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# A RELATIONAL MODEL OF FAMILY LAWYERING: EXPLORING THE POTENTIAL FOR EDUCATION, PRACTICE AND RESEARCH

**Jill Howieson\***  
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***Abstract:** This article responds to what seems to be a “hot” millennium topic in the family law environment—namely the nature of the relationship between the family lawyer and the client. It proposes a model of family lawyering that puts the relationship with the client explicitly in the foreground of the process and suggests a research regime that could investigate the merits of the model. The authors refer to the model as a “relational model of family lawyering”. The model involves family lawyers working within a partnering framework that incorporates attention to the relational aspects of the process, and in particular, to “mentalizing.” Mentalizing is a construct that research has found creates space for parties in the family conflict to consider others’ perspectives, alternative courses of action, and more constructive methods of approaching the*

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*dispute. The authors propose that the relational model could be a way of conceptualizing what family lawyers already do in practice with a number of additional factors that could enhance “best-practice.” Adoption of the model could assist family lawyers in attending to some of the psychological needs of the clients in a dispute resolution mode while still fulfilling their requirements as legal advisors. The authors discuss this proposition in the context of implications for education, practice and research.*

## INTRODUCTION

### Background

In a newspaper article in the Weekend Australian on 24 November 2010, the Chief Justice of the Family Court of Australia spoke about the difficulties currently facing family law professionals. She said that, amongst other issues, “an increase in self-represented litigants, many of whom have mental health problems and can’t maintain a relationship with a lawyer because they struggle to take advice,” populate the family law environment.<sup>1</sup>

While unrepresented litigants do present unique challenges, it seems that many represented litigants may also have difficulty maintaining a relationship with their lawyers. A study of Australian family lawyers and their clients found that 44% of represented clients in the sample had been to more than one lawyer in an effort to resolve their disputes.<sup>2</sup> The study revealed that those clients who had not yet adjusted

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<sup>1</sup> Christine Jackman, “Divided Lives”, *The Australian* (24 November 2010) online: The Australian <<http://www.theaustralian.com.au/>>.

<sup>2</sup> (n = 95); Jill Howieson, “The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change” (2011) 25:1 Int’l JL Pol’y & Fam 71.

emotionally to the divorce were the most likely to have had a poor relationship with their lawyers.<sup>3</sup> The study highlighted the complexities involved in family lawyers maintaining a satisfying and co-operative relationship with their clients. It showed that in order to create a positive environment for their clients, family lawyers needed to finely balance their approach and attend closely to the client's emotional response to the divorce.<sup>4</sup>

Although the study focused on the Australian context, research reveals that the issues faced by Australian family lawyers are widespread.<sup>5</sup> Practitioners and scholars in many countries have been searching for new models of dispute resolution that could enhance the relationship between lawyers and their clients. The collaborative law movement, the "cooperative law" model, and Julie Macfarlane's "conflict resolution advocacy" concept are examples of the new models of lawyering that have emerged over the past two decades.<sup>6</sup> In this article, the authors propose another: *the relational model of family lawyering*. The relational family lawyer is one who puts the relationship with the client at the forefront of the lawyering process and who attends explicitly to the mental states of the client.

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<sup>3</sup> Jill Howieson, *Family Law Dispute Resolution: Procedural justice and the lawyer-client interaction* (D Phil Thesis, University of Western Australia, 2008) online: <<http://theses.library.uwa.edu.au/adt-WU2009.0109/public/02whole.pdf>>.

<sup>4</sup> Ibid.

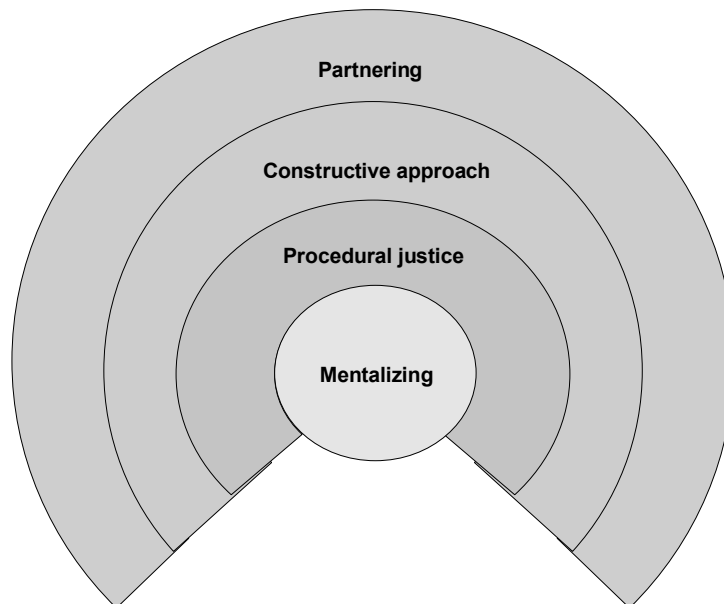
<sup>5</sup> See the literature review below.

<sup>6</sup> J Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" (2003) 64 Ohio St LJ 1316; Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).

### **Brief Introduction to the Model**

The relational model of family lawyering is presented in Figure 1 below.

*Figure 1: A relational model of family lawyering*



The model begins with the concept of *partnering*, which provides an overarching and integrating framework. Riane Eisler’s idea of partnering refers to a cultural system of practice where the partnership supports “mutually respectful and caring relations... where mutual gains move to the forefront.”<sup>7</sup> In a lawyering context, as Macfarlane proposes, partnering involves lawyers and their clients working in partnership rather than from the traditional system of the lawyer as the “dominant” expert controlling the process.<sup>8</sup>

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<sup>7</sup> Riane Eisler, *The Power of Partnership: Seven Relationships that will Change your Life* (Novato: New World Library, 2003).

<sup>8</sup> Macfarlane, *supra* note 6 at 138.

Next, a *constructive approach* refers to the balance of lawyering behaviours used by family lawyers in their approach to resolving disputes.<sup>9</sup> In her 2008 study of Australian family lawyers and their clients (“the Howieson study”), Howieson found that the lawyers who used a constructive approach were able to balance their lawyering strategies according to the needs of their clients and were able to provide a more stable and satisfying dispute resolution experience for the clients.<sup>10</sup> The Howieson study also found that those clients who perceived that their lawyers treated them fairly were more likely accept their lawyers’ advice and co-operate with their lawyer, than those who did not. Hence, the third ring of the model comprises the concept of *procedural justice*, which involves family lawyers using specific techniques and strategies to create a sense of procedural fairness for their clients.

