a date and time you would find convenient.

The study will make an important contribution to the development of policy in respect of matrimonial dispute resolution, and we think it is important to include the views and experiences of mediators in that debate. We therefore hope that you feel able to support the research.

Yours sincerely

Fiona Myers
Fran Wasoff
ANNEX 2 – THE THREE CASE STUDIES

Case One - Jenny and Ian Hamilton

Family and Financial Information
Family Details

- Mrs Jenny Hamilton is aged 38 years.
- Mr Ian Hamilton is aged 40 years.
- They have three children:
  - Carrie aged 8 years.
  - Morag aged 11 years.
  - Jamie aged 17 years.

The Context

The relationship between Jenny and Ian Hamilton, who have been married for 19 years, has deteriorated to the point where they wish to separate. At this stage they are hoping to negotiate an amicable settlement, but with a view to obtaining a divorce based on consent in two years time. They are, however, having difficulties agreeing on financial aspects as well as disputing what is best for the children. According to the parents, two of their three children would like to live with their mother, but the third wants to live with her father. Jenny Hamilton does not feel this is appropriate. Jenny Hamilton, (who is the pursuer), will qualify for legal aid or legal advice and assistance. Ian Hamilton does not have a solicitor.

Issues

- Residence of the children
- On-going financial support for all the children
- Distribution of the matrimonial property
- On-going financial support for Jenny Hamilton
Financial Details
The family live on a housing scheme just outside the city in a council built property they purchased with a mortgage under the right to buy scheme nine years ago. They have a repayment mortgage spread over 25 years.
Ian Hamilton works full time for the local authority as a manual worker. In addition to his basic income he has the opportunity to work overtime. Ian Hamilton contributes to an occupational pension scheme.
Jenny Hamilton left school at 16 years and worked full time as a nursing assistant until the birth of Jamie. About 18 months ago she obtained a part time job, just three hours per day, on weekdays at lunchtimes in a local cafe. She would like to work a few hours more, but would prefer to wait till the eight year old started at secondary school.
They have a car which they purchased on credit. There are still twenty-four monthly payments of £253.00 to be paid. Ian Hamilton would like to retain the car and is prepared to continue the payments.
Ian and Jenny Hamilton have a joint bank account and a joint building society savings account. Their total capital amounts to around £1750.

Additional Financial Information
Approximate current value of shared matrimonial home £45,000
Value of the home at the time it was purchased. £38,000
Obtained a 95% mortgage, repayment over 25 years. The remainder of the purchase price came from their joint savings.
Outstanding mortgage. £25,517
Mortgage repayments. £143.73 pcm
Ian Hamilton’s basic income per annum (gross). £15,000
Ian Hamilton’s average yearly overtime payments (gross). £1,900
Ian Hamilton’s net monthly income. £975.00 pcm
The value of Ian Hamilton’s pension assets. £46,000
Jenny Hamilton’s monthly net income. £200.00 pcm
Financial assistance for Jamie while he is on his course £220.00 pcm
Monthly payments on car. £253.00 pcm
Case Two - Vicky and Jonathon Macintosh

Family and Financial Information

Family Details

- Mrs Victoria (Vicky) Macintosh is aged 34 years.
- Mr Jonathon Mackintosh is aged 35 years.
- They have two children:
  - Theo aged 3 years.
  - Joshua aged 8 years.

The Context

Vicky Macintosh is the pursuer.

Vicky and Jonathon Mackintosh have been married for nine years, having previously cohabited for three years. Vicky is wanting to leave Jonathon because of his unreasonable behaviour. Jonathon is very unhappy both about the fact that Vicky is leaving him, and that she is proposing to take the children with her. They have two young children, the eldest of whom is causing concern. Jonathon has moved back temporarily to stay with his parents.

Issues

- Residence and contact of the children
- On-going financial support of the children
- Distribution of matrimonial property
- On-going financial support for Vicky Macintosh
**Financial Details**

Jonathon is self-employed: he and Vicky lease a shop selling imported textiles. The family live above the shop. Both the flat and shop are leased via a private lettings agency. The income from the shop is variable and there are some outstanding debts to suppliers. Both the lease and the debts are in their joint names. Vicky is nominally a partner in the business. But this was primarily for tax purposes, her role in the running of the shop has been minimal. It is very much Jonathon’s baby.

They have an estate car which serves both as the family car and for the business. This belongs nominally to Jonathon, but is also used by Vicky to ferry the children around. Neither Jonathon nor Vicky contribute to a private pension scheme. They do however have a life insurance policy.

Some of the furnishings within the marital home, given to them by Jonathon’s grandmother shortly before they married, may be of financial value.

Vicky was working as a freelance graphic designer, but stopped working following the birth of their first child, Joshua. Very occasionally she does small pieces of freelance work.

In addition to the debts outstanding to suppliers, around £1000s owing on their joint visa card. They have a joint bank account.

