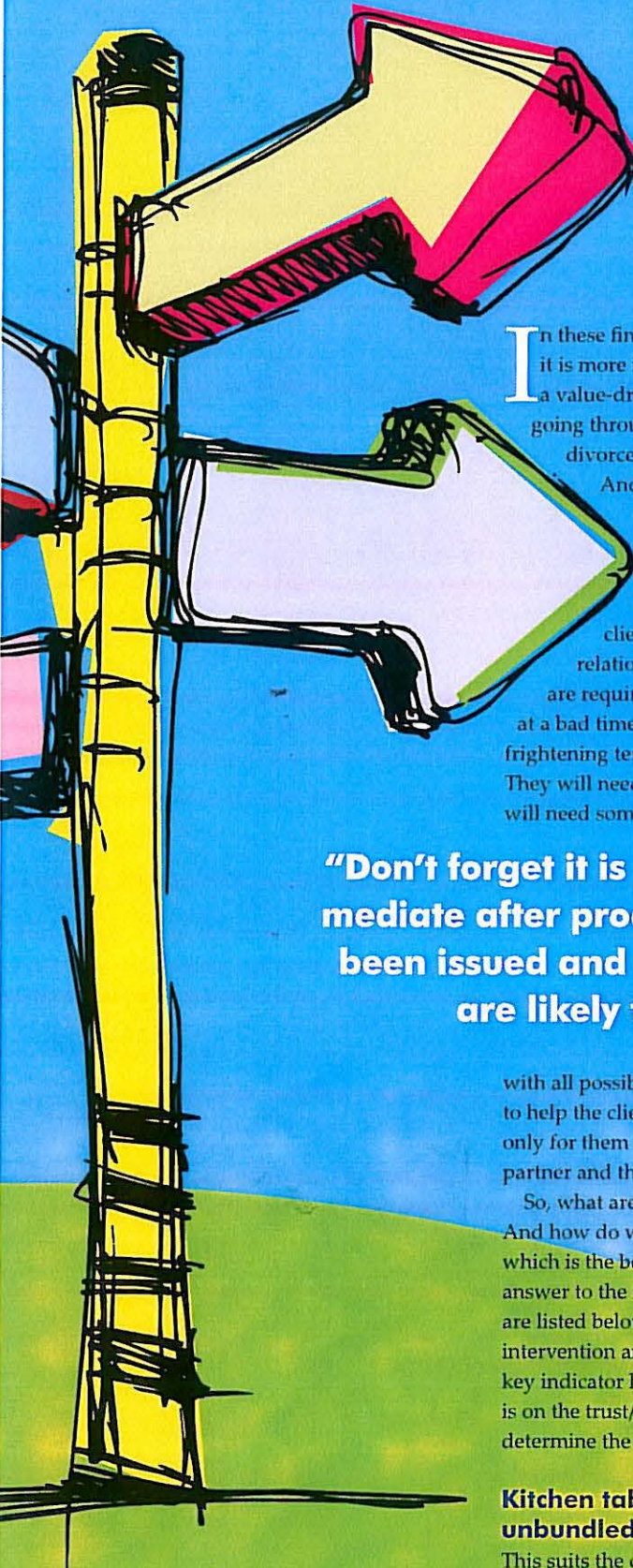


Route masters

Couples going through separation or divorce must make difficult decisions at a stressful time. **Therese Nichols** explores the options available and how you can help find the best route for them



In these financially straightened days it is more important than ever to offer a value-driven service for our clients going through separation and/or divorce. But what does this look like? And how do we deliver such a service in our nanosecond changing world while at the same time meeting and hopefully exceeding our clients' expectations? When in relationship breakdown our clients are required to make good decisions at a bad time. They face unknown and frightening territory that they must cross. They will need more than just a map. They will need someone thoroughly familiar

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with all possible routes through that terrain to help the client decide the best route not only for them but for their former spouse/partner and the children.

So, what are the options now available? And how do we help our clients decide which is the best route for them? In answer to the first question the options are listed below in increasing extent of the intervention and help your client needs. A key indicator here will be where your client is on the trust/conflict spectrum. This will determine the extent of help they will need.

Kitchen table discussion/ unbundled service

This suits the client where there is a high level of trust and the conflict is low or manageable. It also suits the client who is

high functioning and can do a great deal by themselves. Such a client may well have discussed with their ex already the choices they both want to make regarding future care of the children and division of the assets. They are likely to come to you with an agreement already. All that is required from you is information and advice on which legal framework would be appropriate, i.e. separation agreement or divorce/dissolution and consent order and then some drafting. You will find that increasingly clients only want specific tasks done at an agreed fixed price, which we must have available for them in our tool box. Increasingly our clients will not want a 'soup to nuts service' but a versatile and task-limited retainer.