At the core of the model is the concept of mentalizing. *Mentalizing* refers to the capacity to mentalize—to consider what one’s own mental states and those of others might mean, and how mental states influence behaviour. Research has shown that the act of mentalizing can have a profound effect on one’s ability to resolve interpersonal conflict, and can lead to positive change in one’s relationships.<sup>11</sup>

Mentalizing-based therapy is a therapeutic approach articulated initially by Fonagy and his colleagues, and now used for treatment of people with borderline personality

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<sup>9</sup> Howieson, *supra* note 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> Jon Allen, Peter Fonagy & Anthony Bateman, *Mentalizing in Clinical Practice* (Arlington: American Psychiatric Publishing Inc, 2008).

disorders who often have high levels of expressed emotion.<sup>12</sup> We know that separated couples also experience high levels of emotion and this led the authors to consider the effect of a mentalizing-based approach to family lawyering and family mediation. Research in the family mediation context has revealed that supporting the parties to mentalize assist the parties to better understand the interpersonal dynamics of the dispute as well as their own and the other party's conflict behaviour. This in turn helps to facilitate the parties in shifting from intractable behaviour toward a more flexible and productive approach to dispute resolution.<sup>13</sup> The authors propose that the same might apply in the family lawyering context. As will be explained in more detail below, by creating the conditions for their clients to mentalize, and by attending to their own self-mentalizing, family lawyers can help to create not only a constructive conflict resolution process but also long-term relational benefits for everyone involved.

The relational model of family lawyering provides a framework through which family lawyers might conceptualise and describe what they do in their dispute resolution practice. It also introduces some fresh ideas about how lawyers can help their clients cope with the complexities of divorce, while reducing any tensions that might exist in the lawyer-client relationship.

The model introduces strategies that should not take the lawyers away from their primary purpose, which is to provide representation and legal advice to their clients. Nor does the model ask family lawyers to radically change their approach. Instead, it describes a framework for already

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<sup>12</sup> Peter Fonagy, Gyorgy Gergely, Elliot Jurist and Mary Target, *Affect Regulation, Mentalization, and the Development of the Self* (New York: Other Press, 2002)

<sup>13</sup> J Howieson, *Mentalizing in Mediation: A Research Report* (2012) [unpublished].

existing lawyering practices (procedural justice and a constructive approach) and then provides additional components (mentalizing and partnering) that could add value to the family lawyer's daily work.

While the relational model of family lawyering is informed partly by studies conducted in Australia, the authors propose that the model is universal. It suggests a model of "best practice" that could assist family lawyers worldwide in tackling the many issues inherent in their respective family law environments. In particular, it provides a framework and strategies that aim to assist family lawyers in attending to some of the deeper psychological needs of their clients while still fulfilling their requirements as legal advisors. Essentially, the model presents a guide to help family lawyers assist their clients with reconciling the social-emotional divorce with the legal one.

### **Structure of the Article**

Before describing the model in more detail, the article provides a summary of research highlighting the importance of the interpersonal relationship between family lawyers and their clients. The article then discusses the findings of the Howieson study that inform the relational model: namely, *procedural justice* and the *constructive approach*. It then expands upon the concept of mentalizing. It explains how, by attending to and promoting mentalizing, family lawyers could provide their clients with a more relaxed and relational environment for resolving their disputes.<sup>14</sup> Next, the concept of *partnering* and its application to the practice of family law is explored. Finally, it links these concepts together in the relational model and discusses the implications of the model for research, education and practice.

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<sup>14</sup> Allen, Fonagy and Bateman, *supra* note 11.



## THE RELATIONSHIP BETWEEN FAMILY LAWYER AND CLIENT

### Previous Studies

In the 1990s and early 2000s, several seminal Australian and international studies explored the lawyer-client relationship and described the nature of family law practice. In the 1990s in the United Kingdom, Ingleby investigated how family lawyers handle their family law matters. The Ingleby study revealed that much of a family lawyer's work involves the lawyer conducting negotiations with the opposing solicitor on behalf of his or her client, while juggling the relationship with his or her client.<sup>15</sup> Ingleby refers to the work of Cain whose "pioneering study" revealed that a family lawyer's specific practice involves the "translation of the client's aims into the relevant legal categories."<sup>16</sup> Cain exposed that this type of practice inevitably caused tension between the client's emotional experience and the legal one.<sup>17</sup> Smart reported a similar finding in 1984, presenting results that show that solicitors, while focussing on the legal dimensions of the dispute, often completely disregard the social and emotional component of the client's dispute—aspects, she argues, that are the most significant for divorcing couples.<sup>18</sup>

In the United States, Sarat and Felstiner specifically examined the dynamics inherent in the lawyer-client

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<sup>15</sup> Richard Ingleby, "The Solicitor as Intermediary" in Robert Dingwall & John Eekelaar, eds, *Divorce Mediation and the Legal Process* (Gloucestershire: Clarendon Press, 1988) 43 at 48.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge, 1984)

relationship. They found that divorce lawyers “use their professional position to interpret their client’s past behaviour and present intentions and negotiate “realism” and responsibility” with their clients.<sup>19</sup> Overall, Sarat and Felstiner found that lawyers work very hard to try to bring reasonableness into their clients’ perceptions of the dispute but found that this created suspicion and doubt in the lawyer-client relationship.

In the early 2000s in the US, Mather, McEwen and Maiman explored how lawyers respond to conflicts and problems with their clients. Their study revealed that divorce lawyers mostly tend to “listen, advise, counsel, negotiate, and occasionally litigate on behalf of their clients.”<sup>20</sup> Further, they found that the relationship between family lawyers and their clients “is a long and complex series of discussion, decisions and negotiations between the two parties” and “a relationship fraught with tensions and ambiguities.”<sup>21</sup>

In the United Kingdom, Eekelaar, Maclean and Beinart also studied what solicitors do in practice. They identified that family lawyers undertake a wide range of tasks, including providing practical and legal advice, “constructing narratives from the chaos of events and acts; and offering support and guidance, both emotional and practical.”<sup>22</sup> Eekelaar *et al.* also

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<sup>19</sup> Austin Sarat and William L F Felstiner, *Divorce Lawyers and their Clients: Power & Meaning in the Legal Process* (New York: Oxford University Press, 1995)

<sup>20</sup> Lynn Mather, Craig A McEwen & Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York: Oxford University Press, 2001)

<sup>21</sup> *Ibid* at 287

<sup>22</sup> John Eekelaar, Mavis Maclean & Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Oxford: Hart Publishing, 2000) at 79.

found that much of the family lawyer's work involved trying to 'modify the client's expectations.'<sup>23</sup> They concluded that practice is difficult for family lawyers as they struggle to respond to the "human and emotional matters" of the client as well as to the legal ones.