**Additional Financial Information**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income from the shop</td>
<td>500 - 1000 pw</td>
</tr>
<tr>
<td>Approx value of the assets of the shop</td>
<td>£2,000 - 4,000 pcm</td>
</tr>
<tr>
<td>Vicky Hamilton’s gross income from freelance work (over the previous 12 months)</td>
<td>£2,745 pa</td>
</tr>
<tr>
<td>Value of joint life insurance policy</td>
<td>£75,000</td>
</tr>
<tr>
<td>Redemption value of life insurance policy</td>
<td>£7,000</td>
</tr>
<tr>
<td>Rental paid for shop/flat</td>
<td>£600 pcm</td>
</tr>
<tr>
<td>Monthly direct debit for life insurance</td>
<td>£15.00 pcm</td>
</tr>
<tr>
<td>Amount currently in joint bank account</td>
<td>£1,300</td>
</tr>
<tr>
<td>Estimate of outstanding debts</td>
<td>£2,500</td>
</tr>
<tr>
<td>Amount owing on visa card</td>
<td>£1,000</td>
</tr>
</tbody>
</table>
Case Three - Charles and Emma Andrews

Family and Financial Information

Family Details

- Mr Charles Andrews is aged 59 years.
- Mrs Emma Andrews is aged 47 years.
- They have two children:
  - Abigail aged 12 years.
  - Zoe aged 14 years.
- Charles Andrews’ son by his previous marriage:
  - Toby aged 19 years. Prior to going to university Toby had lived with Charles and Emma since they married.
- Emma Andrews’ new partner, has two boys aged 8 years and 10 years, by a previous marriage who stay with him at weekends and during school holidays.

The Context

Charles Andrews is seeking a divorce from Emma Andrews on the ground of her adultery with a colleague at work. Charles and Emma have been married for 16 years and have two children aged 12 years and 14 years. Additionally, Charles has sole responsibility for one child from a previous marriage who is currently studying at a University in England. Emma moved out to rented accommodation nine months ago, she and her new partner now want to set up home together in Emma’s marital home to provide a settled environment for themselves and their children. Emma’s new partner has two children from a previous marriage, with whom he has frequent contact.

The case is marked by acrimony between Emma and Charles who are at loggerheads, but who also want to find a ‘civilised’ solution.

Issues

- Residence of the children
- On-going support for the children of the marriage and Charles Andrews' son
- Distribution of matrimonial property
- On-going financial support for Charles Andrews.

Financial Details

The family live in a fairly large property, located in a popular area. The house is valued at around £200,000. This was purchased jointly by the couple when they got married for £165,000, £115,000 being met from the sale of properties both partners had prior to their marriage. Emma contributed £46,000; Charles contributed £69,000.

Charles was working full time as a Director of Human Resources for a finance company prior to his marriage to Emma. Shortly after the birth of their second child Charles was offered early retirement, receiving a lump sum payment and a protected occupational pension. For the past 11 years he has cared full time for the children.
Emma works full time as head of service support in a large insurance company, a high income post which includes a company car and private health insurance which currently covers all members of the family. Additionally, Emma has a life insurance policy and occupational pension. Both singly and in joint names the Andrews’ have a portfolio of stocks and shares. They have a joint bank account and several high interest savings accounts. The two girls both attend a fee paying day school. Charles has his own car.

**Additional Financial Information**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of Charles Andrews’ lump sum payment</td>
<td>£70,000</td>
</tr>
<tr>
<td>Emma Andrews’ gross annual income</td>
<td>£62,000 pa</td>
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<tr>
<td>Emma's net monthly income</td>
<td>£3,500 pcm</td>
</tr>
<tr>
<td>Approximate current value of shared matrimonial home</td>
<td>£200,000</td>
</tr>
<tr>
<td>Outstanding mortgage</td>
<td>£15,000</td>
</tr>
<tr>
<td>Monthly mortgage repayments</td>
<td>£100 pcm</td>
</tr>
<tr>
<td>Value of Emma Andrew’s occupational pension</td>
<td>£65,000</td>
</tr>
<tr>
<td>Value of Charles Andrew’s occupational pension</td>
<td>£75,000</td>
</tr>
<tr>
<td>Value of Emma Andrew’s life insurance policy</td>
<td>£75,000</td>
</tr>
<tr>
<td>Value of shares portfolio and other savings/capital (approx)</td>
<td>£30,000</td>
</tr>
<tr>
<td>School fees per child per annum</td>
<td>£2,400 pa</td>
</tr>
<tr>
<td>Costs (fees in the future and support) of Toby’s university education</td>
<td>£3,370 pa</td>
</tr>
</tbody>
</table>
REFERENCES


Matheson, Sue and Gentleman, Hugh (1986) The Scottish Family Conciliation Service (Lothian), Edinburgh: Central Research Unit, Scottish Office.