Mediation – neutral help

This was much in the news in 2011 with the advent of the new pre-application Protocol for Mediation Information and Assessment for all private family law applications (save in emergencies) post 6 April 2011 (see practice direction 3A, Family Procedure Rules 2010).

Mediation provides your client with neutral help in the form of a family mediator who will be jointly appointed by the couple to help them both in face-to-face meetings with the mediator:

- Establish what is important to both of them and provide all relevant information about the children and the family finances.
- Identify all the issues that relate to this family pre- and post-separation.
- Empower them both to make their own decisions in order to achieve lasting solutions for the family.

Crucial to this mediation process is the legal advice your client will need

while travelling through this particular landscape. Such advice is both in relation to further information needed (if any) from either party as well as advice on proposals for settlement for your client to put forward in mediation. If you are a family mediator yourself you will know whom to recommend in your area as suitable for your client and former partner. You can also assess whether co-mediation would be better than sole mediation. If there is likely to be fairly high conflict in the mediation sessions co-mediation can move the process forward more quickly with two mediators on hand to manage the conflict.

"If after four months you reach impasse sometimes the only solution is painful backtracking and unavoidable duplication of costs to start again through the court"

It might be also appropriate for you and your legal colleague to attend one or more of the mediation sessions to provide immediate advice to your client/s and to ease the process to a final outcome.

If you are not a family mediator yourself it is important to acquaint yourself further on how mediation works so you can advise your client what this offers them (for more information on this visit http://www.resolution.org.uk/alternatives_to_court/).

Also don't forget it is certainly not too late to mediate after proceedings have been issued and district judges are likely to welcome it.

Collaborative process

If you are a collaborative lawyer you will know all about this. If not, the fundamentals are:

- The lawyers for both of the couple must be collaboratively trained.
- All negotiations take place in face-to-face meetings with both clients and both lawyers always present.
- All sign up to a limited retainer agreement at the start, which also includes a disqualification clause that both lawyers must withdraw if negotiations break down. This is known as a 'participation agreement'.
- There must be total transparency and willingness to move from positions to interests on both sides.
- The children are a priority.

There are collaborative-like models that some lawyers are using but without the disqualification clause. Just be aware that this is not the collaborative process. Your client may prefer this rather than risk losing you but the model then will be round table meetings by another name.

You might be reluctant to advise the client of this option if you are not collaboratively trained yourself. If so, is it not time to think about training as a collaborative lawyer? If you believe the cost is prohibitive, can you afford not to? It offers the client and their partner the chance to reach an agreement together with appropriate and timely input

from lawyers and other professionals where necessary. Furthermore the clients have the chance to develop skills to take them forward as parents when you are long gone.

Lawyer-led negotiations

If your client is likely to find meeting their former spouse/partner too traumatic and want you to negotiate 'front of house' then this might be the best route for them. This route does not necessarily rule out 'round table meetings'. They may still be useful. Separate rooms for clients with lawyers undertaking shuttle-style negotiation might suit and achieve your client's desired outcome. Words of warning here: this route can very easily go via 'by-path meadow'. Also, if after, say, four months you reach impasse sometimes the only solution is painful backtracking and unavoidable duplication of costs to start again through the court.

Family law arbitration scheme

This is so new it will not be available for clients until March 2012. However, it is likely to become a useful alternative to formal court proceedings and certainly worth raising with your client when it becomes available. The scheme has been developed by the Chartered Institute of Arbitrators, Resolution, the Law Society and the FLBA. Resolution will handle the administration of the scheme. Experienced family lawyers will have received extensive

training to become family arbitrators. The parties, if they choose this route, agree that the arbitrator's award will be final and binding on them. They will also agree to take all reasonable steps to obtain a court order in the same terms if this is necessary. This route will be a welcome option to our overstrained and lengthy court process.

Going to court

Sometimes this might be the only and best route for your client where there is fraud, mental or abuse issues. This has been the route of first resort (and for those who could afford it) for decades. However, this should no longer be the case today. Indeed, the parliamentary under-secretary of state for justice, Jonathan Djanogly, has spoken "of the need for a cheaper family justice system and a more responsive family justice system with mediation at its heart".

The courts are necessary where there are issues of law or safety. However, your client will need your input to identify whether such a level of intervention is right for them.

In the words of Abraham Lincoln: "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person."

Costs and delay are never more relevant issues than when considering carefully whether court is the best route for your client.

Given the multiple choices of process now open to our clients our first meeting must now be a very different animal. Exploring the landscape first with your client is crucial. It's what matters to your client not just what matters to the court. What are your client's hopes and fears? How have they dealt with the conflict in the marriage/relationship? How do they see parenting working out in the future?

Our role now is as choice architects – legal health care providers and guides to the best source of help for our clients.



Therese Nichols is an accredited family mediator and collaborative lawyer