Eekelaar *et al.* were not the first researchers to determine that the work of family lawyers often resembles that of social workers.<sup>24</sup> A number of studies have shown that family lawyers find their clients to be more emotionally intense than other type of legal client. "Clients often want to talk about their feelings of guilt, fault, anger and bitterness. They often feel overwhelmed by their problems and expect that their solicitor will be able to lift this burden from their shoulders" in much the same way that a social worker might.<sup>25</sup> Further, and adding to the complexity, Pleasance and Walker *et al.* refer to "problem clusters" that family law clients often encounter:

Vulnerability to problems is not static, but cumulative. Each time a person experiences a problem, the likelihood of experiencing a different problem increases ... some 'trigger' problems, such as domestic violence and divorce, naturally bring about other problems, and these can be key elements of problem clusters ...<sup>26</sup>

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<sup>23</sup> Janet Walker et al, *The Family Advice and Information Service: A Changing Role for Family Lawyers in England and Wales? Final Evaluation Report* (Newcastle Centre for Family Studies, 2007).

<sup>24</sup> Eekelaar et al, *supra* note 22.

<sup>25</sup> Walker et al, *supra* note 23 at 207 citing Mather et al, *supra* note 20, Eekelaar et al, *supra* note 22, Ingleby, *supra* note 15, and Sarat and Felstiner, *supra* note 19.

<sup>26</sup> Walker et al, *supra* note 23 at 257, citing Pascoe Pleasance et al, *Causes of Action: Civil Law and Social Justice*, (UK: The Stationery Office, 2006).

Thus, not only do family lawyers need to talk to their clients about the legal issues relating to the case, but they are also frequently faced with other personal concerns of the client, which might influence the case and/or the client's well-being. Mather *et al* determined that the lawyer-client relationship is one that is characterised by two dilemmas for the lawyer: first, how much personal counselling should the lawyer provide for the client, and second, how much responsibility for decision-making should the lawyer exercise on behalf of the client.<sup>27</sup>

Sarat and Felstiner ultimately conclude from their study that it "is in a context of mutual suspicion that divorce lawyers and their clients negotiate a shared understanding of the nature of the divorce dispute and the nature of the legal process."<sup>28</sup> Eekelaar *et al.* similarly characterise the lawyer-client relationship as one that is demanding and could suffer from a lack of trust. Eekelaar *et al.* describe the relationship as one that requires a balance between sensitivity to manage the case carefully and negotiations over the adoption of taking a reasonable "position" in the dispute.<sup>29</sup>

### **Maintaining a Co-operative Approach**

In Australia, Banks provided empirical evidence of what being a family lawyer means in practice. Banks found that essentially, a family lawyer "is a subjective participant on a very complex journey with a client" and that often, family lawyers face ethical and practical challenges in practice "that they often do not feel well equipped to deal with."<sup>30</sup> There is

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<sup>27</sup> Mather et al, *supra* note 20 at 306.

<sup>28</sup> Sarat, *supra* note 19 at 47.

<sup>29</sup> Eekelaar et al, *supra* note 22 at 90.

<sup>30</sup> Cate Banks, "Being a Family Lawyer and Being Child Focused — A Question of Priorities?" (2007) 21:1 *Austl J Fam L* 37.

also not much guidance on the subject. The Australian Best Practice Guidelines ask family lawyers to “act in a constructive and conciliatory manner” but do not offer any particular strategies for situations in which the lawyer is faced with less-than-conciliatory clients.<sup>31</sup>

Both Hunter studies conducted in Australia in the early 2000s, as well as the Howieson study, found that family lawyers “belong to a cohesive practice community culture” and tend to take “a conciliatory and cooperative rather than adversarial approach to practice.”<sup>32</sup> In this sense, the studies show consistency with the international studies described above. However, all of these studies also identify that the mental states of the clients can impede the lawyer’s ability to remain co-operative in their approach. As Mather describes,

Divorce lawyers pointed to their clients’ emotional state to explain why meaningful client participation in the divorce process was often difficult to sustain. Howard Erlanger et al. found some divorce clients unable to assert themselves due “their shock or reluctance over the divorce”. Other research cited lawyers whose clients were so full of anger and blame that they were unable to think “realistically” about their case options, or whose clients were so agitated or depressed that they could not focus on case discussions. A client’s vulnerability could lead

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<sup>31</sup> Family Law Council, *Best Practice Guidelines for Lawyers Doing Family Law Work* (Australia: Law Council of Australia, March 2004).

<sup>32</sup> Rosemary Hunter et al, *Legal Services in Family Law* (Law Foundation of New South Wales, 2000) at 158, 344; Rosemary Hunter, “Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law” (2003) 30 *JL & Soc’y* 156; Howieson, *supra* note 2.

even the most client-centred divorce lawyer to become more directive and controlling.<sup>33</sup>

The Howieson study highlighted that Australian family lawyers use a mix of lawyering behaviours and tend to tailor their particular approach depending on the characteristics of the client's matters.<sup>34</sup> The study did not explore in any detail the training, if any, that family lawyers have for dealing with the emotional issues that might arise for their clients. Nor did it investigate how lawyers manage to sustain a constructive approach in the face of all types of clients, and in particular with those experiencing severe emotional turmoil or those who feel emotionally alienated.

In an early study of Dutch family lawyers, Griffiths noticed that,

Emotional lawyers are more easily tempted than their more reserved colleagues are to respond to the client's interjections concerning the social-emotional divorce. Those who are motherly manage quickly to create a warm, comfortable atmosphere. An insecure young lawyer takes refuge in a rather aggressive approach to a distraught client. An authoritarian lawyer leads the discussion at a fast and disciplined pace that leaves little room for clients to discuss what really concerns them. Another lawyer is authoritarian in a different way, intruding her own values and concerns rather deeply into the client's decisions.<sup>35</sup>

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<sup>33</sup> Lynn Mather, "What do Clients Want? What do Lawyers Do?" (2003) 52 Emory LJ 1065, 1075.

<sup>34</sup> Howieson, *supra* note 2.

<sup>35</sup> John Griffiths, "What do Dutch Lawyers Actually Do in Divorce Cases?" (1986) 20:1 Law & Soc'y Rev 163.

These are all dangers for the family lawyer — to be too emotional or too authoritarian; to respond too much to the social-emotional divorce or too much to the legal divorce; or to intrude too much into the client’s dispute. As Murch argues, “client satisfaction with divorce lawyers derives from the way their role as legal advisor is often combined with an ability to fulfil psychological needs.”<sup>36</sup> But what, if anything, is a family lawyer taught about fulfilling a client’s psychological needs?

### **Client’s Psychological Needs**

Sclater, from her study of family law clients, suggests that,

The emotions of divorce are not “pathological”, but are readily explicable as ordinary human “coping strategies.” From a psychodynamic perspective, ... these are integral, and psychologically necessary, aspects of the divorce process.<sup>37</sup>

In summary then, it seems clear that as well as the legal aspects of the divorce, there are many psychological aspects that the clients may expect, or even demand, their family lawyers attend to. Again, the question remains: what strategies do family lawyers have for helping their clients to manage the psychological elements of divorce?

The Howieson research identifies that being *procedurally just*, that is, by treating the client with respect, politeness and dignity and by affording the client an opportunity to voice all his or her concerns, fulfils one aspect

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<sup>36</sup> Mervyn Murch, “The Role of Solicitors in Divorce Proceedings” (1978) 41:1 Mod L Rev 25, cited in Griffiths, *ibid*.

<sup>37</sup> Shelley Day Slater, *Divorce: A Psychosocial Study* (Surrey: Ashgate, 1999).

of the client's psychological needs.<sup>38</sup> However, what of the other needs of the client? How do family lawyers assist their clients with unpacking their problem clusters, reconciling their shock, anger or blame, regaining their composure and finding the best in themselves in order to resolve their disputes constructively? What the authors propose in the relational model are some clear strategies for helping family lawyers to support their clients toward this type of understanding about themselves and about the other. In this sense, the model presents a nexus between the work of family dispute resolution practitioners and lawyers.<sup>39</sup>

### **Dispute Resolution Professionals**

In her 2008 study, Bagatol laments the lack of collaboration between lawyers and dispute resolution professionals who are not lawyers.<sup>40</sup> Bagatol suggests that many dispute resolution professionals “do not have a clear understanding of and respect for the work of family lawyers.”<sup>41</sup> This, Bagatol argues, can lead to “clients [who might wish to have the support of a family lawyer but] are unlikely to overcome their own prejudices against family lawyers and obtain legal advice alongside the family dispute resolution they are obliged to attend.” Bagatol's study refers to the current family law regime that requires divorcing parents to make a genuine effort to resolve their dispute via mediation, before seeking a legal

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<sup>38</sup> Howieson, *supra* note 2.

<sup>39</sup> Jill Howieson & Lynn Priddis, “Mentalising in Mediation: Towards an Understanding of the ‘Mediation Shift’” (2012) 23 *Australasian Dispute Resolution Journal* 52.

<sup>40</sup> Becky Bagatol, “Fomenters of Strife, Gladiatorial Champions or Something Else Entirely: Lawyers and Family Dispute Resolution” (2008) 8:1 *Queensland University of Technology Law and Justice Journal* 24.

<sup>41</sup> *Ibid.*



solution to their dispute.<sup>42</sup> The Australian Government has established a network of community-based Family Relationship Centres for this purpose, where legal practitioners are “sidelined” in favour of dispute resolution practitioners.<sup>43</sup> However, several studies since the introduction of this new regime have noted that family lawyers have an important part to play in dispute resolution processes.<sup>44</sup> Family clients appreciate the lawyer who is able to ensure the protection of the client’s legal rights while still creating opportunities to find a fair resolution for everyone involved.<sup>45</sup> This finding has in part led to the Government changing its policy to allow lawyers to represent their clients in these previously lawyer-free environments.<sup>46</sup> However, Bagatol suggests the need for further policy reform that “involves systematic training for both lawyers and family dispute resolution practitioners in professional responsibilities and models and methods of best practice for legal advice around family dispute resolution.”<sup>47</sup>

The authors propose that the model of relational family lawyering could address this issue. The lawyering strategies

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<sup>42</sup> *Family Law Act 1975 (Cth)* s 60I (7).

<sup>43</sup> House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Canberra: Parliament of the Commonwealth of Australia, 2003) at 60.

<sup>44</sup> Howieson, *supra* note 2; Catherine Caruana, “Dispute Resolution Choices: A Comparison of Collaborative Law, Family Dispute Resolution, and Family Law Conferencing Services” (2010) 85 *Family Matters* 80; Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms* (Canberra: Commonwealth of Australia, 2009).

<sup>45</sup> Howieson, *ibid.*

<sup>46</sup> Caruana, *supra* note 43.

<sup>47</sup> Bagatol, *supra* notes 39, 45.

that the model incorporates resemble, in many ways, those employed by mediators and dispute resolution practitioners. Although currently many family lawyers have had some form of dispute resolution training, they have usually gained this training through dedicated mediation courses.<sup>48</sup> Training in the relational model could involve both family lawyers and family dispute resolution practitioners, and in this way has the potential to improve the understanding between the two fields.

## NEW RESEARCH AND THEORY

### Need for a Model

The literature review above demonstrates that many scholars have noted the inherent tension for family lawyers in reconciling the social and psychological divorce that the clients are experiencing with the legal divorce that the lawyers are trained to address. Although the studies show that family lawyers, in general, manage this tension well, it is clear that the lawyers do not have any formal education in handling their clients' psychological issues, or indeed any clear way of conceptualising the work that they actually do in this regard.

Endorsing Mather's contention that "good description can lead to better prescription"<sup>49</sup>, the relational model of family lawyering has two aims: to conceptualise and describe what lawyers do well in family lawyering, and to provide extra components that could assist lawyers in addressing the more complex psychological needs of their clients. The Howieson study demonstrates that family lawyers already do well in providing procedural justice and taking a constructive approach, and these strengths will now be discussed in more detail.

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<sup>48</sup> Howieson, *supra* note 2.

<sup>49</sup> Lynn Mather, *supra* note 33, 1066.

## **Procedural Justice and the Constructive Approach**

### *Procedural Justice*

Procedural justice refers to the perception of the fairness of a dispute resolution process. This concept was developed from studies conducted by Thibaut and Walker in 1975, which found that people's satisfaction with, and perceptions of fairness of, a legal dispute resolution process were "powerfully shaped by their views about the procedure that generated those outcomes."<sup>50</sup> These studies represented a major shift in thinking: previously, justice studies had focussed on distributive justice or the fairness of the outcome, rather than on the procedural aspects of decision-making or the fairness of the process. In other words, previous research and theory had focussed on people's concern with outcome, under the assumption that a fair and favourable outcome would automatically mean that people would see the whole experience as fair and satisfying.<sup>51</sup> A long line of research since Thibaut and Walker has also shown that parties are more likely to be satisfied with the outcome of a dispute resolution procedure, and more willing to accept the outcome, regardless of whether the outcome was in their favour or not, if it was generated by a fair procedure.<sup>52</sup> Known as the *procedural justice* effect, it is a robust effect noticeable across many

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<sup>50</sup> Tom R Tyler, *Readings in Procedural Justice* (Burlington: Ashgate, 2005) at xiii.

<sup>51</sup> Neil M Drew, Brian J Bishop and Geoff Syme, "Justice and Local Community Change: Towards a Substantive Theory of Justice" (2002) 30 (6) *Journal of Community Psychology* 623.

<sup>52</sup> Robert MacCoun, "Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness" (2005) 1 *Annual Review of Law and Social Science* 171.

dispute resolution contexts, including judicial determination, mediation, and police decision-making.<sup>53</sup>

Howieson's field study identified that the procedural justice effect also applies in the family lawyering context. Specifically, the research found that regardless of whether the lawyers' advice was in their favour or not, the family law clients who perceived that their lawyers treated them fairly were more likely to accept their lawyers' advice and co-operate with them than those who did not. The study further identified that perceptions of procedural justice exert a major influence on the clients' view of their relationship with their lawyers, and that the *quality of treatment* that the lawyer affords the client is an integral factor in perceptions of both the fairness of the advice and the satisfaction with the lawyering experience.<sup>54</sup>

The elements found to be most integral to the perceptions of procedural justice included the relational criteria of *status recognition* (dignity, respect and politeness), and *voice*, having one's needs taken into account and having the experience of the lawyer being sensitive to the client's viewpoint.<sup>55</sup> In particular, clients with a lawyer who treated them with respect, allowed them to say all that they needed to say, and whom they perceived as trustworthy (a high quality of treatment), generally felt satisfied with the lawyering experience, viewed it as fair, and felt as if they retained their sense of autonomy. These clients were subsequently more likely to co-operate with their lawyers and accept their lawyers' advice.

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<sup>53</sup> E Allen Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

<sup>54</sup> Howieson, *supra* note 3.

<sup>55</sup> *Ibid*, 154.

On the other hand, clients with lawyers who did not treat them in a respectful manner, who denied them their voice, and whom the clients perceived as less trustworthy (a low quality of treatment), generally felt less satisfied with the experience and perceived that the advice that they received was not fair, regardless of whether it was in their favour or not. Hence, they were less likely to feel they had autonomy over their dispute, which meant that these clients had difficulty accepting their lawyer's advice and chose to co-operate reluctantly with their lawyers, consult another lawyer, or take another course of action in the dispute resolution process.<sup>56</sup>

### *Constructive Approach*

In addition to the influence of perceptions of procedural justice on the lawyer-client relationship, the Howieson study also identified that in terms of fairness and satisfaction, the clients preferred the lawyers who took a *constructive approach* to their lawyering. The study found that the majority of the lawyers used a mix of lawyering behaviours in their work, and that the use of the blend of strategies was in the most part dependent on the particular characteristics of the client.<sup>57</sup> The study gave us a picture of what this particular balance of lawyering behaviours looked like. Constructive lawyers tend to:

1. take responsibility for all legal advice but also build trust, provide honest explanations for their advice, and communicate their ideas clearly so that the client can understand the reasons for the advice;
2. employ communication strategies that include the client in discussions about the best way to resolve the dispute, allow the client to air all their interests and concerns, take the

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<sup>56</sup> Ibid, 211.

<sup>57</sup> Ibid, 212.

client's needs into account and ensure that the client has enough information to make the right decisions about the progress of the dispute (but not so much information that the client becomes confused on decisions of a legal nature);

3. ensure that all clients are treated with dignity, politeness and respect;
4. pay particular attention to the emotional response of the client to the divorce;
5. avoid using unexplained legal language or exerting inappropriate social power;
6. maintain a court focus when required (especially for clients who are fearful for the safety of their children);
7. incorporate elements of the interest-based approach into their work, including searching for a fair resolution for the entire family group and for both clients in the dispute;
8. ensure that the client has an opportunity to change his or her mind if he or she wants to;
9. stay firm on process by conducting simple and efficient meetings;
10. ensure that the client is kept fully informed on the progress of the dispute resolution process; and
11. balance all of this with:
  - a. giving an honest and realistic representation of the client's legal position;
  - b. protecting the client's legal rights; and

- c. ensuring that any advice that they give is in accord with the relevant law and not based on any personal biases and opinions.<sup>58</sup>

The main point to emerge from the study was that the lawyers tailored their techniques to suit the client's situation. For instance, constructive lawyers used a court-focused approach only when their clients were experiencing high levels of co-party conflict, fearing for the safety of their children or had high financial stakes in the outcome. They did not use this approach in other circumstances when the client's situation did not demand it. It was a clear finding of the study that if the lawyers took a constructive approach and adapted their approach to the experience of the client then the clients were more likely to perceive procedural fairness and develop a co-operative relationship with their lawyers.

#### *The Relational Approach*

Taken together, the findings of the Howieson studies highlighted the importance of the relational aspects of lawyering. They showed that by being procedurally fair and taking a constructive approach to their lawyering, family lawyers were able to establish a positive relationship with their clients. However, the study also showed that those clients who were not well adjusted to the divorce (i.e. experiencing high levels of anger, attachment insecurity, attachment disparity and/or reluctance to divorce) were likely to have been to another lawyer previously.<sup>59</sup> These same clients were likely to have perceived that their previous lawyer was not responding to their needs and was therefore not able to maintain a positive relationship with them.

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<sup>58</sup> Ibid, 212.

<sup>59</sup> Ibid.

This finding parallels a rising emphasis on the importance of the relationship in other conflict-resolution disciplines. For instance, in therapeutic settings, it is becoming increasingly clear that therapists come to understand their clients best through the professional-client relationship, and that by attending to the relational components in the interaction, the therapist encourages the client to form a more balanced perspective of the conflicts that they are experiencing. In particular, the research shows that it is by attending to the relational component of *mentalizing* that the therapist is able to shift the client.<sup>60</sup> Similarly, in the mediation context, the research has shown that by creating space in the mediation for the parties to engage their mentalizing capacities, the mediator is able to shift the parties off their seemingly intractable positions to a place where they can understand their own, and the other parties' experiences better.<sup>61</sup>

### **Mentalizing**

The mentalizing concept proposes that internal mental processes such as feelings, thoughts and needs underpin our actions and behaviours. Attending to personal mental processes while wondering about mental states of another forms the basis of our ability to interact socially and form meaningful relationships.<sup>62</sup> It is now recognised that mentalizing is a fundamental human capacity essential for our social development and lifelong resilience.<sup>63</sup> When we mentalize, and do so in an unrestricted manner, "we are able to communicate clearly since we hold in mind the perspectives of others; we understand other people's behaviour better; and we have a

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<sup>60</sup> Allen et al, *supra* note 11.

<sup>61</sup> Howieson, *supra* note 13.

<sup>62</sup> *Ibid.*

<sup>63</sup> Allen et al, *supra* note 11.



sense of being in control of our behaviours and of ourselves.”<sup>64</sup> Our ability to mentalize enables us to be flexible in our thinking, which can in turn, “protect our self-esteem, advance self-efficacy, and aid in us making informed judgments about risk in interpersonal situations.”<sup>65</sup> In addition, mentalizing can be a powerful agent of change in conflict situations.<sup>66</sup> Through mentalizing, people can uncover the underlying reasons behind their conflict behaviour, and this can help them to feel less overwhelmed by their circumstances.

Yet mentalizing in times of conflict and stress may not be as simple as it seems. Although mentalizing is a natural human capacity that is usually done automatically and implicitly, the evidence shows that we all have different capacities for mentalizing, particularly when things are not going smoothly.<sup>67</sup> Essentially, we all lose mentalizing capacity to some extent when we become highly emotional, such as when we are experiencing the conflict or considerable stress common in the context of family relationship breakdown.

Neurobiological research explains this phenomenon. Researchers have observed that when people experience escalating levels of emotional stress, their capacity to mentalize

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<sup>64</sup> Jill Howieson & Lynn Priddis, “Building Resilience for Separating Parents Through Mentalizing and Constructive Lawyering Techniques” (2010) 18:2 *Psychiatry, Psychology and Law* 201.

<sup>65</sup> Helen Stein, “Does Mentalizing Promote Resilience?” in Jon G Allen & Peter Fonagy, eds, *Handbook of Mentalization-Based Treatment* (London: Wiley & Sons, 2006) 310.

<sup>66</sup> Allen et al, *supra* note 11.

<sup>67</sup> Patrick Luyten et al, “Assessment of Mentalization” in Bateman & Fonagy, *supra* note 12; Peter Fonagy, Anthony Bateman & Patrick Luyten, “Introduction and Overview” in Anthony Bateman & Peter Fonagy, eds, *Mentalizing in Mental Health Practice* (Arlington: American Psychiatric Publishing Inc, 2012) 3.

decreases as their brain functioning switches from flexibility to automaticity. Essentially, people revert to their more concrete ways of thinking and/or their default patterns of behaviour. These usually take the form of fight, flight, freeze or dissociation mechanisms used for protection from danger or emotional chaos.<sup>68</sup> What this means is that when they are experiencing relationship breakdown (especially a relationship with a strong attachment component) their mental flexibility and access to a wide range of organised behaviours and coherent thoughts that could assist them in resolving the conflict disappear, and they tend to approach the situation more rigidly.

The difficulty with relationship conflict is that when people are embroiled in it they are typically in a state of emotional arousal or stress; consequently, their ability to mentalize is impaired, and they operate from default positions. Therefore, one method to help the parties cope with the emotional stress of conflict is to assist them with re-engaging their mentalizing capacity. Once the capacity to mentalize improves, the parties are better able to attend to their own mental states and those of the other person, and to consider how those mental states might influence their respective behaviours. This can in turn lead them to increased acceptance of the situation, increased capacity for flexibility and consideration of alternative readings of the situation, and an ability to play with options for resolving the conflict.<sup>69</sup> It could also lead to a greater sense of optimism about the situation and an increased sense of self-worth—things that in the long term can lead to a greater resilience.

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<sup>68</sup> Allen et al, *supra* note 11 at 134.

<sup>69</sup> Stein, *supra* note 62.

*The Mentalizing Stance*

It seems clear that family lawyers will be better able to assist their clients in addressing the more complex psychological content of the divorce experience if they attend to their client's mentalizing capacities and provide opportunities for their clients to re-engage their capacities if these have become disengaged. But how do they do this? One way is by taking what is called the *mentalizing stance*.<sup>70</sup> The mentalizing stance aims to foster a spirit of inquiry into and clarification of the client's mental states in order to bring the client's mentalizing online. The mentalizing stance involves taking a "curious enquirer" role and moving away from the role of the expert. A family lawyer using a mentalizing stance would, amongst a range of other techniques,

1. encourage the client to be curious about his or her own mental states and the mental states of his or her former partner;
2. help the client to appreciate that he or she and his or her former partner might be perceiving their experiences differently;
3. explore how these different perspectives could be influencing each other's behaviours; and
4. explore the full detail of the client's unique situation and experience, rather than assume that it follows a general pattern.

The mentalizing stance requires that family lawyers make a concerted effort to remain in the inquiry mode if they notice that their client's mentalizing capacity has become

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<sup>70</sup> Jon G Allen & Peter Fonagy, *Handbook of Mentalization-Based Treatments* (Chichester, UK: Wiley, 2008).

impaired. Research shows that if people take the role of the expert (about another's experience), present their ideas with a sense of certainty, try to make others' minds up for them, and/or reduce another's experience down to a norm, then this can erode the other's mentalizing capacity.<sup>71</sup> Therefore, a non-expert and curious attitude is integral to the mentalizing stance. The technique of taking a mentalizing stance has great potential to enable family lawyers to help their clients through the family law dispute resolution process in a positive and constructive manner. By helping their clients to engage their mentalizing capacities, lawyers will help their clients become clearer about their situations, more flexible about their options and better able to consider alternative ways of resolving their disputes. At the same time, a mentalizing stance could help family lawyers attend to their own self-mentalizing.

#### *Lawyers' Self-mentalizing*

It is not always easy to help people to engage with their mentalizing capacities, especially when the person's experience or personality might diminish one's own mentalizing. As Griffiths found, family lawyers can sometimes identify too closely with their clients' emotional divorce, be tempted to insert their own values into the client's experience, or become aggressive or agitated at the client's decisions or behaviours.<sup>72</sup> Therefore, lawyers also need to attend to their own mental states and their mentalizing capacity to ensure that they can assist their clients properly. Again, taking a mentalizing stance is likely to facilitate this.

By maintaining curiosity and relinquishing the need to be an expert, lawyers can create a way to privately acknowledge their own thoughts and feelings about their

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<sup>71</sup> Adapted from Allen et al, *supra* note 11.

<sup>72</sup> Griffiths, *supra* note 34.

clients and their clients' situations, and adjust their interventions accordingly. For instance, if the lawyer, through self-mentalizing, becomes aware that he or she is speeding up proceedings in a bid to save time and is giving little room to the client to discuss emotional issues, then the mentalizing stance enables the lawyer to notice this and respond accordingly. For example, the lawyer might respond by acknowledging the situation: *"I notice that I'm speeding up here, and you have had little chance to respond. I guess I'm worried you are becoming overwhelmed and that we might not have time to attend all the legal issues today. I wonder if that is how you are seeing it."*

Alternatively, it may assist when lawyers find themselves wanting to respond adversely to the client's emotional experience. The mentalizing stance can enable the lawyer to examine this authentically in the interaction and respond in a curious and non-judgmental manner. For example, the lawyer might say, "If this were happening to me I might feel x, it seems like that is not your experience, help me to understand what is happening for you."

A further example is this real-life situation described in Walker *et al.*, 2007. The solicitor has been given the name of Mary for ease of description.<sup>73</sup>

Sandra was not entirely satisfied with her lawyer, Mary. She felt that Mary tended to defend Eric more than her. She said that Mary kept telling her that she needed to compromise and that she needed 'to bend a bit' and allow Eric to have some contact with the children. She was annoyed that Mary made her agree to arrangements that were inconvenient.

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<sup>73</sup> Walker et al, *supra* note 23 at 423.

Mary had tried to persuade Sandra to be flexible and had asked ‘Why can’t you just do it that way round?’ Although Sandra had told Mary that she did not have any commitments and could have changed her arrangements, it was clear that she was ‘just sick of [Eric] getting his own way all the time’. She felt as if Eric always wanted to adjust the arrangements and that she was always expected to be flexible. Sandra felt that Mary could not see the issues from her point of view, and she was a little disappointed that her solicitor was not ‘gung-ho’ and fully committed to being on her side.

I said to Mary that I could keep going on like this for the rest of my life, any time he wants to change his mind, me agreeing to it. I said ‘I’m not having it’. And that’s when I said ‘He doesn’t pay my bus fare’. And she said ‘Oh well. There’s nothing we can do about that. You can’t stop his contact for not paying bus fares.’

In this scenario, Sandra appears to feel unsupported by her lawyer, Mary and seems to be reacting with petulance. By using a mentalizing stance, Mary could have responded to Sandra with more curiosity and perhaps Sandra would have felt less resentful. However, in the first instance, Mary may have needed to attend to her own mentalizing. Mary might identify a touch of annoyance in herself as Sandra speaks, note this, wonder about it, and then realise that Sandra reminds her of a difficult client she once struggled to work with. As Mary realises this is a different client and scenario, she is better able to think about what might be happening for Sandra.

Once aware of her own mental states and having attended to them, Mary could have said something to the following effect to Sandra:

1. “It sounds as if you feel like a puppet on a string, expected to move this way and that as Eric continually changes arrangements. What is it like for you?”
2. “Bus fare? You lost me there, can we rewind back to . . ., so we can understand better what is happening for you in these negotiations?”
3. Alternatively, “What is it you think your ex is doing? I hadn’t seen it that way. Can you tell me what he does that makes you think that?”

*Nexus Between Mediation and Family Lawyering*

A family dispute resolution practitioner or mediator might also use the mentalizing stance and these mentalizing techniques. As such, this might be where the work of family lawyers and those of dispute resolution practitioners might meet. Indeed, mediation research in a family dispute resolution setting in Western Australia has shown that this is the case. In the study conducted in 2012, the researchers noted that when the mediators used the mentalizing stance, this created space in the mediation for the parties to explore their situations to a greater depth and for the parties to talk more to each other (rather than the mediator) about what they were experiencing.<sup>74</sup> The parties who reported that they were able to talk about the situation also reported feeling more relaxed and supported in the mediation, and understood their situation and what was happening for their children more clearly after the mediation.<sup>75</sup>

These findings support the use of the mentalizing stance to assist the parties in engaging their mentalizing capacities. However, a family lawyering context is far broader

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<sup>74</sup> Howieson, *supra* note 13.

<sup>75</sup> *Ibid.*

than this and a mentalizing stance might not be central to all aspects of the lawyering process. In the relational model of family lawyering presented here, the mentalizing stance falls within the overarching strategy of partnering. By working within the framework of partnering the lawyer can openly use the mentalizing interventions without detracting from the more traditional work of attending to the legal issues.

### **Partnering**

Partnering refers to Eisler's concept, which she considers fundamental for understanding (and implementing) social justice and sustainability, and which can facilitate cultural transformation.<sup>76</sup> In the relational family lawyering context, the partnership concept refers to a system where family lawyers and their clients can explicitly work in partnership and from a "partnership lens" of "we" rather than "I".

Macfarlane also explores the idea of a "working partnership" in her concept of the "new lawyer".<sup>77</sup> Macfarlane describes the *conflict resolution advocate* as one who works in partnership, and shares decision-making and control of the dispute resolution process with the client. The ideas of partnering and "mutual participation" are also fundamental concepts of collaborative law.<sup>78</sup>

In many ways, family lawyers seem to have been progressive in the idea of partnering. The Howieson study shows that rather than focussing on legal rights and legal expertise, family lawyers have naturally taken a partnering approach to resolving family law disputes. Perhaps, as the

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<sup>76</sup> Eisler, *supra* note 7.

<sup>77</sup> Macfarlane, *supra* note 6.

<sup>78</sup> Collaborative Professionals NSW, "Collaborative Law Articles" (2011), online: <<http://www.collabprofessionalsnsw.org.au/>>.



literature describes, the complex and peculiar nature of family disputes demands this type of approach. However, what the relational model now suggests is that the partnering approach should be made explicit in the lawyer-client relationship. By explicitly attending to the relationship and ensuring that they are working in partnership with their clients, the lawyer could enable better understandings and solutions that take into account the needs of the client, the children and the family.

The lawyer could also use the partnering relationship to consider how other relationships (for instance, between the disputing parties or between the representing lawyers) might be influencing the dispute resolution and its progress. By explicitly taking a relational view, it might better enable the management of the other relationships in the conflict dynamic. A partnering relationship could also necessitate that the lawyers and the client engage in a “learning journey” where the lawyer openly seeks to understand the client’s experience and the client seeks to understand the legal dispute resolution dimensions. This could facilitate a shared understanding of how best to resolve the dispute for the client, the children and the family and in turn could create a model for future joint decision-making.

The authors propose that, by partnering, the family lawyer could automatically create the conditions necessary for procedural justice, a constructive approach, and mentalizing in the lawyering experience. This in turn could have the potential to increase the self-esteem, optimism and resilience of the client and his or her children and family. Essentially, the concept of partnering, or creating a working partnership, provides an overarching link for the other concepts inherent in the relational model of family lawyering.

## **THE RELATIONAL MODEL OF FAMILY LAWYERING**

## **The Model**

To recap, the concept of partnering creates the overarching framework for the relational model of family lawyering, which has mentalizing at its core and is layered with the concepts of the constructive approach and procedural justice. Within the partnering framework, lawyers partner with their clients to create a constructive approach to the dispute resolution process. The constructive approach in turn creates perceptions of procedural justice and establishes the relational base from which the clients can mentalize. Mentalizing is the centrepiece of the model. Mentalizing is fundamental because through providing opportunities for their clients to mentalize, family lawyers could contribute to the short and long-term well-being of everyone involved in the dispute.

## **Implications For Practice**

The relational approach does not involve a vast shift away from what family lawyers already do in practice as they tailor their lawyering behaviours to the needs of their clients. By adding some simple mentalizing interventions at some stage in the lawyering process, family lawyers might be able to assist their clients in engaging their capacities to mentalize. This, in turn, could help the clients think more clearly about their situation and the situation for their former partner and children. This would not detract from the lawyers' more legally oriented work but instead add another, perhaps crucial, dimension.

### *Opportunities*

There are considerable opportunities created by lawyers following the relational model. For instance, for the clients, the Howieson study implies that this approach would be likely to lead to a fair and satisfying experience, in turn potentially leading to increased co-operation, self-esteem, and resilience. For the lawyers, this approach might increase client co-

operation, enable a greater understanding of clients' needs, and perhaps provide a more therapeutic and satisfying way of practising. This could in turn have positive effects on the mental health of both lawyers and clients.

### *Tensions*

However, this type of shift in practice could also create tensions. Not all family lawyers are likely to feel comfortable with an approach to lawyering that involves concepts such as partnering and the mentalizing stance. However, as the Howieson study showed, lawyers already seem to work with a mix of approaches and have different strengths and weaknesses. Many family lawyers naturally incorporate parts of the relational model; for those who do not, perhaps the model offers some new ideas and techniques. What the authors see is that training and education focussed on the ideas presented in the relational model of lawyering could be beneficial to all practising family lawyers.

### **Implications for Education**

The lawyering strategies inherent in the relational model are to a certain extent also used by dispute resolution practitioners. Using active listening and being a curious enquirer to explore the client's interests and options are techniques frequently used by mediators. The mentalizing interventions take this work further and add another dimension to the work of both sets of professionals. Therefore, as Bagatol recommends, education in this area could be inter-professional and inter-disciplinary.<sup>79</sup> In Western Australia, during an evaluation process into child protection mediation, the evaluators conducted inter-professional mediation training, which incorporated aspects of

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<sup>79</sup> Bagatol, *supra* note 39.

mentalizing and partnering.<sup>80</sup> The participants included lawyers, mediators, and Department of Child Protection (DCP) professionals. Many of the DCP staff had little or no familiarity with mediation and many of the lawyers, although from a family law background, also had little experience with mediation practice. The concept of mentalizing was new to all of the participants.

The evaluation and ensuing training was conceived and conducted as a vehicle to model the ideas of procedural justice, mentalizing and partnering. Post-training surveys revealed that the participants continued to engage with these concepts well after the evaluation had concluded.<sup>81</sup>

In addition, in Australia, mediation-style conference training for family lawyers explicitly incorporated procedural justice and mentalizing theory and practice.<sup>82</sup> Written feedback from the 143 senior family lawyers and barristers who participated in the training indicates that the added dimension of mentalizing provided the participants with new insight into, and techniques for addressing, the parties' emotional response to the divorce and to the dispute resolution process.<sup>83</sup> As one family law barrister who participated in the training said, "mentalizing is the game changer."<sup>84</sup>

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<sup>80</sup> Jill Howieson, "A Constructive Inquiry Approach: Blending Appreciative Inquiry with Traditional Research and Evaluation Method" (2011) 1:2 *Evaluation Journal of Australasia* 14.

<sup>81</sup> *Ibid.*

<sup>82</sup> Jill Howieson & Andrew Davies, "Family Law Mediation-Style Conferencing: Creating Crisis in Opportunity" (2012) 23:1 *Australian Family Lawyer* 13.

<sup>83</sup> AIFLAM post-training evaluation forms.

<sup>84</sup> *Ibid.*

### **Implications for Research**

Whether or not mentalizing provides a key to constructive family lawyering remains to be seen, but it is essential that future research tests the premises of the relational model further. To recap, throughout the article, the following propositions were made:

1. Family lawyers, who create the space for the parties to mentalize, or to engage their mentalizing capacity, can open their clients up to a deeper understanding of their own and the other party's experience. This could have long lasting benefits for both the family lawyer and the client.
2. The mentalizing stance provides a range of useful techniques to create the space for clients to mentalize and to assist the client in unpacking the complexities of his or her emotional response to the divorce. This in turn could enable the family lawyer to understand and empathise with the emotional experience of the client.
3. Further, this would mean that the client might feel less "alienated from their sense of their own strength and their sense of connection to others".<sup>85</sup> It is likely to result in the client feeling a restored sense of dignity and developing greater capacity to think about and support any children and other family members affected by the dispute.
4. Overall, the relational model of family lawyering can provide lawyers with a template to describe what they do in

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<sup>85</sup> Lisa P Gaynier, "Transformative Mediation: In Search of a Theory of Practice" (2005) 22:3 Conflict Resolution Quarterly 397; Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994).

practice, and guide them in ensuring that they stay constructive, procedurally fair and attend to their clients' mentalizing capacities. By following the model, lawyers could create relationships with their clients that maintain the clients' dignity and self-esteem, as the clients perceive themselves as "partners" in the dispute resolution process. All of this is likely to result in clients (and lawyers) making clearer and wiser decisions, and to provide better relational outcomes for everyone involved.

These propositions lend themselves to a rich research design. Lawyers are a relatively understudied population. Despite the studies mentioned in the literature review, there is a paucity of data relating to lawyer education and training, or lawyers' experiences of lawyering. Further, there is little data available to show the longitudinal effects of what happens in the lawyer's office between the lawyer and the client. Applied research that investigates the propositions in detail could contribute to a greater understanding of a lawyer's work: namely, the impact that the client's situation has on the lawyer and the lawyer's approach has on the client, and of the lawyers' understanding of the nature of his or her practice. Essentially, by using the relational model of family lawyering as a foundation for research, the potential for broadening the knowledge base in this area is vast.

## CONCLUSION

This article began with a quote from the Chief Justice of the Family Court of Australia indicating that family law clients "can't maintain a relationship with a lawyer because they struggle to take advice." The authors then argued that by making the relationship explicit through partnering, and by taking a constructive approach, which provides procedural justice and allows an opportunity for mentalizing in a relational model of family lawyering, lawyers might be able to provide a

dispute resolution experience that is beneficial beyond simply providing a resolution to the dispute.

This idea may seem novel to some. However, what the authors also propose is a research regime that investigates these aspects and tests the propositions inherent in the model. By undertaking applied research to test the model, the authors believe that the results could prove beneficial for not only family lawyers and their clients from many jurisdictions, but for global communities as a whole.